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A PRINCIPLED DISCUSSION OF PROFESSIONALISM: LAWYER INDEPENDENCE IN PRACTICE

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HON. SUSAN P. READ

HON. ROBERT S. SMITH

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HON. SHEILA ABDUS-SALAAM

NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

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A PRINCIPLED DISCUSSION OF PROFESSIONALISM: LAWYER INDEPENDENCE IN PRACTICE

PROCEEDINGS

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

My name is Paul Saunders, I am the Chair of New York State Professional Institute on the Law. Our Institute was created about twenty years ago by Chief Judge Kaye, when she was the Chief Judge of the Court of Appeals.

Following one of the recommendations made by the commission that she appointed to study the legal profession, and in particular attitudes of the public. That commission was chaired by Lou Craco. And Lou and his fellow commissioners travelled around New York State for about two years, held town hall meetings up and down New York State, studying the question of lawyer professionalism, and attitudes toward lawyers.

The Craco Commission, as it became known, made a series of recommendations to Chief Judge Kaye, all of which I believe have since been accepted and adopted. One of them was something that we practitioners all know and love, the very famous retention letter that we are required to send to clients when we are first retained. That was one of the recommendations of the Craco Commission.

And one of the other recommendations of the Craco Commission was the creation of a permanent institute in New York State to study and speak out on issues related to lawyer professionalism. She gave the institute a very broad mandate to speak out on issues of professionalism, holding public meetings and to be a liaison with the judiciary and the academy on issues relating to lawyer professionalism.

Lou Craco became the Chair of the Institute. And remained Chair of the Institute for about fifteen years, during which time the Institute held a series of Convocations on issues relating to lawyer professionalism. And I replaced Lou about five years ago. He is now the Chair Emeritus of the Institute.

We are here tonight because of an address that Lou gave at the Pace Law School about six or seven years ago on the subject of lawyer independence. I will say more about that in a moment.

Growing out of the address that Lou gave at Pace, the Institute decided to conduct an in-depth examination of the issue of lawyer independence. Many people think that it is the independence of the lawyer that is at the heart of what it means to be a professional and that lawyer independence is important to professionalism.

So we decided to study that question from many different perspectives. We looked at the issue from the perspective of big law firms that have general counsel, we asked if lawyers are true professionals, why do law firms need their own general counsel. And we examined that question at Fordham Law School in 2009.

We then looked at the question of lawyer independence from the perspective of government lawyers. A topic that turns out to be quite complicated. And very interesting. And we studied that question at a convocation at the New York State Bar Association in Albany in 2010.

In 2011 we studied the question of lawyer independence from the perspective of solo practitioners and small firm lawyers at a convocation that we held at Hofstra Law School.

We then examined the question of lawyer independence from the perspective of in-house corporate lawyers. We did that at the Judicial Institute — the other Judicial Institute, the one that owns a building, or leases a building — at the Judicial Institute in White Plains at the Pace University campus in White Plains.

That brings us to tonight. We've had four convocations so far on the question of lawyer independence from different perspectives.

Tonight we're going to do something entirely different. Tonight we decided to bring back some of the people who participated in our earlier convocations. And I am going to moderate a discussion of lawyer independence, bringing out some of the things that we learned, we hope, from the earlier convocations on lawyer independence. I hope it's going to be a freewheeling discussion.

And I tell you now that I am going to encourage audience questions, audience participation. I want this to be a very in-depth, freewheeling, thorough discussion of the question of lawyer independence which we think is so important to the issue of lawyer professionalism.

I have to make one confession at the beginning. In light of what has happened to some of the people in the United States Senate lately, I am going to confess now to all of you that I'm going to plagiarize. But, it's fair, because I'm plagiarizing Professor Bruce Green who is sitting here. And I've told him in advance that I'm going to plagiarize him, and I've showed him what I'm going to take from his writings. And I'm going to invite Mr. Green to comment, if the spirit moves him.

So I hope you enjoy this evening. There is some CLE credit, and I'm told to remind you that because we're not charging any of you for your attendance at this program, we're not going to mail your CLE certificates to

you. So if you want CLE credit, you have to pick up your certificate on the way out. It's going to be available for you on the way out.

So thanks in advance to the New York County Lawyers Association, our co-sponsor, and particularly Sophia, who is a member of the — Sophia Gianacoplos, who is a member of the Judicial Institute and has been just as gracious as possible.

So without further ado, let me introduce the members of our singing trio. Stuart Aaron, Martha Stine and Peter DiZozza, who are going to give us a brief musical introduction to the subject of lawyer independence. And our lyricist is here with us, also a member of the Judicial Institute, The Clerk of Court of the Second Circuit Court of Appeals, Catherine Wolfe.

(Applause.)

So let me bring up Stuart, Martha and Peter to sing Catherine's song.

(Musical performance.)

MR. SAUNDERS

Thank you to Peter, Paul and Mary. I don't know who was better, but we provide not only our own singing group, but our own lyricist. So we are a full service Institute.

Let me invite the members of the panel to go up to the dais.

Let me very briefly introduce the members of our panel. Starting on the left, Hank Greenberg is a member of the Greenberg Traurig law firm, and he was counsel to then Attorney General (now Governor) Cuomo, among many others things I think he was an Assistant U.S. Attorney at one point as well.

Sitting next to Hank is Jennifer Daniels, who is the general counsel of NCR Corporation.

Sitting next to Jennifer is Steve Friedman, who is the president of Pace University, who was in an earlier incarnation a member of the Securities and Exchange Commission, a general counsel and a practicing lawyer in private practice.

Sitting next to him is Lou Craco, who I identified earlier, the Chair Emeritus of the Judicial Institute.

Sitting next to him is Michael Cardozo, who is the current Corporation Counsel of New York City and has been for the last nine years, I guess.

MR. CARDOZO

Twelve.

MR. SAUNDERS

Twelve years. Corporation Counsel of the City of New York.

Sitting next to him is Bernie Nussbaum, who is a senior partner of the Wachtell Lipton firm, and in an earlier incarnation was counsel to the President when President Clinton was President of the United States.

And sitting next to him is Dan Alonso, who is the Chief Deputy District Attorney for the Borough of Manhattan.

Each one of these participants participated also in one of our earlier convocations.

Before we get into actual practicalities, hard practice questions, I'd like to talk about the general subject of lawyer independence.

Let me begin with the New York Rule of Professional Conduct. That's where the requirement for lawyer independence is found, in the rules that govern our practice.

Rule 2.1. "In representing the client, a lawyer shall exercise independent professional judgment and render candid legal advice."

Let's go through these words. A lawyer shall, it's a requirement, exercise independent professional judgment and render candid advice.

Now, the closest thing that the rules come to defining what they mean by independence is to say that a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client. That is, don't be afraid if you're going to tell the client something that the client doesn't want to hear. That's as close as the rules come to defining independence.

I should also add that this rule, unlike most or all of the other rules, is not to be enforced through a disciplinary proceeding. I don't know why, but that's what it says.

So, the question is, independent from what? Or independent from whom?

What does that possibly mean?

Well, I can think of three possible answers, and we're going to explore these in some detail with our panelists. Independent from clients, you have to be objective, stand back from your clients. Independent from third parties who might want to interfere with your ability to give advice, candid advice to your clients, which is one reason why the various Bar Associations rejected multidisciplinary practice, the concern was that if you associate yourself with other disciplines, accounting firms, so forth, they might get into the middle, and impair your ability to give candid advice to your client. So independent from third parties.

Or, excuse me, I must apologize in advance to the members of the judiciary who are here, but the third possibility is independence from the judiciary. Those are the three possibilities that are discussed in the literature.

Now, Lou Craco, who I think I said earlier in my remarks, at his speech at Pace Law School, articulated a theory of lawyer independence that has animated our Institute and our discussions for the last five years. Let me read to you what he said.

He said, "in the daily counseling practice of lawyers, the rule of law is delivered by the lawyer to the client and become, for that client, the law."

What that means, I think, is that although we have judges who tell us what the law means, the rule of law on a daily basis is delivered not by the courts, not by the legislatures, but by practicing lawyers in their private communications with their clients. That's where the rule of law is delivered.

And Lou then goes on to say, "it is only because lawyers have that fundamental role that we have a legitimate claim to independence." Independence in both senses that we lawyers use the term. Our collective autonomy from supervision by others," sense 1, "and our ability to give disinterested advice to our clients," sense 2. "We are allowed to be independent in the first sense because it is necessary for independence in the second sense."

That's what has animated our discussions.

Along comes Professor Green, and Professor Green says, and here I'm going to quote with attribution, "it is not obvious why professionals should have the right to regulate themselves. One would be skeptical if Wall Street brokers claimed a similar right. The Bar's principal rationale is that self-regulation is necessary to secure individual lawyers' independence." But, he asks, "are lawyers really independent?"

He thinks that we may be overstating or mischaracterizing our independence as professionals, given the regulatory role of the courts.

So I put this first to Mr. Craco and then to the others: If it is in fact the case that the courts regulate our profession, as we are said to be officers of the court, and if the courts control the disciplinary committees who regulate our profession, and draft in the final analysis the Rules of Professional Conduct, are we really so independent? Are we really so autonomous?

Mr. Craco, defend yourself.

LOUIS A. CRACO
CRACO & ELLSWORTH, LLP

Well, I thought it was a yes or no question.

Well, I like the reading of Green on the subject of judicial paternity over the profession, and he brings an interesting perspective to it, but I don't think he contradicts what I said in the first place. And I would be a poor advocate or a member of this Institute if I folded so easy.

Modern judges, despite the judicial separation from the practicing lawyer for a whole lot of reasons, remain lawyers, they're a part of the legal profession.

And I don't join in the disassociation of the judiciary from lawyers any more than I would say that in-house counsel aren't lawyers anymore. They have a different role, but they germinate from lawyers, from the legal profession in the first place, and they have a special position as those who articulate what the standards are, both of the law in a substantive way, and the standards that should govern the practice.

They do it typically by a very elaborate process of consensus. The rules which you started by quoting and which should hardly exhaust the subject, are the product of Bar Association endeavors and commissions like ours. And they are studied by lawyers, commented on by lawyers, generated by lawyers, and then enforced by lawyers who have taken on a black robe. And I don't think that dynamic in any way undermines the fundamental proposition that we have independence in the other two senses, which the lawyers' role and the judge's role in enforcing the rules enables. And reinforces.

The two senses are, as you said before, that we are a profession that is independent from governance by, for example, the Congress, or other institutions that might determine how we practice.

And secondly, we have had independence to do what we think is right as lawyers so that we might do what we think is right as lawyers in advising and advocating for clients. And it seems to me that that's the heart and soul of what makes it a profession and what makes us satisfied to do this job at this time.

MR. SAUNDERS

So you would distinguish regulation by the judiciary on the one hand from regulation by the legislature or the executive on the other hand?

MR. CRACO

Take yourself back — you can get me started on this, as you perfectly well know. So you're apt to have a hard job moderating this panel once you —

MR. SAUNDERS

I can cut you off.

MR. CRACO

— once you put the nickel in nickelodeon —

Take yourself back to the Jackson era, where the regulation was by the populace. Every man a lawyer. And all sorts of regulations about how lawyers could, should and would practice law if anybody imposed any kind of regulation on that practice of law.

I think there is a huge difference between regulation in that sense, regulation by other political devices, regulation by other entities set up for the purpose of regulating the profession, and regulation by judges who are part of the profession.

MR. SAUNDERS

Here's the way Evan Davis put it, Evan Davis, for those few of you who don't know who he is, he was, among many other things, president of the New York City Bar Association, just as Lou Craco was.

Here is the way Evan Davis put it. He said, "it is very important for the Bar to be independent from the political branches of government." He says, "it has not been a problem that in the United States the Bar has come to be regulated by the judiciary, because of the judiciary's own neutrality. But," he says, "it would be a huge problem if the Bar were regulated by the Department of Justice. Or by the various elected or appointed State Attorneys General."

Some people, in order to harmonize collective autonomy that we say lawyers enjoy, with regulation by the judiciary, some people have said that you could just consider the judiciary as a special branch of the legal profession. And therefore it's true that we are in fact regulating ourselves and that we are autonomous.

So, let's talk about what it means to be independent. If the law is a public profession, and if we all are engaged in doing public good when we give legal advice, under what circumstances may we give advice to our clients that may not be what the clients want to hear? Under what circumstances may we separate ourselves from our clients? May we promote legal viewpoints and policies that are different from those that the client perceives to be in its interest? Mr. Cardozo?

MR. CARDOZO

CORPORATION COUNSEL,
NEW YORK CITY LAW DEPARTMENT

I think you're asking the fundamental question of the role of the lawyer. If the client says to you I want to do X, and you look into it and you find it is illegal to do X, you're not worth anything if you're giving up your independence and say to the client sure, you can do that.

Now, I think most of us faced with situations like that learn that it rarely is that black and white. And so you may say to the client, you know, there is an argument here, 60/40, but why don't you do X plus and then you're going to increase the likelihood of your success on a particular policy significantly.

But if you can't tell your client, no matter what you think he or she wants to hear, what you think the law is, you've given up your independence.

MR. SAUNDERS

Professor Russell Pearce, Bruce Green's colleague at Fordham Law School, has said that lawyers should be morally accountable, should be, and must counsel their clients on the moral implications of their actions. Must.

Now, Rule 2.1 simply says that lawyers may, they're permitted, but not required, to refer to other considerations when they give legal advice, such as moral, economic, social, psychological and political. But there is no requirement that we do so.

And the question is, should there be?

President Friedman?

STEPHEN J. FRIEDMAN
PRESIDENT, PACE UNIVERSITY

Well, to my mind, it's perfectly clear that a lawyer is not compelled to advise clients on moral issues. A lawyer often does that, it's often an important function in the lawyer/client relationship. But to say that a lawyer is in default of his or her professional obligations if the lawyer fails to do that, I think is just silly.

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

MR. SAUNDERS

Let me read to you something that Chancellor, former Chancellor Bill Allen from the Chancery Court of Delaware, who is currently a professor of law at NYU, let me read to you something that he wrote and ask you to comment on it. And then I'm going to ask Dan Alonso to comment on this as well.

He said, "the lawyer advances the honor of the profession and the best interests of his client when he renders service or gives advice tending to impress upon his client his undertaking exact compliance with the strict principles of moral law." His words.

DANIEL R. ALONSO
CHIEF ASSISTANT DISTRICT ATTORNEY,
NEW YORK COUNTY

That's a big responsibility for a lawyer to bite off.

First of all, one person's morality might differ from the next person's. Secondly, I kind of like Rule 2.1 the way it is and I disagree with Professor Pearce. It gives you the ability to say to the client this is the right thing to do, but it doesn't require you to.

Looking at the context where I practice, which is criminal justice, I can't imagine requiring a criminal defense lawyer to tell the client, you know, do what the lawyer personally thinks is right. You could imagine that being tell the truth, tell the judge what you did, tell them where the body is buried, tell them where the evidence is. You could imagine that being one person's view

of the truth, and I don't think that's the system that we've set up. So I kind of like 2.1 the way it is.

MR. SAUNDERS

Steve?

MR. FRIEDMAN

There is an old story about umpires, baseball umpires who are discussing how they make calls. I won't bore you with the whole story. One says I call them as I see them. And the oldest, most experienced umpire says, they are as I call them.

And I think the problem with your question, and indeed the problem with all of the questions you've posed so far, Paul, is that it assumes there is a strict code of moral principles that is perfectly clear and your questions about a lawyer intent on giving advice, assumes that most of what lawyers do is give advice about issues that are perfectly clear.

My own experience as a lawyer was that I spent very little time in the perfectly clear area. And that I thought of — I often thought of my role as communicating risk. And as a general counsel, of managing risk.

And so part of the way I thought of my role was arriving at a consensus with the management of the company about the level of risk the company was prepared to assume and that I was prepared to participate in.

And once you have a general understanding, then I think the whole tenor of the legal advice relationship becomes very different. A lot of what I said to clients is look, this is not clear, but it's really dumb of you to do this. Because you're assuming a risk that's unreasonable for the company and unreasonable for the board.

I often found that to be a more effective way to counsel clients than pronouncing about what the law is.

MR. CRACO

I would certainly agree with that. But let me give a concrete example, blunted by the irony that it's the Chancellor of or the former Chancellor of Delaware that is offering this advice about strict adherence to moral law.

Last time I looked, the law of Delaware was, as promulgated by its Chancellors and Supreme Court, that if a company, a public company, were put in play, the single, the single, sole, absolute duty of the directors was to maximize the value to the shareholders in the transactions that ensued.

Now, if your moral view happened to have been shaped by being steeped in Catholic social justice, or in another ethos that thought that the shareholders were important but that so were the employees, so were the economies of the area of Pennsylvania when Hammersmith closed, you might conclude that although those factors shouldn't govern, but that they ought to have a part in the consideration.

And if you advised your Delaware incorporated client, board of directors to that effect, you would commit malpractice. You would have to point out to them that, it seems to me, this is what the law is in Delaware.

Now, you may want to consider some of these other things, but you better have an articulate basis on which you can show that considering the citizens of Erie and the employees is useful for the benefit of the shareholders. And that's, it seems to me, the kind of problem that counsel always have.

And one of the reasons why it is so tremendously important, and why I put so much insistence on the notion that private lawyers perform a public act when they give private advice, is because the law as it has emerged in Delaware is Delaware's attempt to reconcile all those competing interests and to articulate a standard by which people should be governed.

And when someone asks you what you can do in Delaware, you are delivering the law, you are telling them what the possibilities are and what the possibilities aren't. You can embellish, you can give prudential advice, you can give moral advice. But what you must give is legal advice.

MR. SAUNDERS

Bill Allen says that the 1908 rule said, among other things, that a lawyer must obey his, they were sexist in those days, his conscious and not that of his client. The lawyer should not render any service or advice involving disloyalty to the law, whatever that means. And, that the rules in 1908 said when advising as to uninterpreted statutory law, the lawyer is free and entitled to advise as to what he conscientiously believes to be its just meaning and extent.

So the lawyer had to import into his or her legal advice the lawyer's concept of what the just meaning was of a statute.

I don't see anything remotely like that in the current Rules of Professional Conduct.

Hank?

HENRY M. GREENBERG
GREENBERG TRAURIG, LLP

I have a practical perspective about drawing a hard and fast distinction between what is moral and what is legal.

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

It's been my experience that arguments made to courts that shock the conscience frequently end-up being losing arguments.

Lawyers, I believe, must see the world three-dimensionally; they need to appreciate that appearances count and conduct which appears immoral

stands a good chance of ultimately being adjudged unlawful. You may think in the abstract — having reviewed the case law and statutes — that you've made a strong legal argument. And maybe you have. But be sure to take a step back and ask yourself whether the argument makes practical sense. Does it produce a cruel, or harsh, or unjust result? If, on reflection, the legal position for which you are advocating is immoral, you do your clients a grave disservice not calling that to their attention.

So, while of course we are obliged to tell the client what the law is, if that's all we do, we do less than what is expected of us as members of a great and noble profession.

MR. SAUNDERS

So to pick up on that, Jennifer. Why should lawyers be independent from their clients?

JENNIFER M. DANIELS
SENIOR VICE PRESIDENT, GENERAL COUNSEL & CORPORATE SECRETARY, NCR CORPORATION

I want to respond to that and respond to you.

I agreed with you to a point. But within the construct you just laid out is an assumption that the lawyer in your example is uniquely qualified to determine what is moral, vis-à-vis the client. So I agree with you that I say to my clients all the time this is okay to do this, this is okay to do more often than not. I agree we are in a gray area where it isn't black and white.

And then I try very clearly to make sure, and I think it's particularly important in the general counsel context to make sure you are very clear when you are giving legal advice and when you are giving advice that is something else, whether it's business advice or some advice about whether this "the right thing to do," and I'll just put that in quotes.

But I hope that lawyers don't uniquely have a mandate to determine morality for their clients or the world, and there was a little bit of an assumption that somehow lawyers are better able to do that than somebody else, be they clergy, someone else sitting in your boardroom, someone sitting on your management team. So I think I take a little bit of issue with the notion the lawyer is uniquely qualified to do that.

MR. SAUNDERS

Before you answer the question I asked, let me push back on that.

If that's correct, what does Rule 2.1 mean when it says, you may counsel your clients on the moral consequences, the moral factors that may be relevant to the client's situation? Whose morality?

MS. DANIELS

The way I think about it, it's a little challenging in the corporate counsel context, because the first question you have to ask yourself if you're inside a company is who is your client. So management's not really my client, though I counsel management all the time. And the board's sort of my client, but not entirely. I think the shareholders are my client, maybe some of the employees are my client. But the company is, in the end, my client.

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

And I need to be able to be in a position to give that advice to my client, but make clear that in the end it may be perfectly legal to do what they want to do, but that is otherwise something that my mother would frown at.

MR. SAUNDERS

So in that context, who again is your client?

MS. DANIELS

The company is my client. It's challenging.

MR. FRIEDMAN

I want to make one comment on what Jennifer just said. Because I think it's very important.

What both of the last two comments said is that there are legal arguments that are going to fail because they're in one way or another preposterous.

MS. DANIELS

Or morally bankrupt.

MR. FRIEDMAN

And I viewed that as legal advice, not moral advice. I mean, what you're really saying is yes, and I think all of it, yes, we've got this argument, on the law it's probably right, but it's a loser. That's a legal function.

MR. SAUNDERS

The rules of professional responsibility, I think, prohibit us from making frivolous arguments, arguments that we know to be frivolous.

MR. FRIEDMAN

Nothing to do with being frivolous.

MR. SAUNDERS

So I want to come back to Jennifer on the question of what it means to be independent. But first I want to put this to Bernie Nussbaum.

You said a moment ago, Jennifer, that your client is the company. I think that's the conventional wisdom, if you're representing a corporation, your client is the company.

Now, Mr. Nussbaum was counsel to President Clinton, he was White House counsel to President Clinton. And when we asked him that same question in one of our earlier convocations, this is what he said: "You do not give advice to a building. You could only advise its current occupant, who is a human being. That human being in his or her official capacity is the client to whom you are bound by ethical duty, and that duty includes the duty to preserve confidences."

So who was your client when you were White House counsel?

BERNARD W. NUSSBAUM
WACHTELL, LIPTON, ROSEN & KATZ

That was a very insightful statement. That was expressed extremely well.

MR. SAUNDERS

I edited it a little bit.

MR. NUSSBAUM

It's hard for me to improve on those words.

Sure, my client was the President of the United States in his official capacity. That's the person to whom I owed a duty.

MR. SAUNDERS

Why isn't Jennifer's client the chief executive officer of NCR?

MR. NUSSBAUM

In the corporate context, yes, the company is the client. But you're giving advice to the CEO of the client, in that CEO's official capacity.

MR. SAUNDERS

Mr. Cardozo represents the City of New York. He gives advice to bridges and tunnels?

MR. NUSSBAUM

He gives advice to the Mayor.

MR. CARDOZO

My client is the City of New York. My client is not Michael Bloomberg.

But how do you define the City of New York on a day-to-day basis? And so when Mike Bloomberg asks me a question as to whether or not it's lawful to do something on behalf of the City, I give him that advice.

But if in fact I think the City would be violating the law by whatever it is he wants to do, it's my job to tell him that.

And I frequently use the example, and I'm not violating attorney-client privilege by telling this story, but I think it's an important one. Eight years ago, now a long time, the City Clerk had refused to give a marriage license to a same sex couple because at the time New York law prohibited gay marriage. And a State Court judge had declared that law unconstitutional.

Obviously from a — I don't know if you want to call it public policy, but certainly from a political preference — the Mayor, obviously an outspoken proponent of gay marriage, as was I, in fact I signed a report on behalf of the City Bar Association a few years earlier arguing the law was unconstitutional.

But it's clear that the law was unsettled. And I suspect if I had taken a poll of New York City residents at the time they probably would have preferred gay marriage.

If I didn't file a notice of appeal from that ruling the next day, it would mean that the City Clerk would be bound to give marriage licenses to anyone, any gay couple that sought it.

What was my obligation? I thought it was not up to Michael Cardozo to decide whether or not the gay marriage law was unconstitutional. And I thought since I had sworn to uphold the law, which included State law, it was my job to file a notice of appeal. Because my client was not Mike Bloomberg, it was that I had sworn to uphold the law, which includes the law of both the City and the State.

The point, I think the more relevant point, is my client was the City, and I have to give the view of the law to the City, not to the Mayor of the City of New York.

MR. SAUNDERS

Let's push that a little bit further. Let's assume the City Council passes a law, the Mayor vetoes it. And the City Council overrides the veto. Can you sue to have the law overturned as Corporation Counsel?

MR. CARDOZO

We have had that, and I draw this distinction. If the Mayor simply disagreed as a matter of policy with the City Council, I think it's my job to defend that law. If the Mayor had vetoed the law on the grounds that he thought it was illegal, preemped or something like that, I don't think it's my job.

And we've had that case. That was a case that Judge Ciparick participated in. If the Mayor believes the law is unconstitutional, does he have to enforce it? And the Court of Appeals ruled 4 to 3 that if the Mayor had a good faith belief that it was illegal, he did not have an obligation to enforce it until the courts found otherwise.

MR. SAUNDERS

So why wasn't Bernie Nussbaum's client, using your articulation, why wasn't his client the presidency and not the President?

MR. CARDOZO

I think you have to ask Bernie Nussbaum.

MR. SAUNDERS

Bernie?

MR. NUSSBAUM

My client was the Office of the President.

But the Office of the President, you don't talk to an office, like I said, you don't talk to a building, you talk to a person. And that's where you owe your duty of loyalty to, and that's whom you have to give your best advice, your legal advice.

Look, you know, this is really a great country. And one of the reasons it's a great country is because the people of the United States, the Presidents as well as other people, can have a champion fighting for their interests. You can't do that in a lot of other countries in this world. I don't think the trials in China or in various other places, you know, meet these kind of criteria.

But what we have to do is to be able to protect that relationship between the public — the independence of lawyers is really for the benefit of the public, not merely for the benefit of the Bar.

MR. SAUNDERS

Or of the clients?

MR. NUSSBAUM

Or the clients, that's what I mean when I talk about the public.

That's whom we have to protect. We have to sort of keep that inviolate. That a person, a client, the public, can have a champion who acts in their interests, who wants to fight for them, who is their agent. That's important.

Now obviously you can't do everything, you can't commit crimes, you can't violate certain codes of ethics and things like that. But we should really focus not so much on the independence of the lawyer from the client, but the lawyer's acting on behalf of the client. The lawyer serves the client best when he acts objectively, he acts strongly, he gives him sound legal advice, and he gives it to him in the knowledge that the attorney-client privilege will be preserved.

In that fashion, as you said earlier, that's how the rule of law is enforced in this country. That's why compliance with law is enforced in this country. Not by judges, not by prosecutors, and not by Corporation Counsel. It's by private lawyers, in many cases, or government lawyers, in many cases, giving advice to individual clients.

MR. SAUNDERS

We have several present or former government lawyers on the panel.

Is there a different set of obligations, professional obligations, for government lawyers? I know there are for prosecutors in the rules, but putting prosecutors aside, Dan, are there different sets of rules for government lawyers? And in particular, are government lawyers in the justice business? Are they meant to be in the justice business?

MR. ALONSO

Well, I don't want to put aside prosecutors just yet if that's okay. I think that we are literally in the justice business. We very much, the sort of ethic among prosecutors is that our job is to see that justice is done and not just to win the case, and that's taken very, very seriously.

Obviously the good ones understand that justice might be in the eye of the beholder, but nevertheless we're required to do our level best to seek justice and not merely to represent our client right or wrong, our client being the people of the State of New York, for prosecutors.

In the civil context, I know there is some very interesting differences of opinion between Mike Cardozo and Professor Green. And I side with Professor Green. I think there is a special obligation to the public when you are a government lawyer in the civil arena. I don't think that it's — it necessarily trumps the best interests of either the Office of the President or the Corporation of the City of New York or the State of New York. But I think that it is something that public lawyers ought to take into consideration. I know people disagree with that.

MR. SAUNDERS

I know Mike Cardozo wants to comment on this. I want you to comment on what Dan said, what I said, but also I want you to comment on what Jack Weinstein said, Jack Weinstein was at one point the County Attorney I think for Nassau County if I'm not mistaken.

So he said, "if there is a wrongdoing in the government, it must be exposed. The law officer has a special obligation not to permit a cover up of illegal activity on the ground that exposure might hurt his party, where his duty to the people, the law, and his own conscience requires disclosure and prosecution. Government lawyers should act as guardians of the public interest. The government lawyer must be the chief whistleblower of the government."

Mr. Cardozo?

MR. CARDOZO

I think we have to be practical. You are asking what exactly we're talking about.

Obviously we have special rules, Brady obligations and the like on the criminal side. And there certainly are instances where you have the hypothetical, the Mayor comes to you and says I bribed someone, for example, what do you do.

And on the other hand, because of the importance of independence, we also have the accompanying attorney-client privilege. And you have to therefore ask yourself if the client, the Mayor in my hypothetical, thought that you were about to go and tell on him, will you be drawing up the need for, that we all I think believe in, in confidential communications.

So I think you have to look at this practically. I think, I don't know, as Bruce's article or someone else's article raises the hypothetical, you know as the government lawyer that in three days the statute of limitations on a particular claim is going to run, I don't know, Bruce, if that was your hypothetical. And you're negotiating with the other side. And apparently they are unaware of the statute running.

What's your obligation as a lawyer, as the government lawyer? Should you say all right, we'll talk to you — I have to talk to my client, we'll get back to you next week, knowing that you got a slam dunk then because the statute has run.

I don't — well, I would not want to say next week, I don't think it is the government lawyer's obligation to say hey, you damn well better sue in the next two days or the statute is going to run.

And if you take that attitude, what is your client going to start to do? You know, he's going to say why the heck should I go consult with Cardozo, he's going to give away the ship. And most of the time the government lawyer should be playing the role of saying to the client, as we've said before, you know, I think you don't have a great shot in this case; the damage case, let's try

to cut our losses and settle. If it's a public policy case you're saying why don't you change your policy to make it more likely to succeed in court.

And if you start saying I'm just going to tell the other side, I think you're going to dry up the communications. I think it's very difficult to draw a black and white line, but I don't agree with Bruce, who I think had an article that the government should do justice or government lawyer should do justice or something like that. I think that's a dangerous, slippery slope.

MR. SAUNDERS

Hold that thought.

Jennifer, your CEO comes to you and says, you know, last year we put a statement in our SEC filing that we knew to be false. Materially false. Just thought you'd like to know.

Would you report that to the SEC?

MS. DANIELS

I would not in the first instance myself report that to the SEC.

MR. SAUNDERS

Hold that thought.

Michael, the Mayor of not New York City, but a hypothetical city comes to you and says last year I took a bribe in order to appoint somebody to an agency. Just thought you'd like to know.

Would you report that out?

MR. CARDOZO

First, is he communicating to you in an attorney-client relationship?

MR. SAUNDERS

I didn't say.

MR. CARDOZO

Well, I think it becomes — if the answer is no and he's not asking you for any legal advice, I think, and you look at the whistleblower statutes, I think you might well report him in that context.

MR. SAUNDERS

All right.

He is asking for legal advice, he says what should I do about it?

MR. CARDOZO

All right. I'm his lawyer, I'm not going to report him. I don't know what the legal advice is going to be.

MR. SAUNDERS

So you disagree with Jack Weinstein?

MR. CARDOZO

Yes.

MR. SAUNDERS

You're not the chief government whistleblower.

MR. CARDOZO

That's correct.

MR. SAUNDERS

Mr. Friedman, would you report that out if you were in Mr. Cardozo's position, the Mayor says I took a bribe last year to appoint somebody to an agency, just thought you'd like to know?

MR. FRIEDMAN

I mean, the Corporation Counsel — you know, I think he would run a risk of being disbarred if he did something like that.

MR. SAUNDERS

If he reported that?

MR. FRIEDMAN

You know, the problem with most government lawyers is that most of the time they don't really have a client. They are the client for all practical purposes, and they are making all of the judgments.

And it's really, and it's also true of general counsel very often. Because a huge portion of what a general counsel does is that the lawyer, or the senior lawyer makes the final judgment about what to do about things.

It's in that context that comments like Jack Weinstein's are made, which is that you have an obligation to do justice. Because really that's what you're doing, I mean, you're making your own judgment about what the law is, what's just, what's appropriate conduct.

But in a situation where you actually have a client, I mean, ordinarily in a corporate context the decision to self-report to the SEC is not a legal judgment, it's a corporate judgment. And I'm not quite sure where we come out in — with the Corporation Counsel, but it would be quite extraordinary for the Corporation Counsel to in effect inform on the chief executive of the city, except in the most extraordinary case of wrongdoing.

MR. SAUNDERS

Mr. Alonso?

MR. ALONSO

What's the question?

MR. SAUNDERS

Should you report it out?

MR. ALONSO

Well, I think there is an obvious distinction between the situation where the Mayor of the hypothetical city comes to Mike versus the CEO comes to Jennifer, because the filing was on behalf of the company. But the acceptance of a bribe is a breach of fiduciary duty.

I don't know that the Mayor could reasonably expect that in speaking to the corporation's lawyer, he has an attorney-client relationship. In fact, it's almost like getting a confession from a bad guy, you know, if you're counsel to the company.

So I don't know if — I don't know if Mike would be okay if he reported it. I'd probably say yes, but I think that if I subpoenaed Mike to come to the grand jury to testify about that confession or admission, I think I might win. I think there may well not have been an attorney-client relationship there.

MR. CARDOZO

If I could just add, to make this a little bit more practical. We have situations in government all the time where you may be representing both the entity as well as an individual. For example, a cop gets sued along with the city on some police, alleged police misconduct. We have a standard script that we tell the policeman. First of all, we investigate as to whether the policeman did anything wrong before we undertake the representation. But then we tell the policeman, our client is the City of New York. We will — and if we learn something that you have done something wrong, we're going to have to report it. That's dealing with the issue up front.

Because obviously entities are composed of people. When you use the Mayor as a hypothetical it gets a little more difficult.

MS. DANIELS

And I would have lots of obligations. I would not pick up the phone and call the SEC in the first moment, which is what my answer is. But I have lots of obligations, I have to tell the CEO he needs to find a lawyer if he deliberately misstated financial statements.

MR. SAUNDERS

Well, you are saying you should seek your own lawyer. You're not going to tell on him. So what's the problem? You're not going to rat him out.

MS. DANIELS

In the end, though, I now know that our SEC filings are misleading in a material way. That was your hypothetical. There are tons of things the company has to go through now. The audit committee has to be advised. I'm going to for sure figure out if it is a material misstatement, do we have to restate anything?

I'm going to tell the CEO, if the hypothetical is as you said, that he deliberately misstated our financials, I'm going to tell him he needs to get his own lawyers. There are a hundred paths that have to be gone down before I agreed with the company's decision, whether the company is going to self-report the CEO to the SEC.

For sure if there is a material misstatement, it's going to become public. Then the question is how does it become public, when, and how do I make sure in representing the company that we're doing that in a way that's most powerful?

MR. SAUNDERS

Seth?

MR. ROSNER

It seems to me that that's not a realistic question. A realistic question is what happens if the Corporation Counsel or general counsel discovers documents that reveal that the Mayor, the Governor, whomever, has been engaging in serious misconduct? The same question, but slightly different.

MR. GREENBERG

I have been in private practice for nearly a decade and public service for more than a dozen years. As a government attorney, I served as counsel for statewide elected officials, as general counsel for a state agency, as a federal prosecutor, and as a law clerk to judges.

Based on these experiences, I believe it is harder to be a government attorney than a private practitioner. The work is more complicated, more stressful, and more rigorous. At the highest-levels of public service, you function in a fish bowl-like environment, where public scrutiny is intense.

As challenging as government work can be, though, the answer to your hypothetical is clear. If your client is the Mayor (or some other elected official) and you learn he or she committed a serious crime while in office, you should tell them to get a private attorney. You did not sign-up to be a defense

counsel for a known criminal. And it wouldn't be appropriate for you to perform that function in such circumstances.

By contrast, in the private sector, when a client breaks the law, there are well-established practices and principles to guide you and which you can turn to in counseling your client. It's different for public service attorneys. When your client commits a serious crime in office — and thereby breaches the public trust — there is little, if anything, you can or should do to help them out of the morass.

You ask whether government attorneys must concern themselves with justice. Of course they must. It is part of a government attorney's job to struggle with fundamental questions of right and wrong. It's the prosecutor who discovers their once slam dunk case has suddenly collapsed because evidence was lost or destroyed. Does the prosecutor conceal this knowledge in the hope the defendant pleads guilty to a crime that is no longer provable? When I was a young prosecutor, I was taught that that was not a close call. The prosecutor should tell defense counsel what happened to the evidence.

MR. SAUNDERS

Lou?

MR. CRACO

Let's go back to your question, put aside the quite compelling greater practicality of Seth's change in the hypothetical. Because your question illustrates, and the answers given to it illustrate, I think, an important point that has permeated much of what we discussed about independence over the last several years.

Both perps, the Mayor, or the President if you want to get there, or the CEO, come and volunteer the statement to a person who is in their perception their lawyer, about a past act of wrongdoing. I think it's fair to assume that they think they're doing it in a confidential setting.

And your question wasn't what do you do next. Your question was, do you report it out to the public, do you blow the whistle?

Now, I think in each case that confession is the beginning of a discussion, not the end of it. And a discussion in each case that is meant to be covered by the attorney-client privilege under the circumstances that you articulated.

And the kinds of answers that have been given illustrate why we have an attorney-client privilege. It's so that you can give advice to the CEO and to the company about the legal obligations that the company or the City or the Mayor or the President had in that situation and how they proceed to do it.

And the point of my remark is that we have an attorney-client privilege only, only to allow you to do that. The only point of the attorney-client privilege, which is not handed down with the other ten commandments, is that it's a bargain. It's a bargain. It's a bargain between the policy that gives us

some monopoly and gives us some rights, that they will shroud that conversation in privacy so that our clients can tell us what we need to know in order to give independent, objective advice, and we can give that advice without everybody in the world knowing about it at the first instance.

It's a functional, utilitarian tool to insure independent, in the first instance.

MR. SAUNDERS

Bernie, if what Lou said is correct, why are there so many exceptions to the attorney-client privilege for government lawyers?

MR. NUSSBAUM

Well, I wonder that myself sometimes.

MR. SAUNDERS

Right. You know what I'm talking about.

MR. NUSSBAUM

Yes. In the talk I gave a couple of years ago, I talked about various cases which really cut back on the attorney-client privilege for government lawyers. And I warned that that was unwise, and incorrect, and would reduce compliance with the laws, not foster compliance with the laws.

What Michael said earlier was right. If he followed Judge Weinstein's advice and the lawyer becomes, the government lawyer at least, becomes the whistleblower, you are not going to get more compliance with law, you will get less compliance with law. You will get people not talking to the government lawyers.

And that's not good for society, it's not good for the government, it's not good for the public, it's not good for anybody. That's why government lawyers should be treated like private lawyers. They should be encouraged to give advice and they should know that their advice will be kept in confidence.

And if you do that overall, you will have — the rule of law will be preserved much better than if you turn lawyers into some sort of whistleblower or moral guardian.

MR. SAUNDERS

As I was preparing for this, I tried to figure out who the client is for the government lawyer. The Rules of Professional Conduct talk about the lawyer representing an entity or an institution. But the law seems to be that when it comes to government lawyers, the question as to who the client is is a matter of law, not ethics, not rules of conduct or procedure.

The commentary that I read suggests that it's not easy to determine who the client is for a government lawyer, in all cases.

Would you agree with that?

MR. NUSSBAUM

Yes, I agree with that.

MR. CRACO

I would also add that I think the pressure to create those exceptions is a political manifestation of something I said up at Pace, which is probably good for us to keep in mind.

If, as I think, the attorney-client privilege is — has the character I described a moment ago, it truly is a use it or lose it proposition. If you use the attorney-client privilege to conceal the kind of things that you were talking about rather than to advise how the mess that the CEO is creating can be put right in a legal way, but you don't use what the privilege was given to you to allow you to do, then pressures will build up, as they did in the wake of the securities scandals a few years ago, to make the lawyers whistleblowers.

And you can only protect the attorney-client privilege as an artifact of your genuine independence, if you use that independence, to do just what Bernie was saying before, to procure compliance.

MR. SAUNDERS

Let me change the hypothetical, or the question very slightly.

When he spoke to our convocation in White Plains, Bob Weber, who is and was then the general counsel and chief legal officer for IBM, told us that he did not consider himself the Jiminy Cricket, the conscience on the shoulder for IBM. He said that was not his role. He said, "I am not, I never have been, I am not now nor would I ever be IBM's Jiminy Cricket."

On the other hand, Chancellor Allen, who we talked about before, now a professor at NYU, writes that, "a lawyer's moral scruples should," and he emphasizes the word should, "affect the decision to employ a legal strategy. It is the lawyer's moral judgment, not that of the client, that acts as the final safeguard against lawyer involvement in socially destructive activity."

And he referred to the old City Bar 1908 rules, which said that lawyers were not seen as amoral tools of their clients, but as professionals who are morally responsible for the results that their actions helped to bring about.

Ms. Daniels?

MS. DANIELS

I disagree with that entirely. I have an obligation under the rules of professional responsibility to represent my client zealously. And I represent the company. And the company's legitimate objectives are to generate returns for its shareholders. That's okay. That's what companies, many, are around to do. And if —

MR. SAUNDERS

Are those the only legitimate objectives of the company?

MS. DANIELS

No, they are not the only legitimate objectives of the company. But it is an important, it is an important objective of the company.

And what is moral in the way the company does that is very much in the eye of the beholder. Having worked with Bob for a while, I respect Bob greatly, is it moral to move jobs out of the United States to a low cost place in the world. Is that moral?

I believe it to be, whether we think that's a moral thing, and I am sure there will be different views in the room whether that's moral or immoral. It may be profit maximizing for the company, and it may be a perfectly appropriate thing to do, and I'm not talking about IBM here, just to be clear, I have no ability to talk on behalf of IBM.

But is that moral, I don't know. Is it legal, provided you comply with all of the state laws and other laws with respect to eliminating jobs in the state and moving them somewhere else, yeah, it's probably perfectly legal to move jobs to a lower cost jurisdiction.

I don't know whether it's immoral, and I certainly don't think it's my job to tell the company that's an immoral thing to do. It is my job, to everyone's point on the whole panel, to say to the company we can go do that, and, by the way, here are the things we are going to have to contend with in doing that. The place we are moving the jobs from, they are going to be very unhappy. And the citizens of that state or city where we had those jobs are not going to be very happy about that. There may be implications for us in the newspaper, people may not think we are a very good company because we moved those jobs out of the United States.

It's not my job, though, I don't think at all, to be the conscience of the company and say that's an immoral choice. In fact, I don't think I would be representing my client zealously if I tried to impose some morality judgment on that.

MR. SAUNDERS

Seth?

MR. ROSNER

Paul, I think there is an elephant in the room that we've touched on, if at all, only tangentially. I was a Navy lawyer for three years. I was stationed on the USS Intrepid as its legal officer in the Brooklyn Navy Yard years ago. The issue is command control or command influence.

That's obviously something that is particularly pertinent in the military because it has discipline and court martials and the issue is to what extent the

commanding officer that organizes the court martial imposed his or her will on the legal officer and the courts.

It seems to me that it is pertinent, however, in the context of the government lawyer with respect to the Mayor, the Governor, the President. In fact, an Attorney General of the United States, Elliot Richardson, some 40 odd years ago, resigned because he refused to carry out of the order of President Nixon. I wonder how that command control issue is something that our panel might want to comment on.

MR. SAUNDERS

Michael?

MR. CARDOZO

Obviously, a lawyer can always resign. The resignation, whatever, the withdrawal sends a strong message. And if you are asked to do something that you think is immoral, that's obviously the way to do it.

But I agree with that, and I also think that in giving advice to your client, and I think we should not be the Jiminy Cricket, to use those words, but we may have an ability to see, you know, hard facts make bad law. And when you're in a 60/40, 70/30 situation you are performing a very important role if you're saying, I think you can do it, but the facts here are lousy and moral arguments A, B and C, which may be pretty persuasive, you better damn well take those into account.

It seems to me, that's the way to do it. I certainly don't think that we can simply be — consider ourselves an independent moral compass, because if we do, I totally agree with Bernie, we are going to get less communication from our client, not more.

MR. SAUNDERS

Steve?

MR. FRIEDMAN

I would just like to come back to something Jennifer said earlier.

I'm the CEO of the university. I consider myself the moral conscience of the university and the board. It's not that I don't listen to other peers, and I welcome other peers, but there is an arrogance, a really quite extraordinary arrogance from the seat I now sit in, listening to the kinds of things you've been quoting. Because it assumes that in some sense lawyers are better judges of moral issues than other human beings. I may have believed that when I was a practicing lawyer, but I know better now.

MR. SAUNDERS

Let me change the subject entirely.

We've talked about independence from clients, that is, the ability to give objective advice. We've talked about independence from third parties, principally people who — parties who interfere with our ability to give objective, independent legal advice to our clients, the great fear in the multidisciplinary argument days.

Now let's talk about a third possibility: independence from the judiciary, a subject that is not often discussed, but a subject that Professor Green recently addressed directly in a Law Review article in the *Akron Law Review*.

What Professor Green said was, under the old canons of ethics, the old Rules of Professional Conduct, lawyers were free, within some limits, to take issues with judges, and to, quote, I'm not sure I'm quoting directly from Bruce Green, maybe somebody that he was quoting, "to be free to cuss the court."

And he quoted Justice Robert Jackson of the U.S. Supreme Court, when he said, "we lawyers maintain our rights respectfully to criticize what we may think errors of honest judgment by our courts and by our judges."

So the question is, how should a lawyer respond to a ruling by a court that the lawyer believes to be erroneous? I'm not talking about taking an appeal, I'm talking about whether we are free as independent lawyers to express our opinions about decisions made by courts.

In particular, the question is, is there a tension between our role as officers of the court on the one hand, and our role as independent lawyers on the other hand?

Hank Greenberg?

MR. GREENBERG

That's a tough question.

As a practical matter, I do not think it's a good practice for attorneys to be openly critical of the judges before whom they appear.

MR. SAUNDERS

It may not be a good practice, but the question is are you free to do it or will you be sanctioned if you do it, as some lawyers have recently been?

MR. GREENBERG

Well, you can go too far. There is a point where you bring the profession and the judiciary into disrepute. We believe in what we do. We think we are pursuing a high and noble calling. And you can go too far.

Too far isn't writing an article that is critical of a judge's opinion. But launching a personal attack against a judge's character is beyond the pale.

Historically, law professors have been viewed as the members of the profession best positioned to objectively analyze and critique the judiciary's performance. I'm inclined to take that view, as a general proposition.

MR. SAUNDERS

There is a corollary question. And the corollary question is, under what circumstances may you advise your client to disobey an order of the court? Or may you disobey an order of the court?

And this is not a trick question. Let me tell you what the rule says. Rule 3.4 in New York says, "a lawyer may not disregard or advise a client to disregard a standing rule or tribunal or ruling of a tribunal made in the course of a proceeding, but a lawyer may take appropriate steps in good faith to test the validity of such a rule or ruling." Period, end quote. That's the New York rule.

Now, the model rule, the ABA model rule, is slightly different. The ABA model rule adds a phrase at the end of the rule. It's an exception. "Except for an open refusal based upon an assertion that no valid obligation exists." That's Model Rule 3.4-C. That exception does not appear in the New York rules.

The question is, should it?

Bernie?

MR. NUSSBAUM

The exception, say it again?

MR. SAUNDERS

The exception says, "except for an open refusal based on an assertion that no valid obligation exists."

MR. NUSSBAUM

What is the exception saying? It's saying that a judgment has been made, that this ruling is clearly off the wall. It's clearly wrong.

MR. SAUNDERS

An open refusal based on an assertion that no valid obligation exists.

MR. NUSSBAUM

Well, the language is very unclear and very tricky, and if I was a lawyer I wouldn't, in that situation, rely on that language. The answer is I don't think it should be added to New York.

MR. SAUNDERS

Let me try language that's not quite so tricky.

The Supreme Court decided a case in 1975 called Maness vs. Meyers. The Supreme Court said in that case that lawyers must obey all court orders absent a stay, except where the lawyer has a good faith belief that a court order violates a legal or constitutional privilege.

Now, we're not saying you're not going to be held in contempt if you do, you may well be. What the Supreme Court seems to be saying, what the model rule seems to be saying, is if you do that, it's not unethical behavior.

MR. NUSSBAUM

Maybe not unethical, but it's dangerous.

MR. SAUNDERS

It is dangerous.

MR. NUSSBAUM

That's probably not normally in the best interests of your client. It will be hard to imagine a situation where you're taking major risks when you do that. There are always appellate remedies.

MR. SAUNDERS

You're Mr. Attorney-client privilege. There is a court order that obligates your client to disclose an attorney-client privileged communication, you think it's wrong, it's an error, you can appeal it when the case is over. You'll get it reversed on appeal in a year or so. But in the meantime, your client will have been forced to reveal the confidential information in your communication. That's a real situation.

MR. NUSSBAUM

Yeah, that's a real situation. What you try to do in that situation is exercise whatever intermediate appellate remedies you might have, including things like Mandamus—

MR. SAUNDERS

It's an order of the court.

MR. NUSSBAUM

Then you have to obey the order of the court.

MR. CRACO

That's not an order directed to you.

MR. SAUNDERS

It's an order directed to your client. Are you going to advise your client to comply with the order or not?

The order requires disclosure of privileged communications, or if we're talking about self-incrimination, incriminating information. The order

requires your client to disclose that, it's going to take you six months before you get to appeal. Do you have to advise your client to comply with that or not?

MR. CRACO

No, there is another remedy. You can advise your client to violate the law, be held in contempt.

MR. SAUNDERS

The New York rule, I understand what Lou said, the New York rule does not contain that exception.

MR. CRACO

I think we're mixing up in the hypothetical, a question of law and how you make and test the law on the one hand, and lawyer ethics on the other. I think in the situation you described, if you have a good faith belief that the material is confidential and properly protected by the attorney-client privilege, there is an urgent order for your client to reveal it, you sit down with your client and you say, "I think this ruling is wrong, it's bad for you for this, that and the other reason. The only way we can timely test it is for you to disobey it. You'll be held in contempt, and at that point we can challenge the contempt ruling and get a prompt determination whether this is a correct or incorrect decision as a matter of law."

That advice is perfectly appropriate it seems to me as a matter of ethics.

MR. SAUNDERS

Professor Green, what does this dialogue tell us, if anything, about independence from the judiciary?

PROFESSOR GREEN

Well, what it tells me is that the concept that may have existed a hundred some odd years ago of lawyer independence has kind of dropped out of the conversation, and that we don't really want to bump up against judges, maybe for pragmatic reasons or maybe because judges are less tyrannical nowadays or for other reasons.

I think it's a serious question. There is an accepted procedure. You know, Lou, if you change the hypothetical and the lawyer is subpoenaed for documents and information in the lawyer's possession that the lawyer thinks is privileged, then it's not about advising the client, it's about whether the lawyer is willing to go into contempt. And there is a tradition of lawyers going into contempt when they think they're right. They're not always right, in hindsight, but nobody thinks it's unethical to test the law in that way.

MR. CRACO

I think they have at least as much ethical right to do that as a newspaper reporter does.

PROFESSOR GREEN

Exactly right.

And then I guess the question is we have a tradition in the privilege context, is it limited to that? And so, as Paul knows, I gave an example that arose in Ohio of a defense lawyer who was pushed to go to a criminal trial after having had about an hour of two on the case. And the problem that the lawyer felt was, if he defends the case he may not win based on ineffective assistance grounds. "It's really hard to win; do I challenge the court's ruling requiring me to try the case after an hour or two?"

And in Ohio the lawyer went into contempt, because the Ohio case law is pretty good and got the contempt overruled.

In New Jersey recently, there is an *Atlantic* article about a lawyer in a similar situation, where the lawyer perceived that he had inadequate time to defend. The court said go ahead and defend the case. The lawyer did and on appeal there was a divided decision, but the majority said it was not ineffective counsel.

The question I ask in the article is, are there situations like that where lawyers should, A, be willing to stand up to judges more frequently than they do, and B, should we regard that as an aspect of lawyer independence that we don't frequently talk about? We talk about lawyers' independence from clients and willingness to give objective advice. Lawyers' independence from third parties, which is sort of a conflict of interest notion, the corporation pays your fee but you should represent the individual, be independent of the corporation as the payor.

But I think that the idea of independence from judges is kind of an interesting one that might be worth thinking about.

MR. SAUNDERS

Thank you very much.

We're almost out of time. I want to do two final things. I want to end with one very quick hypothetical that came up during our convocation on solo practitioners, then I want to throw this open very briefly to members of the audience here for questions or comments that they might wish to make.

Here is the hypothetical, very simple. You represent a criminal defendant who is charged with a serious felony and is out on bail. He asks: "What countries do not have extradition treaties with the United States?"

Mr. Alonso, what do you do?

MR. ALONSO

Well, I think that this is a good situation where I as a lawyer would exercise my option to bring morality into it. And I also would want to steer very wide of any suggestion that I helped this person escape the country.

But the hypothetical is perhaps too easy in this day and age, because it's pretty simple to Google the question, so I don't know. That's frankly probably what I would do—

MR. SAUNDERS

That's a copout.

MR. ALONSO

—if the client were asking me that on the phone. So, I think I would probably give a whole lot of preamble about you realize that you have conditions of bail and that it's a crime for you not to return to court.

MR. SAUNDERS

But would you answer the question?

MR. ALONSO

I probably might with all sorts of disclaimers.

MR. SAUNDERS

Bernie?

MR. NUSSBAUM

Yes. I will answer the question. Yes.

MR. SAUNDERS

You would?

MR. NUSSBAUM

Yes.

MR. SAUNDERS

Michael?

MR. CARDOZO

I think I would decline to answer and would withdraw from his representation.

MR. SAUNDERS

Lou?

MR. CRACO

I would tell him the story when the client asked me virtually the same question, and I gave him two pieces of advice. He had the jurisdiction in mind, and asked whether it had an extradition treaty. And I told him the truthful answer, which was that it did not. But that the last person who had tried that had discovered that an extradition treaty really serves a lot of protections in extradition, but that guy had gotten picked up on the beach in his bathing suit by Interpol and was brought back without any recourse.

So you won't get extradited, but you might get kidnapped.

MR. SAUNDERS

Steve?

MR. FRIEDMAN

I would refer him to Lou Craco.

MR. SAUNDERS

Jen?

MS. DANIELS

I would probably withdraw.

MR. SAUNDERS

Hank?

MR. GREENBERG

I defer to everyone.

MR. SAUNDERS

In just the few minutes we have left, let me throw this open to any of you who have comments or questions. This gentleman here had one before.

QUESTIONER

I'm not trained as a clergyman, I'm trained as an attorney, as an advocate. So my morality, where I hear it, where I get it, is something very personal to me.

And you didn't come to me to hear me preach. You came to me because you needed a legal decision.

So all of the other conversations here, at the outset of this very interesting meeting, thank you, is to me almost bordering on theocracy. You know, we're a democracy. No one is asking me to make horrible judgments.

MR. SAUNDERS

All right.

So you would ignore that part of Rule 2.1 that permits you to advise your client on the moral implications of the situation.

Somebody else here had a question.

QUESTIONER

I just want to second what the first gentleman said over there, regarding — I want to say that I think the discussion is very naive in the sense that if you're a government lawyer, not in the private sector, but you're a government lawyer, the idea that you're going to tell your boss the right thing to do and risk your job is kind of absurd.

When I was a staff attorney for a federal agency, we had no protections whatsoever, there were no civil service protections or anything. And that would have been that.

MR. SAUNDERS

Why wouldn't the same be true for an in-house lawyer in a corporation?

PROFESSOR GREEN

Well, it's just like the young lady said, you know, you get into these moral issues, the company is moving overseas, is that right or wrong morally. There is financial obligations to the stockholders.

It becomes much more ambiguous than let's say somebody who's stretching an expense account or maybe a senior person who's saying these expenses are fine, you know that they're not fine, maybe people whose jobs are being extended, you know it's not appropriate. And I could be quite more specific.

But there is a higher obligation for a government lawyer that I don't think would apply for a private one. So I just wanted to second this. The gentleman put it much better than I did.

MR. SAUNDERS

Thank you.

QUESTIONER

Not to be overly dramatic about it. I think part of this conversation is in the context of us being a stable, advanced democratic society. And it, you

know, history is laced with instances where lawyers were asked by the governments they represented or the individual clients they represented to just interpret the law in a particular way. That led to frankly some institutionalized atrocities. And those were instances where lawyers kept this very lovely distinction between what's legally permissible and didn't answer the question of what's moral. And if not us, who?

MR. SAUNDERS

Judge?

JUSTICE ENG

I was speaking at a legal gathering and it was interesting in my research about what's going on in China, that the rule of law is becoming rule by lawyers, so to speak. And that is, that more and more of the hierarchy of China seems to be pursuing legal education, and they are using the law as actually a means of social control rather than service, service to the people, service to the population.

And I am concerned regarding morality and being overly involved with our judgments with morality as it may morph into rule by lawyers, so to speak. In that you have a class of people who are advising certain courses of conduct because of their moral take on an issue.

MR. CARDOZO

Could I make an observation?

All of this started, as some people in the room will remember, with an endeavor to try to figure out what does it mean to be an American lawyer in the 21st century. What really are we. It's kind of an attempt to identify ourselves.

And we sorted out some of the things that are important about that. And it is quintessentially premised on the notion that there is something unique about how this society uses law, creates law, values law. And generally respects law. If that were to change, if those premises change, all the issues change.

And I just wanted to — it is not an oversight. It is an assertion that there is something unique about the American experiment and the role of law in the American experiment that makes the role of lawyers in the American society different from their role in the rest of the world.

MR. SAUNDERS

On that note, let me bring this proceeding to an end.

Let me first thank all of you for coming and thank our participants for participating in this very interesting discussion. Let me thank the New York County Lawyers Association for their generous hospitality and co-sponsorship.

I hope that you will agree that in the last five years the Judicial Institute has added to the public discourse on what it means to be a lawyer in the 21st century in this country, that we have succeeded at least a little bit in illuminating what it means to be an independent lawyer, and to a greater degree, I hope, what it means to be a true professional in the profession that we all revere and love, the profession of law.

Thank you all very much for coming. And safe travels home.

(Applause.)

(Meeting ended at 8:14 p.m.)