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WATCHDOGS OR LAP DOGS? THE ETHICAL CHALLENGES FACING GOVERNMENT LAWYERS

A JOINT CONVOCATION CONVENED BY THE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW AND THE COMMISSION TO REIMAGINE THE FUTURE OF NEW YORK'S COURTS
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A CONVOCATION ON
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THE ETHICAL CHALLENGES FACING GOVERNMENT LAWYERS

WELCOME AND OPENING REMARKS

PAUL C. SAUNDERS
CHAIR, NEW YORK STATE JUDICIAL INSTITUTE
ON PROFESSIONALISM IN THE LAW

Good morning, everybody. My name is Paul Saunders and I chair one of the two co-sponsors of this program, the New York State Judicial Institute on Professionalism in the Law. The Judicial Institute was created by then Chief Judge Judith Kaye slightly more than 20 years ago for the purpose of promoting a dialogue between the bench, the bar and the academy on issues relating to professionalism in the law, and this convocation today is undertaken in the spirit of that mandate. I'm delighted to welcome all of you to the convocation on the subject of ethical challenges facing government lawyers, a topic we believe is not only timely but extremely important. Our belief is reinforced by the fact that we've had somewhat more than 500 people register for this program.

The topic of this conversation was inspired by an op-ed in the New York Times written by Sherrilyn Ifill. earlier this year. She is the CEO of the legal defense fund. And in the article that she wrote, she criticized the behavior of some government lawyers and she wrote that, and I quote, "As a profession, we must confront ourselves if lawyers are to be worthy of the mantle of leadership that is so routinely and unquestioningly conferred on us and if we are to protect the rule of law in our democracy." We've taken up Ms. Ifill's challenge and this convocation is the result.

In today's highly charged political climate, government lawyers face unprecedented ethical challenges. Whether they're employed by elected officials with agendas or agencies that are untainted by politics, they must often make decisions that reflect a clash between what the ethical rules require and what their superiors demand. We will neither be able to address all of the issues that Ms. Ifill raised nor solve all the problems that she exposed, but we do hope, however, that this convocation will engender a conversation that will last and that will

enable us and others to take a hard look at the rules of professional responsibility for lawyers and we may even recommend changes to those rules where appropriate.

We've put together a distinguished group of knowledgeable jurists, academics and practitioners to address this important topic. In the interest of time, I would ask you to refer to their biographies that are in the links found in the agenda on the website of the Judicial Institute on Professionalism. On behalf of the Judicial Institute and our co-sponsor, the New York State Commission to Reimagine the Future of New York's Courts, I would like to thank all of the participants for their time and their wisdom, and I would also like to thank Chief Judge Janet DiFiore for her unwavering support of the Judicial Institute and the Commission.

It is now my pleasure to introduce a good friend and colleague, the chair of our co-sponsor, Hank Greenberg. Hank is a member of the Judicial Institute. He is also the chair of the New York State Commission to Reimagine the Future of New York's Courts, and he is the immediate past president of the New York State Bar Association. Hank, over to you.

HENRY M. GREENBERG
CHAIR, COMMISSION TO REIMAGINE
THE FUTURE OF NEW YORK'S COURTS

Okay. Just a few words before we launch into the panel discussions to frame for everyone what the architects of this convocation had in mind in addition to what Paul described, and the important issues and the importance of the convocation itself. The great United States Supreme Court Justice, Louis Brandeis, famously described attorneys in public service as the people's lawyers. That phrase, the people's lawyers, captures the highest aspiration of the legal profession to do justice by preserving and protecting the public. However, this high and noble calling is not always followed by those given the honor of public service. Don't misunderstand me, to be sure, most government lawyers serve the public honorably and well, they do admirable and critically important work, truly, they are the people's lawyers. That said, in recent years however, we have seen, with disturbing frequency, high-ranking government lawyers that did not appreciate their obligation to the public and the common good.

We have observed lawyers, lawyers charged with enforcing the law, facilitate its circumvention and, in some cases, its violation. This

was not always so, at least not with this degree of frequency, it was not always the case. We, the legal profession, used to be confident that the norms and traditions of public service in addition to black letter rules of ethics provided the guardrails necessary to ensure appropriate behavior. Attorneys in public service understood that they must turn square corners in discharging their responsibilities. They grasped intuitively that a government lawyer is more than a zealous advocate, that at times justice and fairness, the public good dictate behavior different from a lawyer in private practice would respond. Are these longstanding norms and rules that have served us well in the past, are they still adequate to the task of constraining inappropriate behavior today? What can the legal profession do to ensure that attorneys in public service do the public good all the time? These are among the critical issues the convocation will be considering.

My deepest thanks to our extraordinary leader, Paul Saunders, the committee that meticulously planned this convocation, and its co-sponsors, the Judicial Institute on Professionalism in the Law and the Commission to Reimagine the Future of New York's Courts. And I join Paul in thanking, all of us indeed owe an enormous debt to this distinguished experts and public servants, past and present, who have and will generously share their thoughts, ideas, and insights.

Let me leave you with this thought. We all know that we live in a cynical age. The space of respect for public service and public servants are sadly rare. The coarsening of public discourse quickens, the polarizations of our politics widen, the individuals from whom you have heard and will hear are our answer to the sects. They are the best of the best. They exemplify Brandeis's notion of the people's lawyers. Thank you.

HONORABLE JANET DIFIORE
CHIEF JUDGE OF THE STATE OF NEW YORK
CHIEF JUDGE OF THE COURT OF APPEALS

Good morning, everyone, and welcome to today's convocation, one that carries a very catchy title, watchdogs or lap dogs, the ethical challenges facing government lawyers. And while the title is indeed clever and attention grabbing, there's no question that the substance of today's discussion is both important and timely as the ethical challenges facing government lawyers at all levels have grown urgent in the face of our increasingly polarized political environment. And so, I want to commend our sponsors, the Judicial Institute on Professionalism in the

Law and it's chair, Paul Saunders, as well as Hank Greenberg and our Commission to Reimagine the Future of New York's Courts for assembling an extraordinary roster of accomplished professionals with decades of public service experience to engage in a frank dialogue about the difficult ethical challenges and conflicts facing government lawyers in these politically charged times, including folks who really need no introduction, Loretta Lynch, former United States Attorney General, Paul Clement, former Solicitor General of the United States, and Neal Katyal, former Acting Solicitor General.

And while it is our hope and expectation that today's convocation will lead to suggested reforms to clarify the ethical obligations of government lawyers, we also hope that it will point us to new ways in which we can reaffirm the basic values that define us as lawyers and members of a self-regulating profession including the clear understanding that being a good lawyer is about much more than zealously representing the interest of any one person, party or cause, that the solemn oath we swear to defend and uphold the constitution means that we are officers of the court and of the legal system, professionals who have an overriding duty of fidelity to the law and to the constitution. And that as members of a privileged profession, we are public citizens as the ABA Model Rules of Professional Conduct remind us public citizens with special responsibilities, not only to serve our clients, but to promote justice and defend the rule of law.

This is who we are and these are the noble values that define our profession. And as members of the bench and bar responsible for regulating our profession and legal educators responsible for the training and formation of aspiring and newly admitted lawyers, it is up to us to respond to the imperatives of the moment and to preserve the values we cherish and hold dear. And so, I am grateful to the extraordinary group of jurists, lawyers, academicians, and leaders of our profession who have come together at this moment in time to examine the unique challenges of representing and counseling government actors and help us develop an effective framework to guide government lawyers in ethically representing their clients.

The work that brings us together today is so very critical. We are at a time when less than a quarter of all Americans, less than a quarter of all Americans trust their government to do what is right for them most of the time. And so, we must do everything in our power to reaffirm the public's trust and confidence in the integrity of the government's lawyers, lawyers who have an enormous impact on the ways in which our democratic institutions operate and function. These are the trained,

skilled, and ethical lawyers who we rely upon to do what is right even at times presenting personal risk in order to protect and advance the rule of law and ensure that everyone is bound by the law. And that no one is above the law, including the men and women who lead our government.

And so, on behalf of all of us in the New York State Courts, I am grateful to our distinguished speakers and panelists for participating in this timely dialogue on the ethical challenges facing today's government lawyers. And we are grateful as well to all who are joining us today for your interest and for your commitment to defending and upholding the rule of law which we all know and understand is the foundation of our democracy and the peace and prosperity we desire for our nation, for our families and for ourselves. Thank you and best wishes for a stimulating and productive convocation.

KEYNOTE COVERSATION
GOVERNMENT LAWYERS AS GUARDIANS OF THE RULE OF LAW
A GOAL OR AN ILLUSION?

PAUL C. SAUNDERS

Let me now welcome and introduce our keynote speakers who are going to have a conversation on the subject of government lawyers as guardians of the rule of law. And let me begin by asking them to comment on something that my predecessor in this job, the distinguished lawyer, Lou Craco said in an address that he gave at the Pace Law School some years ago. Lou said that when lawyers give independent and candid legal advice, which they're required to do by the code of professional conduct, they are quintessentially delivering the rule of law to their clients.

And Lou quoted David Wilkins, the distinguished professor at Harvard, by saying that what lawyers should do, must do, is to tell their clients what they must know, not what they want to know. Not the advice that they want to receive. They should be given the advice that they must receive. And let me turn this over to our distinguished guests, both Paul Clement and Neal Katyal, both of whom led the Office of Solicitor General. Both of whom worked in the Department of Justice. Both of whom are professors at Georgetown Law School. And despite the fact that they are sometimes on opposite sides of a given issue, they are the closest of friends. So let me welcome Paul Clement and Neal Katyal.

HON. PAUL D. CLEMENT
PARTNER, KIRKLAND & ELLIS

Thank you, Paul. It's great to be here, and it's great to be here with Neal. And in the spirit of friendship, I'll let Neal take the first crack at your wonderful question.

HON. NEAL KATYAL
PARTNER, HOGAN LOVELLS
PAUL AND PATRICIA SAUNDERS PROFESSOR OF
NATIONAL SECURITY LAW, GEORGETOWN LAW

Well, thanks, Paul. It is really a delight to be here with you, Paul Clement and Paul Saunders. I hold many titles, but the title I am proudest of is that I am the Paul Saunders Professor of Law at Georgetown. And it is such a privilege to be associated with you in any way, shape, and form. At the same time, I know I do a lot of things that are controversial. And those are on me, not on you.

So I think that the question is really important. I think Sherrilyn Ifill's drawing attention to this issue is really important, particularly at this, I think, unique moment in time. I do think the job of any lawyer in both government or in private practice is to give candid advice to your client. I think there's no more sacred calling we have than to do that.

It's different with government lawyering because it's not quite clear who the client is. And I think Paul and I will probably get into that in more detail later. It depends, I think, a bit on where you sit. So the solicitor general has a different set of what might be clients than say some of the hypotheticals that you're going to be discussing later today, the lawyer for the town supervisor or the city council or something like that. I do think there are really important differences.

But to me, kind of the most important thing about being a government lawyer, and it's true in private practice, but I think even more so just given at least in the federal government the awesome powers you have, is the obligation to tell your client no, and you can't do that. And I think what sets the government apart a little bit from the private sector is that there are always some people in the government, political appointees, who want to say yes to the White House, or perhaps the attorney general, whomever, to policy people, even when they know the answer should be no. Even when the answer is obviously no. And conversely, sometimes there's a set of people in government who get power by saying no. They're not relevant unless they become a stumbling block to something that the president or someone wants to do.

So you have both of these dynamics occurring, and that makes it really hard. And to me, the most important thing I learned in two tours, one as a kind of young Justice Department person, 27 years old, in the Deputy Attorney General's Office, and then later in the Solicitor General's Office, is the importance of regularized process. It's going to

be hard sometimes substantively to fight against the people who want to say yes or want to say no. And that's why the Justice Department has such rigid procedures before making an important decision. Like Paul and I, when we were in the SG's Office, and it's still the case today, any decision starts with a line recommendation from the line attorney, maybe in the field, the US Attorney's Office goes up to the US attorney. Then goes up to the relevant component of the Justice Department, then goes to line attorney in the Solicitor General's Office, a career person. Then goes to a deputy solicitor general.

And all these people have to write memos and they all have to share them with each other so that they can react to it in, so there's no stove piping, only certain memos get seen by certain people or something. And then it gets teed up to the solicitor general for a decision. And the best thing about being solicitor general, you don't have to write a memo. Everyone else has written a memo. You don't have to. And you get to make the decision. But you do so with a full view of all of the papers before it. And I feel like most of the problems that happened in the Justice Department, we certainly saw it in the last administration, was when you had a kind of short circuiting of the process and you had stove piping going on. And that's a sure way to getting bad substantive decisions.

HON. PAUL D. CLEMENT

Yes. And Neal, I agree with everything you said, including what a pleasure it is to be here. I can't claim to have a title based on Paul Saunders. But other than that, I echo everything that you say. I think the process really is important. And I do think that sometimes the lawyers can reinforce the process by having in their own minds a very clear distinction between what's the legal question before them and what is the policy question that other people may be trying to conflate matters with. And you're absolutely right about, in the Solicitor General's Office, there's a process that's well understood, generally well respected, where people put their legal analysis in writing and put their names behind it.

And there is always a temptation for people, particularly people who are just much more interested in the policy issue than the underlying legal issue, to try to short circuit the process. There are lots of different ways to short circuit the process. But one way I'll just highlight is that sometimes there'll be a legal challenge to a policy, and some people who never really liked that policy as a policy matter will

essentially try to get the government to not appeal, to drop a legal prosecution or whatever it is, just because they don't like the underlying policy.

And I think it was very helpful when I was in the office to kind of keep the difference between the legal question and the policy question separate. And on more than one occasion I effectively or literally told somebody that was trying to convince us not to appeal, or not to petition for review of a rule that was struck down, I essentially said, "Look, I'm not really hearing a legal argument. If you don't like this underlying rule, here's the address, the physical street address, of the agency that promulgated the rule. If you want to go talk to them and have them take the politically accountable step of withdrawing the rule, I'd be delighted, or at least indifferent. I got plenty of other work to do here."

But I think part of that process that really plays an important role, is it disciplines people to make legal arguments. In my experience, if they're trying to short circuit the process and really just have a policy or political goal in mind, they don't really want that in writing. They don't want their fingerprints anywhere near it. And I think that process really helps discipline people to put their name to the arguments they're making. And then that helps steer the arguments to the legal arguments that are not just kind of policy disagreements that are masquerading.

The other thing that I thought you said that's important, and I just want to amplify, is it's very easy to focus on what I think is probably the most noble thing that a government lawyer can do, and that is tell their client, and we get back to the issue of who's the client, but to tell their client no. I mean, I think at an instinctive level, I think it's easier to understand why there's some nobility of a lawyer saying that this is what the law provides. I know you want to do something different, but you just can't do it.

But I think part of the way, as a government lawyer, you put yourself in a position to be able to say no, and to actually have people listen to that advice, is by also saying yes when appropriate. And I think Neal's point that sometimes, although we focus on saying no as a noble act, I mean, if you're like Mikey in the cereal commercial, and you don't like anything, surely not everything that the government is trying to do is problematic. And if you're going to work in the executive branch of the government, you probably ought to have at least some respect for executive prerogative.

And so I do think that part of the way that you essentially put yourself in a position to be taken very seriously when you say no is to also say yes under circumstances. Give that same candid legal advice

and say, "Yes, we can do this. I mean, it might have some risks, but we can do this." And then if you have a reputation as somebody who doesn't always say no, then you put yourself in a position, I think, where you can credibly say, "No, this is too far. This is a real line. It's not that I perceive everything as problematic, but this is just a bridge too far."

HON. NEAL KATYAL

Paul, I think that's so wise and thoughtful. And I don't think it's in some ways that different from private practice. My rule is if I say no to a client, I'm going to have a "but." And then I say here's how you could do X or Y if I'm giving them advice on something. I think that's all something that all of our audience is well familiar with. And as well, the idea that you really have to say no, as a government attorney, when there's personal motivations behind a certain request, as opposed to government ones. And I think some of the hypotheticals that the folks are going to talk about later today are examples of that in which the government lawyer is being asked to benefit some government person in their private capacity. And obviously that's been in the news of late.

But what I wanted to ask you, Paul, is I think your process point makes a ton of sense. And it's not that hard to implement when you say to an executive branch official, someone at the White House or whatever, "Hey, go get that agency regulation changed." Because after all, they're in control of the agency, presumably, unless it's an independent one. But what about when it's Congress? So I certainly faced that situation in which there were some laws that the administration was deeply opposed to, and they were under attack. And you can say to the White House, "Hey, just go get it repealed in Congress." And they say, "Yeah, fat chance." And that changes, I think, the dynamic a bit. I wonder what your thoughts are on that.

HON. PAUL D. CLEMENT

The congressional aspect of it does raise, I think, an additional complication. And one of the things that I think is an important ingredient of our system is separation of powers, at least at the federal level, is that as a general matter, the people that we expect to and affirmatively want to be defending the constitutionality of acts of Congress in court are people from the executive branch and not people from Congress. I mean you could have a different system. You could have a system where the House General Counsel's Office and the Senate

Legal Counsel, had dozens of lawyers and were hiring Supreme Court clerks routinely, and were getting to appear in court. And they were the selected entities that defended the constitutionality of acts of Congress, but that's not the system we have.

We have a system where we understand that part of the executive branch's constitutional duty to take care that the law is faithfully executed includes defending the constitutionality of acts of Congress, and to roughly state the standard, as I've understood it, that's subject to two caveats. One, you have to be able to make good faith or reasonable arguments in defense of statutes. And there's obviously some play in the joints there. And then the second thing is I think administrations across different parties and across different decades at least have always understood it's a little bit different if the act of Congress, if its asserted unconstitutionality is that it intrudes on the constitutional prerogatives of the executive branch, then it makes a little bit more sense for the executive branch lawyers to sort of take the executive branch's side of the dispute.

But subject to those two caveats, we really do have the presumption that the Justice Department will be in there defending the acts of Congress and their constitutionality. Here too, I think, anytime you're going to have a standard, like reasonable arguments or whatever it is, good faith arguments, there are going to be some debatable cases. There are going to be some hard cases. And here too, I do think sort of in a sense saying yes can help you if you have to say no. I mean in my time period in the office we, I think it's fair to say, defended the constitutionality of a number of acts that were not particularly politically or policy-wise popular with the political party of the administration we were working in.

And so, for example the bipartisan Campaign Finance Reform Act was passed. It wasn't very popular with Republicans on the Hill. But we defended that act, and indeed did so successfully, in the Supreme Court. On the other hand, in my time there were one or two acts of Congress where we didn't defend the constitutionality of the act of Congress because it was effectively indefensible. I mean one, just example, just to highlight the point during my time, is Congress passed an appropriations rider that said that entities that accepted federal transportation funding could not have pro drug legalization advertisements. But they were perfectly free to have advertisements to say, just say no, keep drugs illegal. And of course, there's a name for that. It's called viewpoint discrimination, and it's almost always

unconstitutional. So a judgment was made that we couldn't defend the constitutionality of that.

And I think giving people an example of where we defend acts of Congress, even if they're not super popular with people in our party, I think was very, very important. And then also giving sort of an example of here's where we're going to give independent and candid advice even to Congress, and even putting a huge thumb on the scale that we'll try to make arguments to defend the constitutionality of acts of Congress. This is just a bridge too far. This is indefensible. And so we can't go into court and defend it.

HON. NEAL KATYAL

Yes, that is also wise. I agree with all of it. I mean, and your campaign finance example really does, I think, starkly highlight the implicit question, which we now should make explicit, which is who the client is? Because if the client were the president, and presumably the president at that time was opposed to campaign finance regulation, you'd have to do his bidding and not defend, go into the Supreme Court and either refuse to defend or even come in and say that the law was unconstitutional because that would be your obligation as the lawyer to a client. But as the solicitor general, you also have a second client, which is Congress. And sometimes of course, there's a clash between Congress and the president on a matter of executive power. That's that second category of times when you don't defend something that you mentioned.

But in circumstances like campaign finance, it's not any sort of clash of separation of powers. There's a clash of political views about whether the regulation is good or not. But there isn't a direct conflict in terms of the hierarchy of federal power or anything like that. So you've got two competing possibilities here, or sometimes competing. You've got Congress and the president or the administration as a whole. I'd also add as the solicitor general, and I think that's actually true of all government lawyers, there's a third obligation, which is to the public at large, to the American people.

To me that is expressed most powerfully by the solicitor general's decision to confess error in cases. So this happens about two times a year, and it goes all the way back to, I think, Taft in 1891 when he was solicitor general, in which what happens is that the Justice Department has won case in the Court of Appeals, some criminal case usually. And then the defendant appeals to the Supreme Court, files a petition for certiorari. And the solicitor general looks at it, and says we

actually shouldn't have won that case, in say the Sixth Circuit or whatever. I actually think the defendant was right.

And the solicitor general then files a piece of paper in the Supreme Court saying, "Hey, Supreme Court grant certiorari in this case and rule for the defendant." That's a remarkable thing for a lawyer to do. Obviously there's no private practice analogue. AIG isn't going to hire me, and then I'll win a case with them in the Sixth Circuit, and then go to the Supreme Court and say, "Actually AIG should have lost, Supreme Court. Grant certiorari. Rule against us."

But that does happen in the Supreme Court. And it's so powerful because literally the government lawyer, the solicitor general, will sit on the same side as the defendant in the courtroom, and stand up and argue for the defendant. And then the court has to appoint an amicus curiae to argue what the government would've argued. And for me, at least, when I was running the office, my biggest nightmare was that I would confess error in a case, say that there's no reasonable argument basically for the government to have made in defending this conviction, and then to have the amicus curiae come up with some brilliant reason why the Court of Appeals decision was correct. Fortunately, that never happened. But I think as we think about the obligations of government lawyers, there is I think no finer example of this kind of third obligation, your client being not just the president or Congress, but the American people. I don't know, Paul, if you have thought on this.

HON. PAUL D. CLEMENT

No, I agree a 100%. And I think you've put your finger on it. It's both a great example. It's never something I think anybody in the Solicitor General's Office recommends lightly. It doesn't make you very popular with either your colleagues that procured the prosecution, or worse still, the Court of Appeals judges who accepted the government's argument below. For you to turn around and say that their decision is not just wrong, but essentially indefensible is not a step you take lightly. But virtually every solicitor general since Taft has done it. And the reason is because there are some cases where you're just staring an unjust result in the face.

I mean there's a prudential aspect to it as well. You recognize that it would not go well for you in the Supreme Court, but it's not just that kind of instrumentalist view of it. It really is the office saying this result can't be squared with the constitution, or with the only statute that authorizes it, or whatever it is in the particular case. And I think you're

right to highlight it because it surely is in the interest of the executive branch at some level to defend a prosecution that they've spent time procuring. And yet a decision is made that, no, that either because the executive as a whole has ultimately made its determination that the action is improper and should be discontinued, or because you think of it as being this broadening of the client to take into account the full interests of the United States, including the people who are governed, who obviously have a liberty interest in not being prosecuted unfairly. There are different ways to look at it, but it really does highlight that this question of kind of who's the client is complicated, and it's not just two dimensional.

And let me just add another part of that I think is worth highlighting. Because as you say correctly, there's no private law analog to this. And part of the reason that there's no private law analogue to this is that if you told AIG that, "Hey, I've successfully procured this favorable result in the Sixth Circuit, but I just don't think it's defensible in the Supreme Court," I mean after the client figured out that you actually weren't pulling their leg and you were serious, the next thing they do is say, "Well Neal, thanks for getting us this far. Do you have Paul Clement's number? I'm going to call him and see if he couldn't represent us in the Supreme Court."

HON. NEAL KATYAL

That happens to me all the time anyway.

HON. PAUL D. CLEMENT

And if it weren't my number, it'd be somebody else's number. But the point is that a client's going to get other lawyers to take their position up in the Supreme Court. And in the Solicitor General's Office in particular. But I think through a lot of government organizations, by statute, by tradition, it's the in-house lawyers who are the ones that represent the government. And it's not an easy matter for the government to simply get somebody else to take on the representation. We have both the responsibility, the luxury, and I suppose a little bit of the power, of being the monopoly supplier of legal services to the executive branch. And I think, and this gets to the heart of why this Convocation is so important and why these questions are hard, is because I think that aspect of the representation makes it impossible to just quickly and easily translate all the professional responsibility rules

that govern in the private sector over to the public sector and government lawyers.

And just to give an example, and Neal I know you dealt with similar situations, I think I've heard you talk about them. So I'll introduce this, and then let you sort of take it from there. But it happened probably half a dozen times during my tenure as solicitor general, that the Supreme Court would grant certiorari in a case involving one of the anti-discrimination and employment statutes. Could be Title VII. Could be Americans with Disabilities Act, whatever the statute. And it was a case that the government previously hadn't participated in, and the court would either call for our views, or nonetheless, they wouldn't call for our views, they'd grant cert, but they kind of expected us to participate in the case.

And two very predictable things then happened after the court granted review. One is the lawyers for the Civil Division at main Justice wrote a memo that said, "Okay, the Court is going to decide this important question about the reach of a federal anti-discrimination and employment statute. That statute applies to the federal government as employer. We in the civil division represent the United States as employer defendant in all of these actions. So it's in the interest of the United States that we support the defendants in this case."

So far so good, but it was equally predictable that I get a memo from the Civil Rights Division. And the Civil Rights Division would point out that that same statute applies specifically to certain public, state, and local governments. And as to its application to those state and local governments, the Civil Rights Division of the Justice Department is the principal enforcer of the rights of the employee. And so there's an obvious interest of the United States in the Supreme Court's resolution of this statutory issue. And the interest of the United States is squarely in supporting the employees.

Now, the tricky thing is that the solicitor general represents the Civil Division and Civil Rights Division, and yet they have diametrically opposite positions. My understanding is if you confront that kind of dynamic in the private sector, you certainly can't represent both clients. And probably by the time you're done getting all the professional responsibility advice you need, you can't represent either of them. You have two clients you're currently representing with diametrically opposed views.

But in the Solicitor General's Office, that's not the way you resolve the dispute. That's not the way you'd resolve any conflicts question. And you actually work through the issue and try to fashion the

position of the United States. Sometimes you side with the Civil Division, sometimes you side with the Civil Rights division. Sometimes you come up with some clever compromise where you try to have your cake and eat it too. But all of that is I think something that illustrates that, at least in the Solicitor General's Office, but I think more broadly, the question of who the client is, is very complicated and simply applying all the normal rules from the private sector doesn't quite work.

HON. NEAL KATYAL

Yes. So important, Paul, all you said. Before getting into that whole example and so on, just on confessions of error, you said it was unpopular for Court of Appeals judges when there's a confession of error by the solicitor general. The best example of that, and I know we're in New York, so the legendary Learned Hand actually said something like, "It's bad enough to be reversed by the Supreme Court, but I'll be damned if I'm going to be reversed by some solicitor general."

So on this question of kind of dual components or multiple perspectives housed within the federal government, I do think that's why the process point that we were talking about earlier is so important. Because if you've got a process where the Civil Division can say, "Hey side with the employer in this discrimination case," and a memo from the Civil Rights Division saying the contrary, and they can see each other's memos and respond to one another and hash it all out as the solicitor general will in an hour long or maybe longer meeting or set of meetings before formulating a position, it's going to be a better position than if the favored branch at a given time, the Civil Division in some administrations, or with some cases, Civil Rights in others, can have the ear of the solicitor general. That's the worst way to get a decision.

And so when people ask, "Why is the solicitor general taken so seriously by the Supreme Court," I do think a key part of it is following this process. Because if you follow the process, the brief reflects the multiple different perspectives that mirror American society much more easily than if it's just a kind of one-note pro-civil rights all the time, solicitor general, or anti-civil rights, something like that.

To me, that raises another question. We've been talking about the duty to defend and things like that. But there's also a kind of duty of candor to the court that I think is true for government lawyers. I mean, all lawyers, again, have a duty of candor. But I do think there's a special responsibility when you're a government lawyer. And to uncover, for example, the warts in a case. I think when you're a private lawyer, you

might shade it a little bit more toward the zealous advocacy side than as a government lawyer.

That's particularly true, it seems to me, when you have information in the government that the other side doesn't have. Facts, data, particularly in national security cases, in which some of the information is classified. So when the solicitor general goes in and says there's a serious national security need for X or Y, it's almost impossible for a private attorney to really have that actual information, the sources and methods and whatever that underlies that decision, to question it.

And so, as a result, I know you did this and certainly I tried to as well when I had national security cases, real kind of special obligation to bend backwards and make sure that the information you're giving the court is so straight and on the up and up. That hasn't always happened with solicitors general in the past, most predominantly in the Japanese American internment. But I think that's also part of the duty of ethics of a government lawyer. I don't know if you have any particular thoughts on that, but I would just throw that there.

HON. PAUL D. CLEMENT

No, and I think it goes full circle to what we were talking about at the very beginning about sort of independent and candid advice. I mean in terms of the solicitor general's relationship with the court and the relationship of government lawyers generally to courts, I mean you can't be completely independent of your client. I mean there are difficult questions about who the client is, but once you have the client, you're expected to represent the client. But I think that your duty of candor to the court is amplified because your client is, at some level, a sovereign entity. Obviously we all have a duty of candor to the courts, so that applies to every lawyer.

But I agree with you that I think it's heightened for those who are representing sovereign entities. And I think, again, as with most things, you can look at it from a slightly more practical standpoint, and say you have a duty of candor that's heightened, and you also would be well advised to sort of honor that duty because you're much more likely to be a repeat player before the court. Because mistakes will happen. It's impossible with an entity as large as the federal government for you as the lawyer to know everything that everybody in the federal government knows about something. You couldn't. It's impossible.

But if you do your absolute best to convey that, and you get it right 99 times out of 100, then you're not going to lose your credibility

if an inevitable mistake is made. But you got to know that you're going to be up there in other cases. And so you always have to put the duty of candor first to preserve kind of the overall relationship. So I think you can look at it in just more practical terms, but I also think it's more than that. It's that you are representing the sovereignty of the entity that you're representing. It's clearest in the United States, but I think it's true, I've been privileged to represent state governments or Native American tribes in private practice. And I think representing those clients too, you have this special responsibility because you are allowed to invoke doctrines that nobody else is allowed to invoke. And you get sovereign immunity. But with that, I think comes some added responsibility to make sure that you are faithfully and candidly representing the branch of government that you represent, or the sovereign entity you represent.

So I think those things are very important. I'm conscious we're getting low on time. I just want to throw out one sort of, it's all well and good to sort of explore all the things that are hard or all the difficult issues. Just I'd offer, sort of based on my own experience, one piece of practical advice. And I'm sure, Neal, that maybe you have some additional advice or better advice, frankly. But one thing, representing government entities, it's not as easy and straightforward, I think, as representing private clients in some respect. Sometimes there are divisions of labor within the executive branch or within the government. And so there are other people that people are listening to. And sometimes you do have to give tough advice. You have to give that "no" advice.

And in the Solicitor General's Office in particular, we were given a fair amount of kind of leeway and independence to make judgments about which cases to appeal and which cases not to appeal. I mean, we could have a whole other discussion about the relationship between the SG's Office and the White House Counsel's Office, or between the SG's Office and the Attorney General's Office. But I think with this responsibility, sometimes you can do yourself a great deal of a favor by giving good candid advice, but also keeping lines of communication open with your client. I mean, I think in my own experience, we were allowed to say no, and we were allowed a greater degree of independence because we didn't put ourselves in positions where we were going to take an unpopular position and people in the White House were going to read about it the next day in the papers and not be prepared for it.

And so in my case, I think by keeping the lines of communication open with either your client or your client's other

lawyers, and not asking for permission, but simply saying, in the appropriate circumstances, this is what we're going to do. I just want you to know that this is what we're going to do. And you might read a news article that suggests that we've just abandoned some policy, and we haven't done anything of the sort. But here's what we've done. And in my experience, if you can sort of prepare people for that, you can protect both the independence of your legal advice and your ability to say no.

HON. NEAL KATYAL

Yes. If you wouldn't mind, just a minute. I think the best non-obvious advice I got before going to the Solicitor General's Office was exactly that. That actually the way to preserve your independence is by having regular open communications with the other players. The other thing I'd say, just in terms of concrete practicality, is the role of career lawyers. Because when you come in as a political appointee, you do have people who are trying to bend your ear on X and Y. And in the Solicitor General's Office, and I know it's true in a lot of state governments, you have longstanding career lawyers who've seen everything from both sides of administrations and the like. And often they can be really helpful in kind of steering your conscience and getting to the right result. And time and again, that's what I did in the office, and I think that's true throughout the 50 states.

PAUL C. SAUNDERS

Thank you very much. Thank you both very much.

HON. NEAL KATYAL

Thank you.

PANEL 1 – HOW ARE GOVERNMENT LAWYERS DIFFERENT FROM THEIR PRIVATE SECTOR COUNTERPARTS IN THEIR ETHICAL RESPONSIBILITIES? LET US COUNT THE WAYS

HONORABLE RANDALL T. ENG
OF COUNSEL, MEYER, SUOZZI, ENGLISH & KLEIN, P.C.

I certainly enjoyed the first presentation, and it's my privilege now to begin Panel 1. Let me first introduce the members of this distinguished panel who I'm sure will have some wonderful insights into the problems being presented here.

We have Karen Griffin, who is the Chief Ethics Officer in the New York City Law Department, Office of the Corporation Counsel. We have Deborah Scalise, a partner in the law firm of Scalise and Hamilton. Her practice has been focused on the representation of attorneys and judges in disciplinary matters before both the grievance committees and the New York State Commission on Judicial Conduct. And, we have the Honorable Ellen Biben, the Administrative Judge for Criminal Matters, New York County Supreme Court and a former New York State Inspector General.

Just a brief disclaimer, the views expressed by our panelists are theirs alone and do not necessarily reflect the views of their agencies if they are in government service.

And now let's deal with the issue at hand. And that is, we have the following situation. The fictional New York State Department of Health Care Support is an executive branch agency charged with distributing funding derived from federal, state and charitable sources to health care providers serving underserved communities. The Commissioner, who is a medical doctor, knows that the Senior Deputy Counsel is the key person who advises staff who evaluate and approve funding requests made to the agency, while the General Counsel is focused on advising on administrative matters. Now publicly, the Commissioner is a model of fair play, but privately does not want to give any support to abortion clinics. The Senior Deputy, who is pro-life, is called to a private meeting with the Commissioner and is asked to advise as to how to advance this agenda while making it look good. Among some of the comments that the Commissioner made to the senior deputy are as follows, and that is the commissioner said that, "Abortion clinics are run by shady characters, and I've had to see their patients in the ER when I was a practicing physician after they injured

them at their clinics. And, I'm sorry to say, that patients in underserved areas use abortion like birth control."

Now, in the course of that discussion, the Commissioner tells the senior deputy that he considers this conversation to be confidential and subject to the attorney-client privilege, and to tell no one about it, including the general counsel of the agency.

Among some of the questions that are before us is, is the Commissioner's request legal? If so, can the senior deputy ethically give advice as to how to conceal this policy from scrutiny? If this is a policy, then why can't the Commissioner exercise his discretion? If it's illegal conduct, then what is the deputy to do? Does the senior deputy research this issue alone without seeking further qualified advice? Must the senior deputy respect the Commissioner's direction to tell no one, including the General Counsel. That basically is the situation that confronts our Senior Deputy. What are your feelings, panelists?

HONORABLE. ELLEN N. BIBEN
ADMINISTRATIVE JUDGE
NEW YORK COUNTY SUPREME COURT, CRIMINAL TERM

First let me say, thank you Judge Eng for having me. It's really an honor and a privilege. I've already enjoyed some of the comments today. There was a lot in the hypothetical that you've just read and you posed a few different questions. I think I would just start with... and this is a concept that was addressed in the opening discussion. But obviously, the challenge for government lawyers, and particularly agency lawyers, is first defining who the client is. This is an interesting hypothetical in that it certainly would be intuitive to see the commissioner as a client, but I think the first and most pronounced concern has to be the agency's concern. The Special Deputy and the General Counsel represent primarily the agency. And, to the extent that the commissioner is not acting consistently with the policies and procedures of the agency, it may very well be that the Commissioner is not a client in this context. And indeed, if the Commissioner is acting illegally, which I'm sure we'll talk about, or rogue in any way, then certainly the interests of the agency may very well conflict with the Commissioner. And all of these have to be on the mind of the Special Deputy Counsel.

KAREN M. GRIFFIN
CHIEF ETHICS OFFICER
NEW YORK CITY LAW DEPARTMENT

Thank you. I would agree. I think here, again, we would evaluate this under a Rule 1.13 analysis, who is your client when you represent an entity? And, of course, governments are considered entities and generally you don't represent individuals, you represent an entity as a whole. So here, starting again with who your client is, I would say your client is actually the entity here. And you'd have to consider that in evaluating whether what the Commissioner is asking you to do is something the Commissioner rightfully has the ability to do in directing that government agency, or if the Commissioner is going rogue, and if he has, what steps you should take if the actions are actually illegal.

DEBORAH A. SCALISE
PARTNER, SCALISE HAMILTON & SHERIDAN LLP

Having been a former government attorney with some deputy positions, and as such, as well as in the practice that I have now, I've learned over the years that the ethics rules are a little confusing and you have to look in more than one place, and your facts will determine the outcome. So there's two things that I wanted to bring to your attention. One of them is Rule 1.13, which is the Rules of Professional Conduct at 22 NYCRR, Section 1200 in the court rules and it describes what to do when you have an organization as a client. I do believe that government organizations do, quote, "constitute clients." And so, what is your obligation, as Judge Biben said earlier is, who's your client? Here, your organization is the client. And so what do you do and how do you do that? In conjunction with this rule, at 1.13 (b), it says that if there's an officer of the organization, or board member, or somebody associated, where they intend to act, or refuse to act, in a matter related to the representation that is a violation of a legal obligation to the organization, or violation of law that reasonably might be imputed to the organization and is likely to result in substantial injury to the organization, then the lawyer shall proceed as reasonably necessary.

So what's reasonably necessary? Then you go to Rule 1.6. Okay, and that's the confidentiality rule. So what can this lawyer do because the lawyer is in between a rock and a hard place. This is the lawyer's boss, but yet the lawyer has this obligation to the organization. So under Rule 1.6, there's an exception that allows you to seek outside counsel,

and it does not waive the confidentiality of the proceedings. It says that you can seek outside counsel under Rule 1.6 (b) (4) to secure legal advice about compliance with these rules or other law by the lawyer, or another lawyer associated with the lawyer's firm or the law firm.

So having said that, if you take a look at the rules, you're always going to find an answer and then you're going to carve out what's the best way to act. And if you read further in the comments, and the comments are there for us as guidance, so while, they're not the rule, they do give guidance to all of us. When the Committee on Standards of Attorney Conduct made the recommendations as to the rules, and they were endorsed by the joint rules of the Appellate Divisions, they are the rules. The commentary is really guidance from the bar association, and the state bar committees have written standards of attorney conduct about how you can proceed.

You should look at the rule and look at the commentary. The only thing our court rules do not have, if you look them up, is the commentary. So you can find that on the OCA website, or on the New York State Bar website with the commentary. You want to look at the rules and the commentary, and then you can start your research from there. But my advice would be okay, "Let's see what I have to do to go up the chain of command." And the one thing I did note is that the Commissioner is a medical doctor so their obligations are different than the lawyer's obligations. I think sometimes there's a tension between professions as to what you're obligated to do and what your clients, meaning the Commissioner and the organization, are obligated to do. I think that's where I would start.

HONORABLE ELLEN N. BIBEN

If I could just jump in, just to respond to some of what Deb just described, I would add that before even going to a 1.6 exception to confidentiality I think that you would go within the agency. There is another lawyer in the agency who's the General Counsel and I would say that that Deputy Counsel has an obligation to report up to the General Counsel. That would be without even having to implicate any exceptions to confidentiality. That would be within the chain and within the representation of the client, and it would not violate, I wouldn't think, any rules of confidentiality.

I might also add, by the way, that to the extent that the Commissioner has communicated to the Deputy Counsel his belief that the conversation is in fact protected, is confidential, and that they in fact

have an attorney-client relationship, even if that's wrong I think we've all seen... courts have construed those kinds of situations as creating separate attorney-client relationships, and I would be careful to have the Senior Deputy Counsel go back and inform that Commissioner that in fact the lines, who the client is and that their communications may not, in fact, be protected by attorney-client privilege. I think she has an obligation to be clear about that. It's almost analogous, and just as Deb said around the organization as a client, it's analogous to an *Upjohn* type warning, to be clear to that individual that the conversation may not be protected in the way that they are suggesting.

HONORABLE RANDALL T. ENG

I'm going to add another wrinkle to this and that is, in the course of the conversation between the Commissioner and the Deputy, we learn that the Commissioner's his wife is an attorney practicing corporate law and is a former Assistant Attorney General. The Commissioner's wife cautions the Commissioner that she wants him not to run afoul of the New York State Penal Law Section 195.00, which describes official misconduct. And the statute reads as follows, "A public servant is guilty of official misconduct when, with intent to obtain a benefit or deprive another of a benefit, he commits an act relating to his office but constituting an unauthorized exercise of his official functions knowing that such conduct is unauthorized."

Now, the Commissioner tells the Deputy that he's been made aware of this and wants to stay out of trouble. And he advises the Deputy that he doesn't want to know anything that's going to get him into trouble. This is something like the Sergeant Schultz defense, "I know nothing." Is it ethical for the Deputy to follow that instruction and refrain from advising, in the course of this representation, that he may be engaged in unauthorized conduct? The Commissioner wants to know nothing.

What do we do here? Is the attorney, the Deputy, required to follow this instruction of the Commissioner and not give him any bad news? Is the Deputy breaching an ethical obligation if the Deputy files this rule? What is this?

HONORABLE ELLEN N. BIBEN

I think your question actually raises two interesting questions. One is, what if anything, does the Deputy have to inform or advise the

Commissioner? And then the other, because when you're talking about a government employee one of the things that does distinguish government lawyers is that they are subject to other ethics regulations as any public employee, so there's another obligation. If this were, for example, a New York State employee, there may very well be reporting obligations to others regarding the Commissioner's wrongdoing. One issue is, does she have to inform the Commissioner of the potential exposure or wrongdoing to himself? That's one question. And then the other question is, is she required to report this wrongdoing to one, the General Counsel, but maybe also to the IG. Some states do have that mandatory reporting requirement. I don't know that she would have to report it to the Commissioner, but she would be well advised to inform him, because she may need to inform him both of his potential exposure and of the fact that she may very well have to report it to the IG or through some other regulatory chain.

KAREN M. GRIFFIN

And I would add to that, I think you have, again, starting where we get back to where we began, you have to give frank and candid advice. So if in fact the Commissioner is directing that we engage in actions, the agency engage in actions, that would be unlawful, I don't think that is something you can withhold. Again, I think the client there is the agency, so the Deputy Counsel would have to give advice, if this in fact would be illegal conduct, would have to be frank advice that this cannot be done, this is something that she cannot do or direct the employees to do, and also making sure... Now, the Commissioner is not the client here, of course as an individual client but I think you would go the next step and say, "This could also put you at risk. I'm not your lawyer, I'm the lawyer for the agency. I can't give you personal advice in your individual capacity, but it would put the agency at risk, and may also put you at risk as well."

HONORABLE RANDALL T. ENG

Thank you.

DEBORAH A. SCALISE

I would like to add something from the defense side. No matter what lawyer you are, whether you're in a government agency, or you're

in a private agency, what I would recommend is that, as things happen, that you make notes as you go along, because later on things are going to be problematic because memories can be faulty when someone is in trouble. So you may want to keep your own diary. You may also want to follow up with some in-house memoranda, if necessary, to the counsel to say this is what occurred, this is what happened. And because it's closer in time, it will help you remember later on because sometimes these investigations could take years to come to light and you're not going to remember every detail, but if you have it in writing.

Having said that, sometimes, not only would I advise him or her what their obligations are, because the obligations are that of the organization as well as the individual, but I would probably do some kind of memorialization of the conversation. One last thing that I learned when I was a government attorney, I probably wouldn't have this conversation just with two people present. You might want to have a third person present as a witness to that conversation so that everybody, so to speak, is kept honest. There's not one person against the other in corroborating what actually happened during the conversation.

HONORABLE RANDALL T. ENG

Let's speak about the Commissioner's attorney spouse, who is in private practice now. Is she under any ethical constraints regarding advising him as to how to stay ignorant, so to speak? Is this within or without the purview of private counsel, and not a government lawyer?

DEBORAH A. SCALISE

So I'd say that you guys are uncomfortable, so I think I'll take that one. I think that no matter what you are, private or government lawyer, you can't advise someone to do something that's illegal. The rules prohibit that. You have to make sure that they understand that they have to act in conformance with the law. You can't say, "Okay, I'm going to look the other way," if you know what the obligations are. I also think it's always dangerous to represent a spouse, so you may want to say to your spouse, "Let's get you someone who knows what they're talking about who does government law, or represents government lawyers, who understands that there's the Public Officers Law, or maybe sometimes there's a little local law in a city or a state law that nobody

else is aware of, but a lawyer who focuses or concentrates, because we don't specialize in New York, focuses or concentrates in that area is going to be able to help you better," and quite frankly, it will probably save the marriage because of the aggravation that goes along with it.

HONORABLE RANDALL T. ENG

But in this situation, is it illegal for the Commissioner to ask for advice as to how to remain ignorant of something?

HONORABLE ELLEN N. BIBEN

I'm not sure that he is in fact ignorant of anything. To the extent that he's implementing this policy, which by the way, whether or not it rises to a crime of official misconduct, it may very well be illegal for a host of other reasons, not the least of which is it is a breach of his fiduciary and other duties to be implementing policy consistent with what his beliefs are and not in the best interests of the agency or the public. There's potential illegality, even if it's just an arbitrary application of the agency's function. I'm not quite sure what he's looking to avoid because his policy is problematic on a number of different levels, and whether or not someone actually says it to him or not, it's unethical and illegal. Maybe you're criminal or not.

HONORABLE RANDALL T. ENG

Well yes, because he doesn't want any bad news about unauthorized acts or knowledge that it's unauthorized, because he is a medical doctor. He says he's ignorant of a legal principles, and he has to know that it's unauthorized to have any kind of criminal responsibility. So I think that's what's bothering the Commissioner, but let's move on.

All right. The Deputy, upon returning to her office, receives a visit from the agency Inspector General, a non-lawyer who she regularly counsels regarding investigations within the agency. The IG informs the deputy that she is looking into complaints from operators of abortion clinics; that their applications for funding are taking an inordinate amount of time for processing and are being rejected or severely reduced. The IG is unable to find any written or electronic memoranda on the subject, and the IG suspects that verbal guidance is being given

to examiners by their supervisors to give abortion clinics the lowest priority.

The IG wants advice from the Deputy on how to compel supervisors to answer and wants to be present and wants the Deputy to be present if supervisors are accompanied by their union lawyers. The IG is particularly struck by the fact that she has made an inquiry of one of the supervisors of examiners and that person is a deacon of his church and has status as clergy, however, is permitted to have a secular employment, and the deacon is known to give advice to others in the shop regarding addiction problems, marital problems and things like that. The supervisor tells the IG, "I am not going to answer any of your questions at all if it involves anything that's spiritual." Assuming that the Deputy is able to give advice to the IG, what kind of advice should she give the IG, and particularly involving regarding the deacon

KAREN M. GRIFFIN

So, generally, I think most government lawyers do assist in inspector general investigations to the extent possible. It sounds like in this hypothetical, the Deputy Counsel does advise the IG on how to conduct investigations within the agency. So I believe in that circumstance it would be perfectly appropriate to discuss the parameters and limitations that may apply if somebody is protected or has a separate protection, whereby they don't have to disclose certain communications. Again, I think there's many, many things at play here. Oftentimes, as government employees you're required to cooperate in an inspector general investigation. So that would come into play, and whether there's limitations to that would of course come into play. Here I think there's many factors to consider, but ultimately I think the Deputy Counsel could assist the Inspector General in guiding her on the best ways to conduct these investigations.

HONORABLE ELLEN N. BIBEN

Just to follow up on that, and you're absolutely right, in New York State employees are required to cooperate with the Inspector General's investigation. I would just make the same point I made before, which is I would I think it would be important for the Deputy General Counsel to be reporting up to the General Counsel. I think that's typically part of the chain and would be an important part of the chain just to preserve the integrity of the representation. I would also make

sure, and this does come up in IGs investigations, which is sometimes individual employees are represented or are acting consistent with the agency and are appearing and cooperating in that representative capacity. Other times, perhaps again, like the Commissioner, if they're acting in ways that may not have been consistent, or may have been at odds with agency policy, directive or interests, it may very well be that they do need to be advised about the need for separate and independent counsel.

DEBORAH A. SCALISE

I also am a little uncomfortable because this is the same Deputy who knows that the Commissioner wants to make things look good, and I wonder whether somewhere down the road what she knows about the Commissioner may be implicated in interviews with the employees, because did the Commissioner state this policy to other people, even though Commissioner claims it to be confidential, did they state this policy to other people privately like the deacon or other employees? And then we get into a bigger issue of the Deputy Counsel possibly being a witness somewhere along the way under Rule 3.7. So it's a tread lightly issue and I think that, yes, it may be something where it calls for independent counsel for these employees because it's too close for comfort given the earlier conversation with the Commissioner who is a medical doctor.

HONORABLE RANDALL T. ENG

Can the IG, in New York practice, compel the deacon to answer questions regarding these issues? They all arise out of the scope of employment. Is there a means for a compelling cooperation?

HONORABLE ELLEN N. BIBEN

Yes. Again, every IG is different and has different statutory and other basis for authority, but typically IGs can compel sworn testimony. That means though, and it depends again on statutory structure, but in some instances that might create Kastigar v. U.S.-type immunities where people are compelled to testify. I know we have this in the NYPD and some of the other agencies where you can in fact compel all the testimony, but it means, because of that, you may be conferring immunity on them. You have to be careful about that. In other structures,

they can assert privileges. To the extent that there is an appropriate privilege, if the deacon has, in a separate capacity, has some privilege in his capacity as a pastor then he might very well be able to assert that privilege. That would be why it might be important for someone like him to have his own independent counsel so he could be advised appropriately.

DEBORAH A. SCALISE

And if there's a violation of the law such that it's criminal in nature, you may have to have independent counsel advise him as to whether you take the Fifth Amendment and the negative inferences that can be taken along with that.

HONORABLE RANDALL T. ENG

Another development. The Commissioner is very sensitive to his public image and is ambitious for other offices, and he becomes aware that inquiries are being made about how the agency is conducting its business. The Commissioner hires private counsel, not his spouse, private counsel to protect his good name. Private counsel writes to the deputy, and also follows up with a call, to remind her that any conversations between her and the Commissioner regarding funding for abortion clinics are privileged and confidential, and that any breach of that privilege may subject her, the Deputy, to an attorney disciplinary complaint. Is private counsel acting within ethical boundaries to so warn the Deputy, by letter and by call?

KAREN M. GRIFFIN

Generally, the rules do permit counsel, since it is a self-regulated profession, if you do believe some action may violate the rules of professional conduct, it is perfectly appropriate to reach out and express that concern, and hopefully avoid a future potential violation. I think here what's troubling, is I don't agree with the analysis of private counsel. While the communications with the Deputy Counsel to the extent that the Commissioner was asking, seeking legal advice from the Deputy Counsel on how to execute a particular policy or program, even assuming it was legal, that is a privileged communication and would be a privileged communication, but I think the question here is who holds that privilege. Is the privilege held by an individual, is the privilege held

by the entity? If the privilege is held by the entity, then sharing within the entity of course would not waive privilege and arguably, if it's an executive agency, so a part of the executive branch, even sharing within the executive branch would not waive privilege. So I think that is where private counsel overstepped in threatening to report somebody to the disciplinary committee for doing something that would not be a violation of the rules.

DEBORAH A. SCALISE

I wanted to just add one thing as a former Deputy Counsel to the disciplinary committee, and since, one of the things that committee will... and judge you probably know this too, because you reviewed these cases when you were the Presiding Judge in the Second Department, one of the considerations that the committee has is, what is the motivation for someone making a complaint? Are they a serial complainant as we used to call them? Some people just make a lot of complaints. Is there something in a civil litigation? Is it political in nature? All of those things are something, and there is a bar association opinion, either by the New York County Lawyers Association or the City Bar, and the ABA that says threatening a grievance to deal with a civil action is something that should be considered and could also cause disciplinary problems for the person who made the threat?

Having said that, the response should be, "We don't think so, and we don't agree with you, and we're preserving our rights under the circumstances. Look at Rule 8.3, which talks about what professional conduct is. Very often, and I see this a lot in practice, now that I'm in private practice especially, somebody will say, "You violated a rule. You have a conflict of interest," but they don't understand the intricacies of the rules and they get all puffed up, and then some judge later, like Judge Eng or Judge Biben, will have to take a look at it and say, "Okay, what happened here?" In addition to possibly the grievance committee, because we do see this a lot now in civil context as well.

HONORABLE ELLEN N. BIBEN

And of course, this is a corollary point, but if the Commissioner is using agency or public funds to retain private counsel to protect his possibly, likely illegal agenda that's problematic in and of itself, and unethical beyond the lawyer's ethics. Unethical for a person, for the Commissioner.

HONORABLE RANDALL T. ENG

Does a Deputy have an obligation to report this conduct, that is a letter from private counsel and a follow up call, is there an obligation to report that to anyone? Or does the Deputy just take it in stride?

DEBORAH A. SCALISE

I think that's a political policy decision, to be honest with you, but I certainly would memorialize what happened again in the event there is a grievance filed. The rule on reporting another lawyer is Rule 8.3. A lawyer who knows that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation. So was the doctor's outside counsel mistaken, and were they under a misapprehension of how things worked and now you've straightened them out? Or, was this something was intentional that really does go to the heart of the honesty, trustworthiness or fitness and they're trying to extort you? That's really a question based on the fact pattern that you have to flesh out a little bit before you make a decision as to whether you're going to report. Because, you're going to have an in-house war, and is it worth it is another practical aspect of it.

HONORABLE RANDALL T. ENG

All right. Now, we have some other developments and that is that the General Counsel, the GC, becomes aware of the events swirling around the agency and asked the Senior Deputy if she has had anyone in the senior management of the agency ask about funding for abortion clinics. The deputy hedges in responding and the GC says that the GC, he, is the agency counsel and, "anything said to my deputies in the scope of their duties is said to me." Is the GC right? How should the Deputy respond when put on the spot like that?

HONORABLE ELLEN N. BIBEN

I think that's essentially right. There are some pieces that need to be pulled out from that. But yes, I think the GC is essentially right, that in terms of the duty of confidentiality, duty of loyalty, any of that

owed to the client, reporting to the General Counsel is consistent with those duties. That's the chain of command in the agency and the General Counsel is part of that team representing the agency. So that's right.

I don't know that it means, however... I think to the extent that it means is it consistent with those duties? Yes, it is. And if she hasn't, she should report up to the GC as we've been discussing. I do think though, not everything would be imputed to the GC, which is kind of the different piece of anything said to the deputy is said to the GC. It depends on how you're interpreting that, but I don't think all information and knowledge would be imputed to the GC, particularly given that the deputy is getting access to some rogue or illegal conduct. But, she certainly should report up to the GC if she hasn't. I think she has an obligation to, both as a lawyer for the agency and also as the public employee.

KAREN M. GRIFFIN

And I would agree with Judge Biben. I think that here, depending on the structure, if I remember at the beginning of the hypothetical the GC and the Deputy Counsel had different, or served different purposes, but I still don't think that matters. I think the report up here certainly wouldn't violate any duty of confidentiality to the Commissioner, and I think that is the natural progression, that you would report this up and seek counsel from the General Counsel before proceeding.

DEBORAH A. SCALISE

I agree, having worked in different agencies in my career, I always think that it's a good idea to let your boss know what's going on, especially if it's controversial, because if not, you may be on the firing line, literally. But I also think that it's important to note that anything that is said within an agency, in fact, can be imputed as far as confidentiality. It's done for law firms, and it certainly works in agencies and I've seen that happen, for instance, in cases where *Brady* material wasn't turned over. And so the whole office, even though they should have done a search within the office, I saw a case recently like that, one part of the office didn't know what the other part of the office had in an investigation. And so, you have to be very careful.

In addition to that, under Rule 1.6 (c), a lawyer has to make reasonable efforts to prevent the inadvertent unauthorized disclosure or use of unauthorized access to information provided by Rules 1.6, which

is the confidentiality, Rule 1.9, which is a rule having to do with conflicts. So having said that, I think that you know, yes, you should report back and, yes, you should make sure that when it is controversial information everybody knows about it.

And my last thing that I would reiterate is that it should be memorialized in some way closer to the time, so that if you are ever asked about why you made the decisions you made, you have the information ready.

HONORABLE RANDALL T. ENG

Are those memorializations personal, or can they be discovered in the course of subsequent proceedings here?

DEBORAH A. SCALISE

I don't know the answer to that. I think very often it's an "it depends" issue. So I will tell you then in the context of a disciplinary proceeding, you can use any information that's confidential. And even under the rules of conduct, any time there's an allegation of wrongful conduct against the individual, they can disclose confidential information. However, in the disciplinary context, under Section 90 of the Judiciary Law as well as one of the new rules under Section 1240.18, I believe it is, the confidentiality stays within the disciplinary committee. So that, unless there's some kind of public disclosure, and you could ask for those records to be sealed, and then it's at the court's discretion, it may still stay confidential. But if it's in another context, I think that very often judges are called upon to look at the facts and say, "Okay, what's in the public interest? Is this something that should be disclosed because this agency did the wrong thing?" And I know there's FOIL requests and all these other things that occur. I wasn't ever an IG, and I never had to deal with FOIL requests, thank God, because they're very time consuming. So I'll leave that to the other panelists to discuss.

HONORABLE ELLEN N. BIBEN

I would just follow up by saying, obviously, one of the other obligations of government lawyers and employees is there is an obligation to be as transparent as possible and we have, both on the local and federal level, freedom of information laws precisely because of this. So while I think for the most part appropriate assertions of

confidentiality and attorney-client privilege can be made in those contexts and as you know, in the freedom of information law, most freedom of information laws have exceptions for confidential or specific areas that would be subject to appropriate privilege. That said, you always have to anticipate that these things would in fact be subject to freedom of information or the appropriate subpoena practice. I think there's obviously another layer here with the government lawyer, which is you have that much more so than with the private client or private entity.

KAREN M. GRIFFIN

And to follow up briefly on this, of course if it's an attorney-client privilege communication, it would be exempt from FOIL. There's always a continuing debate about whether something is subject to disclosure under FOIL, so if there's no exemption that applies, can an attorney disclose it? I think it's an open question. Certainly, I have not found any case law that definitively says an attorney can refuse to disclose under 1.6, an incredibly broad definition of confidential information in New York, including anything that's embarrassing or detrimental to your client. So just because something's subject to FOIL, doesn't mean anyone's going to request it. Even public information, if a client publicly announces something, that doesn't bring it outside of confidential information under 1.6. So you've always got this, yes, this duty of transparency, governments are transparent, but also you have the attorney-client privilege duty of confidentiality and loyalty. It's a tug of war back and forth and I always say to lawyers, "proceed with caution." Just because something is FOIL-able doesn't mean that a grievance committee or a court would say that you had the right to disclose that information.

HONORABLE ELLEN N. BIBEN

Proactively, right.

KAREN M. GRIFFIN

Proactively, yes.

DEBORAH A. SCALISE

And also, how do you get a waiver or consent from your client if it's a governmental entity. That's like the bigger issue, because even if you can arguably say, and I guess some of the readings you could take a look at, in Watergate it was for the greater good, but nobody went up the ladder to ask for the consent and they disclosed a lot of information and that's how Watergate came out. The justification was they were doing things that were illegal, but even with illegal things there is a chain of command, and you can't speak for an agency if you're not authorized to speak for the agency. There are many things that we as lawyers have learned in our careers, unfortunately, that we can't disclose, and we'll take to our graves and we've lost sleep over them, but that's our obligation.

HONORABLE ELLEN N. BIBEN

And I just think to amplify that, and I'm going back to what I think Neal Katyal said, which is you need to have a regularized process, and what protects you is to have that process. If your process is to go up through the Special Deputy or the General Counsel, that is in fact what you do. It is interesting, it goes back to who can waive and who can authorize disclosure really goes back to who's your client. But I do think that raises another good point, which is obviously the protection of confidential information is paramount, and you're always well served to go to the client to get authorization if you can. If you can define the client and you can get the authorization, that is obviously the better way to approach it. And when we're talking about government lawyers, and if we're talking about possibly bad policy coming from a government agency, it may very well be that ultimately the right thing to do is to get the agency to be transparent, to understand what the issues are, and to authorize disclosure about what is the corrective action.

HONORABLE RANDALL T. ENG

The District Attorney, who is a law school classmate of the Deputy, has heard these complaints and rumors about possible misconduct at the agency. He asked the Deputy to come in for an informal discussion about the matter before deciding whether to convene a grand jury. Can the Deputy attend such a meeting? And, what can the Deputy say under all these circumstances?

KAREN M. GRIFFIN

I think the Deputy can attend the meeting. I think attorney-client privilege would have to be asserted often. Again 1.13 under the model rule, you can report out misconduct even if not permitted under 1.6, so long as you've followed the chain of command and reported all the way up. One-point-six in New York does not allow it, so here you'd be able to meet but you couldn't discuss any privileged communications.

DEBORAH A. SCALISE

I also think that if you are going to meet, whether it's informal or not, your boss should know about it. I sort of call those meetings a listening tour. You want to listen to what's out there because you might have to react to it later as your agency. You can tell your colleague, the DA, "I'm sorry, I really can't discuss a lot but you can tell me where you're going with this and I'll take it back," and that would be perfectly fine. And then you could talk about your kids, the weather. You know, the people you went to law school with and your last reunion, all of those things but I would stay away from revealing any information that you have obtained in-house until you've gone back and dealt with the chain of command.

HONORABLE RANDALL T. ENG

All right, I believe that takes us up to the conclusion of our allotted time. So I want to thank each of our panelists. This was a very good discussion, and I certainly learned something from your responses. So with that, I thank you very much. I turn the program back over.

HONORABLE ELLEN N. BIBEN

Thank you so much.

KAREN M. GRIFFIN

Thank you.

PANEL 2 – THE RIGHT RECIPE FOR INDEPENDENT CANDID ADVICE: WHAT SHOULD GET THROWN IN? WHAT SHOULD GET LEFT OUT?

WILLIAM E. CRACO
ASSISTANT GENERAL COUNSEL, JOHNSON & JOHNSON

Welcome back, everybody. My name is William E. Craco and I am delighted and honored to be moderating panel 2 today, the title of which is, The Right Recipe for Independent Candid Advice: What Should Get Thrown in? What Should Get Left Out? We've got a very distinguished panel to help us sort through some difficult problems today. Their full bios are in the materials, but I will briefly introduce them. Zachary Carter was the 78th Corporation Council of the City of New York. He also served as the United States Attorney for the Eastern District of New York and was a New York City criminal court judge and a federal magistrate judge.

Sara Shudofsky is a litigation partner at Arnold & Porter. She served with distinction during two tours of duty in the United States Attorney's Office for the Southern District of New York in the civil division, as Chief of the civil division, as well as Chief of the Civil Rights Unit, the Deputy Chief of the civil division and the Chief appellate attorney.

And we have Professor Stephen Gillers who is a professor of law at New York University School of Law where he holds the Elihu Root Chair. He is a nationally recognized and distinguished authority and distinguished scholar in the regulation of the legal profession.

We are delighted have all three of you with us and thank you for being here.

While all three of you have distinguished careers in the New York City area, I am going to use my awesome powers as moderator to transport you and your practices from New York City to Big Town, for the purposes of our hypothetical, which is called Sally the Selfish Supervisor. And you are now all partners in the law firm of Duey & Howe, in the upstate New York town of Big Town. You've been asked to represent the town's supervisor, who is named Sally Selfish, which seems to portend bad things, and the town board, and to give them legal advice as needed. When you are retained, Supervisor Selfish makes it clear to you that she is your primary client, and that the members of the

town board report directly to her. She makes it clear to you that all of your conversations with her are confidential.

So I'd like to start with Zachary Carter. Should you be representing both the board and the supervisor here?

ZACHARY W. CARTER
78TH CORPORATION COUNSEL FOR THE CITY OF NEW YORK

Well, I've seen this movie before. I would not accept the representation of the town's supervisor on the board on the terms that she has claimed are important to her. That is, taking conversations with her in confidence and being foreclosed from sharing those conversations with the members of the town board. And in any engagement letter with her, I would make those terms clear, that the conversations with her and with the town board would be considered in the course of the engagement, would be considered confidential and protected by the attorney-client privilege.

But I would not honor a privilege as between the town supervisor and the town board.

WILLIAM E. CRACO

Does anybody see an actual conflict, by the way that the supervisor set up the representation? Either Sara, or Professor Gillers?

STEPHEN GILLERS
ELIHU ROOT PROFESSOR OF LAW
NEW YORK UNIVERSITY SCHOOL OF LAW

Well, she can't tell the lawyer for the board that he cannot communicate or disclose information to his client, the board. Even though it is also her information. So, that's a problem. There may be information that he must tell the board, in order to represent it. It's not clear that she's asking to be represented personally, or in her supervisor capacity. I assume, the latter.

In your question to Zach, I think it's okay to represent the board and the supervisor on distinct matters, each of which goes through a conflict analysis. But I would not do so categorically on all matters without knowing more about each matter.

SARA L. SHUDOFSKY
PARTNER, ARNOLD & PORTER

Yes, look. You might have to know a little bit. But you have to know a lot more at the outset, about the relationship between the supervisor and town board. I thought you were going to get into a lot more detail with this problem. But the big lesson is, figure out these issues at the very, very beginning. Of course, never go into a relationship as laid out here by the supervisor. But you do have to know a lot more about what is the relationship between the supervisor and the town board. You would want to know how they interact and what the appropriate Big Town legal relationships are.

I certainly agree with everything that's been said. That there's no way at the outset, you agree. You control the shots and automatically, everything that the Supervisor tells me is not anything that I could share with my other client. If you are able to work these things out and represent both the town board and the supervisor, obviously you are going to have duties to represent each of them. And you have to ensure at the outset, that you set out the right guardrails and you navigate it right. So that you're providing the representation that you owe to each of them.

And if there's going to be a conflict, obviously you have to work that out at the outset.

WILLIAM E. CRACO

Okay, your comments made reference to more information that's coming along. So let's start making this a little bit more complicated. At your law firm, one of your partners, a gentleman named Tom Teemarker, represents a local company that develops golf courses. You think, but you don't know for sure, that he may have an interest in the company. Big Town owns a parcel of land located on the town's lake. Many of the residents would like to have the parcel of land turned into a park with beaches. Others would like to have it turned into affordable housing.

Supervisor Selfish has her own plans, however. Before the next meeting of the town board, she tells you in confidence, that she is going to turn the land on the lake into a golf course, and that she would like the company, represented by your partner, to build it.

Let's start this time with Sara. Do you have a conflict because your partner's client will benefit from the supervisor and the board's decision to build a golf course?

SARA L. SHUDOFSKY

You certainly may well have one but obviously, you're going to have to figure this out, and it certainly jumps off the page that you have to figure out whether one partner can be representing the town and the supervisor. And the other can represent a company that obviously has a very different interest. I know the problem was bound to get more complicated, which is going to exacerbate the problem.

It's not clear that the firm can represent all of these, both sides of these entities. Obviously, I guess you do not know at this point, how things are going to shake out. If the town wants to build a golf course. The supervisor wants to build the golf course. The town board wants to build the golf course. They do everything and dot their i's and cross their t's and follow the right procedures and figure out that they in fact, want to go that route. It may turn out that the conflict is not as striking as it presents itself. But you don't obviously, know any of that at the outset.

I think red flags are going to go up at the very outset here, as you try to navigate and figure out whether it's possible. Whether there is a conflict and whether it's possible for the firm to be involved in both representations.

STEPHEN GILLERS

One question is whether, the supervisor's desire to build a golf course, is one she's entitled to make on her own. Putting aside her reasons for wanting to do it, I'd want to know more about her authority and whether her decision has to be a collegial decision among other policy or government decision makers as well. But apart from that, even if the town is choosing to build a golf course, and that there's no question about the authority of that decision, the negotiations between the developers of the golf course and the town are going to be financially complicated, and the firm cannot be negotiating with itself in both positions.

We know that the conflict is imputed throughout the firm. So just as the partner could not represent the town in its detailed negotiation over the terms over the building of the golf course, and the

compensation to the town, for the use of the land that way, neither can any of that partner's partners, do it. So for me, it's a nonstarter.

There is an essential conflict that is even not waivable, or it would be foolish in the extreme to even contemplate asking for a waiver.

WILLIAM E. CRACO

Zach, do you have anything to add? Should, for instance, you tell either the supervisor, or anybody on the board about your partner's client at this point?

ZACHARY W. CARTER

I think that it should be disclosed to your clients that there is a potential conflict, because the entity that the supervisor wants to engage to build the golf course, is a client of the firm. I defer to Professor Gillers as to whether or not the conflict is non-waivable. If Supervisor Selfish were instead, supervisor Pure-of-Heart, dotted every I and crossed every T and consulted collegially with all the town members. And even though there was some disagreement, they were on path to working that out.

It feels like a situation in which you might be able to construct a waiver, that would be non-waivable. But that's not real clear.

WILLIAM E. CRACO

Professor Gillers, with what you know now, are you confident that you don't think that with what you know now, it's likely to be a waivable conflict?

STEPHEN GILLERS

Well, conflicts in negotiations are waivable, but only if the lawyer reasonably believes he or she can effectively represent both clients. I don't know how you could be buyer and seller, or creditor and debtor, or franchisor and franchisee, and represent both people at the table with totally adverse interests. They have interests in common, of course. But key interests are adverse. So half the job of a good lawyer is not to try to figure out how to do something that's really dangerous. But to stay out of it, entirely.

WILLIAM E. CRACO

Let's move along and add some more facts if we can.

Sally Selfish tells you in the same conversation that she anticipates that residents of the town are going to oppose the golf course. And that therefore, she is planning to have the town board meet in private. At the meeting with the golf course, a proposal will be considered without the public in attendance. The board's written procedures permit the board to meet in private, only in emergency.

You tell the supervisor that she must have an open, public meeting, because this is not an emergency, but she says, "Look, you are a lawyer. I hired you to give me legal advice. But I don't have to follow it, and I'm not following it here." You don't tell her that your partner represents the golf course developer, you do not tell the board that the meeting must be open to the public.

So you've already taken some steps here and made some decisions that you can reflect on now. The first question I'd ask Zach Carter, and then get comments from the other panelists is, what do you do? Should you insist that the meeting be open to the public?

ZACHARY W. CARTER

Well you can certainly advise that the meeting has to be open to the public. As outside counsel to the town supervisor and the town, you're not in a position to insist upon it. You can only advise it. The only enforcement mechanism that you have is to withdraw. As is a practical you have a client and frankly, this should have been apparent at the outset, based on the rules of the road she was proposing who is going to not follow your advice, particularly on something as bright lined as whether or not this was a meeting that could be held consistent with the open meeting's logs. I would withdraw. But I wouldn't have taken this in the first place.

SARA L. SHUDOFSKY

Certainly one other point to add here is that you have two clients in this scenario. You have the supervisor, and you represent the board. The lawyer in this instance has taken it upon him or herself, not to tell, to give the board advice. You have an obligation in this instance to give full and candid advice to both of your clients. Withholding information,

withholding advice from your second client, the board, is a big problem here.

Obviously if you tell the board your meeting must be open to the public, then you're in big trouble by not informing one of your client's as to what its obligations are. I don't know by any objective measure, how this could not look like an emergency situation. I don't know if there's any other way to read this requirement, other than this has to be an open meeting.

I suppose maybe there's some other information you could learn, but it doesn't look like it. The way that the problem is presented, you gave the advice. They say, "I'm ignoring you." And then, the question is, what do you do next? At the very least, you're going to press the point with the client, and you may have to consider, whether or not you need to withdraw. And you consider that next step.

I think the first step is to inform the board of what they have to do, and to press the point, more vigorously with your supervisor client.

STEPHEN GILLERS

I agree that you have to inform the board. The threshold question here is, isn't the town the client? Not either the supervisor or the board? They just speak for the client, pursuant to the organic law of the town or the state, however it's structured. And what the supervisor plans to do, and maybe the board will go along with it, is violate the ordinance or other rules, bylaws of the town. So right off, you don't help do that. You refuse to participate in that at all. You do nothing to advance it.

Whether or not you go further and disclose what's planned. Maybe not, because the transgression is comparatively minor, but I have a feeling there are more serious transgressions coming along. And when we come to them, we can talk about what our partner should do.

ZACHARY W. CARTER

I think the problem though is accepting the representation on her terms in the first place. Because now it becomes very awkward to disclose to the town board her intentions about holding the meeting in violation of the open meetings law, because you have, by accepting the representation on her terms, promised, I'm using air quotes, her “confidentiality.”

It was inappropriate for you to do so, but that's the promise that was made if you accepted the representation on her terms.

WILLIAM E. CRACO

Maybe what would be interesting is if we could go, briefly back to the beginning. And I'd like to ask Professor Gillers this. If we could rewind the clock to the time when you first take on the representation. When the supervisor comes to you, and lays out the terms, how would you respond? And how would you work with her to structure representation for the entity of the town in a way that felt appropriate to you?

STEPHEN GILLERS

Well, first of all, we're assuming the town does not have any employed lawyers representing it. So it's the firm only. I would tell her that I will not agree to represent both the board and her, on all matters. That there may be specific matters where after appropriate due diligence, I would represent both. I would tell her that her duty, her instruction on confidentiality cannot supersede my obligations under the confidentiality rules, and exceptions to it. And that I may have obligations to disclose her conversations with me, or other things I learn in representing the town through her, to others.

So I want to make that very clear. Because she seems to believe that she can seal my lips and she cannot. And so, while you might not go through that exercise otherwise, she has identified her presumption that has to be countermanded through a very stern instruction.

WILLIAM E. CRACO

Sara, were you going to say something?

SARA L. SHUDOFSKY

I know the approach you were following was, let's go back to the beginning and start it off right. But if you didn't do it right at the beginning, and you arrive wherever you arrive, there may be a point where you still have to do the disentangling and the working through the issues and figuring out the workaround. You're not going to say in the middle of it, "Okay, I'll do something now that crosses the line, because I screwed it up from the beginning." This is an obvious point, but I just wanted to make it. You are obligated when you're knee deep

into the problem that you helped create, to find the right solution to set it right in such a way that everyone is on the right ethical path, and lawyerly obligation path.

WILLIAM E. CRACO

That's a great point. Just because it's gone wrong, doesn't mean that you are relieved of the obligation to try to find a way to get it right at each point.

Okay so, the next day three members of the board approach you and say that they have heard about the golf course proposal. And they tell you that they are going to invest in the company that will get the contract. You do not mention your partner and his representation, to them. So the question is, are the board members' comments to you, about investing in the golf course developer, covered by the attorney-client privilege? That's a meaty question that I'd like to start with Sara, if we could.

SARA L. SHUDOFSKY

I think the question implies that you haven't mentioned your partner, who himself may have an interest in the golf course. So that's what this is raising, that you could arguably have some obligation to your partner to protect his interests against encroachment by the others who are investing in the company. But I know that's, in some ways, very far afield from what we're talking about because as we said from the beginning, there's a problem for them at the very inception with both you and your partner even being involved in this mess.

I know it's not the question that you raised, but I'm not so sure what your obligations are there to be conveying information to protect your partner's interest. The broader question about whether or not you must maintain in confidence, information that must be shared with your client, or others, in order to untangle from the ethical mess you're in, from the outset is a different question. And I may punt to my other panel members to see if someone has a definitive answer to this.

It's obviously not the position you'd want to be in, but I don't know that you'd have an obligation to disclose. You had an obligation from the beginning, to disclose your partner's relationship to this whole deal. So I guess in that sense, it's a somewhat easy question. You're going to have to come clean about the conflict situations that exist. But I'm going to turn to my colleagues.

STEPHEN GILLERS

Your question was about privilege. But it's not about privilege. Of course, privilege is a concept under the law of evidence that arises when you're ordered to disclose information that is privileged and you refuse. This is about confidentiality. I don't think that the board members' statements to you about their intention, which may violate their fiduciary duty to the town, is confidential. In fact, I think it's information that you need to use, and disclose if necessary, to protect the town against the behavior of the investor board members.

Either immediately, or not if you could dissuade them from doing that. But we're on the precipice of a potential breach of fiduciary duty, and conflict of interest on part of the members of the board who will have to vote on something or may then have a financial interest in what they'd be voting on.

SARA L. SHUDOFSKY

I want to ask Stephen -- if board members, who are your clients, come to you and they're seeking advice, and they provide information in order to get advice from you, that could be a privileged conversation. If the purpose is for their lawyer to render legal advice, just going a little bit to the way you began, doesn't it raise the question as to whether this was information provided in connection with obtaining legal advice. But if it is, I would think that there could be a privilege question working there. No?

STEPHEN GILLERS

The privilege question arises in a different context -- that is, disclosing a statement by a client may or may not violate your duty of confidentiality to the client. The very same information from the client, may be privileged when it arises in a context of let's say, a court order to disclose what the client said. But I don't think that these three board members are clients at all. The board is the client. Not three board members.

And they're not, as presented, coming to the lawyer and saying, "Are we allowed to? Is the board allowed to do this?" They're not looking for legal advice. Even if the board is a client, not just a representative of the client, these three board members are not seeking legal advice on behalf of the board, they're telling the lawyer what their

intention is. An intention that would seem subject to further research, as to whether their intended action will violate their fiduciary duty. And perhaps, their duty under other state and local laws, to the board and the town.

WILLIAM E. CRACO

What would you say if these three board members came to you, and said, "We would like to invest in the company, but we want to do it right if there is a way to do it correctly." What would your advice to them be? And let's say that they also tell you that they want to do that in their individual capacities. How would you tell them to approach that analysis?

STEPHEN GILLERS

Hire a lawyer. I'm not going to be your lawyer, because I represent the town that owns the property on which the golf course may be built. If you want individual advice on your obligations as a member of the board, hire a lawyer and find out whether or not you can do this properly.

WILLIAM E. CRACO

But not you?

STEPHEN GILLERS

Not me.

WILLIAM E. CRACO

Would you disclose the conversation that you had with those board members to the supervisor? And I'm asking all three of you.

STEPHEN GILLERS

Ordinarily, I would, yes. I would think that that's something about which you need to keep your client informed. It's right there, in Rule, 1.4. And I think that while this is not clearly an intended violation

to the duty to the town, it could blossom into something unfortunate. And so yes, in another context if I had no suspicions about the motives of the supervisor, I would definitely alert her to this intention, and what I assume would be the impropriety of going forward with it.

ZACHARY W. CARTER

I wouldn't disclose it just to the town supervisor. I would disclose it to the town supervisor and all of the other members of the town board. I think that would fulfill my obligations to the institution of the board, as opposed to the individuals.

WILLIAM E. CRACO

Professor Gillers raised the prospect of potential inappropriate activities, so why don't we pull that thread and go there. Later that day, two other members of the board come to you and tell you first, that they are opposed to the golf course proposal. That they want that property used for affordable housing, and that the supervisor's brother-in-law owns a 30% share of the golf course development company, and that she, the supervisor, is receiving a kickback because of her support for the golf course project.

I throw this open to any of you. What do you do now? Do you have a duty of loyalty to the supervisor, to the town board? How do you deal with this information you've just been given?

SARA L. SHUDOFSKY

Well you definitely can't sit on it. That's for sure. Mow, you've heard about potentially unlawful conduct -- potentially criminal conduct. Certainly, you've got some obligation here to bring this to somebody's attention. The questions among the questions are, is it a complete disclosure to the supervisor? To the board? Obviously, these are also allegations and you don't really know if they're true or where they're coming from, et cetera. So there's some concern there. I don't know if we are in a position here, where you've got to bring it to the authorities, for example.

But you can't sit on the information for sure, because now, you've learned of not only huge conflict related issues, but potential unlawful conduct.

WILLIAM E. CRACO

You've heard about an allegation of unlawful conduct by an officer of one of your clients. But it is again, an allegation. Professor Gillers, what would you do to try to deal with this information now?

STEPHEN GILLERS

Well, I agree that you have to investigate whether it's true. What level of confidence do you have in the accuracy of the information? We don't know what motives the source of the information may have that are benign or malign. And so, we want to find out if there's a reasonable basis for believing it is true. If there is a reasonable basis for believing that it's true, you confront the supervisor. And if necessary, you take steps consistent with your obligations to your client, the town, to prevent that motive from operating. Including by disclosing information to others than the supervisor.

WILLIAM E. CRACO

I'll maybe ask Zachary Carter to put on his US attorney hat again. How far can your investigation into this allegation go on your own? The town is your client, the board is your client, people involved are members of the board. How much investigation do you do, before you decide that the investigation needs to be done by some other entity? Professor Gillers said you confront the supervisor about her brother-in-law and let's say that she denies it. And then what additional investigation should happen, and who should do it?

ZACHARY W. CARTER

Obviously there's no confidentiality with respect to the allegations that have been brought to your attention by these four residents. I would first inform the town supervisor, and every member of the board, of these allegations that have been brought to my attention. Reiterate my view that any meeting concerning the proposed use of this property, has to be open to the public. I think that would be my first step.

WILLIAM E. CRACO

And then, what would be the tipping point at which you think you would need to bring in someone else, or stop your own involvement or representation?

ZACHARY W. CARTER

The tipping point for me -- particularly with all of that information now being brought into the sunlight, by your disclosure to all of your clients -- is if the town supervisor refused to convene an open meeting, to address all of these issues that have accumulated. That is the possible conflicts of interest. And the allegations that have been brought, concerning her personal conduct. At that point, I would withdraw from the representation.

WILLIAM E. CRACO

I'm curious about one thing. What, if anything, are you doing back at the firm? Are you having any conversations with your partners, with the partner who represents the golf course? What are you doing back at the office?

SARA L. SHUDOFSKY

I am feverishly working the issue. This is certainly not something I'm just thinking about by myself. One of the great things about being in government, and of course, a great thing about being with people that you trust out in the private sector, is hashing these issues out and figuring out next steps. Because this is extremely complicated stuff. I don't think it's super easy, because you can imagine a situation, where you represent a client, and you find out the client could have engaged in criminal conduct. I don't think one can just pick up the phone and call the US attorney's office and tell them, "Hey, I just found out my client could have engaged in criminal conduct."

Of course not. But on the other hand, you're not sitting on this information, and you have to work around it or through it and address it. And that may mean you do withdraw at some point. But most definitely, you are bringing to bear people with tremendous experience in sticky, sticky situations like this, that go to issues like conflicts and withdrawal.

When all of these different interests are converging and pressing upon you. So, most definitely, there's a lot of activity, figuring out best next steps.

WILLIAM E. CRACO

What about partner, Tom Teemarker, who represents the company that develops the golf course?

SARA L. SHUDOFSKY

The question is there, are you talking to him? Are you bringing him in the conversation? This is going to involve others at the firm who from the beginning should have appreciated that this is a conflict situation. The firm cannot be representing both of these entities; it never should have happened in the first place. But assuming that it's happened, surely, you've got to bring in those people at the firm who are going to help you work through this.

So that the firm can come out having done the right thing, protecting its interests as well, of course, as protecting the interests of its clients.

STEPHEN GILLERS

If I, just to cut to the chase. If I was in a situation where Sally Selfish was going to go forward with her plan, and had this financial interest, I would try to stop it in a couple of ways. First of all, my client again, is the town. And my client may even be an entity within the state above the town. I'd want to research the municipal law of the state to see, where within the hierarchy of entities, the town is. Is there a county? Is there a place within the governor's office, that has responsibility for the town?

I would wish to investigate whether or not there are higher ups within the state organic law, to whom I could legitimately, under Rule 1.13, report what Sally Selfish is planning to do. Entirely appropriately, because I'm still speaking within the client itself, in that instance.

Also, I would investigate the exception to confidentiality in New York, although not in most states, to prevent the client from committing a crime. And if this is a crime, I'd have to research that. I would want to disclose what I've learned, even outside the client. Although, I would not necessarily have to do that.

A final option for me, an exception to confidentiality would be to get advice on my own obligations as I could talk to another lawyer to get that advice, and I would choose as that other lawyer, the attorney general of the state, which will ensure that the whole thing is blown open.

WILLIAM E. CRACO

You can choose any licensed lawyer in New York to consult with on that?

STEPHEN GILLERS

That's what the rule says. To consult with a lawyer to get advice on my responsibilities. I operate from the presumption that nobody is going to call me bad names for protecting the town against the exploitation and breach of fiduciary duty to the town's financial disadvantage if I talk to persons able by the nature of their authority, to prevent that from happening.

SARA L. SHUDOFSKY

It does come back a little, doesn't it, to, what you do in order to satisfy yourself in some threshold way that there's something to the allegations though? Because this could be some angry town board members who say, "Ah, she's probably getting kickbacks from her brother-in-law." And so there's that threshold question. I know Bill, you put to everyone, which was, what do you do to satisfy yourself? Because you may not take steps four and five before you get past step one.

On the other hand, you have to protect yourself and the interest of the town and so, you may have to get very aggressive in how you approach it. And there's that threshold question.

ZACHARY W. CARTER

I agree with the threshold question in terms of having to do a sufficient investigation to get a sense of the credibility in the allegations. But you already have a sense of her character, based on the ground rules she attempted to lay out at the outset.

WILLIAM E. CRACO

Right, right. So let's say, word leaks out about the golf course proposal and four residents approach you. They ask to be put on the agenda for the next board meeting. They want to speak out against the proposal. They want either, affordable housing or a park. You tell them, that the meeting is closed. But you don't tell them about the rule regarding emergencies, and they threaten to sue the supervisor and the board. You tell the supervisor about the coming lawsuit and she retains you to represent both her and the town board in the litigation. And the problem you have is that you believe that the litigation is meritorious. The citizens' suit against the board and the people on the board. May you take it on, even though you think it has merit? What do you tell your clients about the merits of the litigation?

STEPHEN GILLERS

This is a litigation to open the meeting, is that what it is?

WILLIAM E. CRACO

It's a litigation to open the meeting, and presumably, to stop the sale.

STEPHEN GILLERS

Ah. And you still have a partner who represents the golf course?

WILLIAM E. CRACO

Yes.

STEPHEN GILLERS

Who may come in, defensively?

WILLIAM E. CRACO

Yew, the conflict chickens are really coming home to roost now.

ZACHARY W. CARTER

Right.

STEPHEN GILLERS

I think you're so far under water that it's practically impossible to save you at this point.

WILLIAM E. CRACO

Sara, what would you say?

SARA L. SHUDOFSKY

I tend to agree with that. But I also think it's worth pointing out, and I know it's embedded somewhere in the question. You don't make policy, so even if you think this should be a park, a beach, or something else, that's not your job to make policy. It's not your job to make sure that this becomes a park or a beach or is used for affordable housing. This goes back to a point that I think Professor Gillers made at the beginning. It's not your job to say this shouldn't be a golf course.

If the elected town representatives make that choice. But the real question here is, as we were just saying, if you're so deep into it, this is not a position you can sustain. The meeting will be in private and I don't know how you're going to possibly represent this town in the litigation, given the conflicts. So I don't know that you have many moves left there.

WILLIAM E. CRACO

Zachary Carter, you were going to say something.

ZACHARY W. CARTER

This gets back to the beginning. The potential for this mess was apparent at the outset. It reminds me of a situation in which you are moving into a new house or an apartment. You're excited about it. It's great to be there. It's all brand new. You're sitting on the first evening at your kitchen counter reading the paper. And out of the corner of your eye, you see movement.

You say to yourself, "Was that a mouse?" Because nobody warned you that there might be mice in here. And you say, "No. Couldn't be." You go back to reading. And then, a minute later, it's plainer. You see the tail. You see the fur. The whole bit, the ears. And you know, wow. It was a mouse. Trust me. You knew the first time; it was a mouse. And that's what conflicts are like, very often. Your gut tells you, it's a conflict. But you try to justify, rationalize to yourself, it's not. You're in a large firm. You have a responsibility for bringing in business. You think there's some way you can work your way around it. You can rationalize for yourself that it really hasn't crystallized into a conflict. Maybe it's waivable. All the things that you try to con yourself into believing, when you should have known darn well, at the outset, that this is not just a potential conflict. It is probably an actual conflict.

And based on your experience, this is not going to turn out well.

WILLIAM E. CRACO

With that good advice and observation, I'll wrap it up before we get the hook. I apologize for imposing on you a scenario that began with a bunch of mistakes, but it made it for a very productive and interesting conversation. So thank you very much to Sara Shudofsky, Professor Gillers, and to Zachary Carter for participating.

SARA L. SHUDOFSKY

Thanks so much.

PANEL 3 – RECALCITRANT CLIENTS: WHAT TO DO WHEN THE "CLIENT" REJECTS YOUR ADVICE (OR WORSE)?

MICHAEL A. CARDOZO
PARTNER, PROSKAUER ROSE

Welcome to Panel Three. Let me briefly introduce our three panelists, whose bios are in the overall link. Start off with Loretta Lynch, former United States Attorney General, now a partner at Paul Weiss. Rebecca Roiphe, who is a professor at New York Law School. Steven Banks, who today is the Commissioner of the New York City Department of Social Services. Prior to that, was the longtime Attorney-in-Chief of the Legal Aid Society. We have an interesting hypothetical, which I distributed to the panelists a few moments ago, and let me read it for the benefit of the audience.

It's entitled, "Burqas on the Beach." You are the General Counsel of Little Town, a small beach town on Long Island. You've been hired by the mayor, Lucy Loser, and you are paid directly by the town. The town has a small beach on the ocean, and only town residents and their guests may use it. When you were hired, Mayor Loser reminded you that you work for her, that your conversations with her are confidential, and that they are covered by the attorney-client privilege. One day, soon after you were hired, the mayor asked you to prepare a memorandum for her, describing her authority with respect to the beach. Specifically, she asked you whether and under what circumstances she can close the beach, and whether she has the authority to require that appropriate attire be worn on the beach.

You do a little research and learn that there is a New York State law that permits town mayors to close town beaches if they deem it necessary in the public interest. There is also a state law that permits town mayors to require that appropriate attire be worn on the beach. You prepare the memorandum and give it to Mayor Loser. A few weeks later Mayor Loser asked to see you. She says that in recent days, a number of women who live in the town, who are ultra-orthodox Jews and Muslims, have begun to wear burqas or shalim, that's long head to toe attire, with nearly full face covering, while at the beach.

Other residents were complaining to the mayor that this attire made them uncomfortable and wasn't appropriate for the beach. The mayor tells you that she wants to ban the practice. She wants to issue an executive order that burqas and shalim are inappropriate attire for the

beach, and the beach will be closed, in the public interest, to any woman who wears it. You advise the mayor that such an order would be invalid, because New York State law prohibits discrimination on the basis of sex or religion. You tell her that such an order would be plainly unlawful and immoral.

The next day, Mayor Loser tells you that she has drafted an order, banning burqas and shalim, and plans to read it at a press conference later in the day. She says that she has done her homework, reminds you that your conversations with her are confidential and subject to the attorney-client privilege, which you cannot waive. She says that if you reveal what you told her, that such an order would be unlawful, she will not only fire you, but will report you to the disciplinary committee for breaching your duty of confidentiality.

A few hours later, the mayor holds a press conference and announces her beach burqa ban. She says that she's been told by you, her lawyer, that the ban is lawful, and she releases your memorandum that describes her power under state law to close the beach in the public interest, and to require the wearing of appropriate beach attire. Her order specifically prohibits women from wearing burqas and shalim on the beach, and goes one step further, requiring that all women over the age of 10 must wear two-piece bikini bathing suits on the beach. You're the general counsel of the town. What, if anything, should you do after hearing the mayor's comments at the press conference? Let me talk to Attorney General Lynch first. Ms Lynch, what would you do?

HON. LORETTA E. LYNCH
FORMER U.S. ATTORNEY GENERAL AND PARTNER, PAUL WEISS, RIFKIND WHARTON & GARRISON

So part of me wants to say that the first thing I would do is show up at the mayor's office for a private confidential discussion, wearing a burqa.

MICHAEL A. CARDOZO

And after that?

HON. LORETTA E. LYNCH

If you're the general counsel of the town, the main issue here, obviously, is what to do about two things. The mayor has issued an

executive order that is clearly unlawful and unconstitutional under both federal and state laws and has also made a material misstatement in describing your advice to her. Certainly, you're going to be concerned about the material misstatement that she has ascribed to you, but that really can't be your consideration. You can't think of yourself in that moment. It's not about protecting your reputation; it really is about giving this mayor the best advice that you can to get her out of this situation. Just by the way this hypo was going, is likely not to be taken.

You need to advise the mayor that, in fact, she made a misrepresentation and she should correct it. She likely won't, and that this particular law is going to be struck down almost as soon as the papers are filed. Just advise her of that. You may end up having to go forward with it. Most people are also probably wondering, is there any way that you can reveal the fact that you didn't say to the mayor that this was lawful, that this was okay? What can you say?

And then you get into the issue of, can you reveal a client confidence? Who is your client? Is the mayor correct when she says that she herself is the client? She is not. But discussions of legal matters about the town are still subject to privilege. So the discussion is privileged, but the privilege doesn't belong to the mayor, it belongs to the town. So one thing that I would consider doing is going to the city council and saying, "We have a real problem here, and we, as a city, through this mayor, have issued an order that's clearly unlawful." And you want to do this behind the scenes, if you can, but you want to make sure that your client, the actual city, knows the legal peril that the mayor has just put you in.

MICHAEL A. CARDOZO

Either Steve or Rebecca, you want to add to that in any way?

STEVEN BANKS

I would add to that. In my dual role of formally bringing lawsuits against government, and now being in the government, one of the issues here is, ultimately, going to be city liability, when someone sues. So communicating to the mayor one last time, aside from what you want to do, she has to understand that it's going to cost the city money. And then I like Loretta's suggestion of pointing out, as you do, Michael, in your article, that there are multiple elements of what the city is, and you're the lawyer for that city. And so making it clear to the council, that there's

going to be additional city costs from this losing litigation is another avenue that might bring people to their senses, because nobody wants to have extra financial liability for the city or the town.

MICHAEL A. CARDOZO

Becky, do you want to add anything to that?

REBECCA ROIPHE

I would have, at the start, when she hired me seen a little bit of a red flag, the way that she suggested that the privilege was entirely hers and with her. It made it sound like I was representing the mayor in her personal capacity, or even the mayor in her official capacity. And if that was the case, I'd like to make that very clear, that it was a representation which didn't create a conflict of interest. In most cases, you probably could represent the mayor and also the town, but it's somewhat odd that she framed it that way.

I would make clear that I'm certainly representing your interest, in so far as we are both fiduciaries for the town. But my client is the town here, and you are the representative of the town, whom I will be dealing with, and, of course, our conversations are privileged, but they're... It's a really complicated question, how that privilege runs. I think in this situation, I agree that you want to be able to reveal this information, but I'm not so sure that you have the power to reveal it.

Even though your client is the town, you have to think about whether your client has, in effect, waived the privilege. If so, then you can go forward. But who's the representative of your client at this point? Normally, it would be the mayor, and you would have to look to see if there's any way in which you can go to a different representative of the client and get some other kind of waiver from that person, if it's not already in some kinds of whistleblower laws or something like that. My guess is, it's a little bit problematic.

I also would say it almost sounds like you might have the exception, in the rule of confidentiality, to defend yourself, and you might be… Under Rule 1.6(b)(5), you can reveal information to the extent necessary if somebody has brought a claim or controversy. This does not rise to that, because it's not actually a claim or controversy, but it is one of those things when lawyers have an inclination that they want to protect their reputation, they often go to that rule, and, unfortunately, find that it's actually much more limited than most lawyers think.

HON. LORETTA E. LYNCH

One question you might have is -- just to add on what Rebecca said -- by the mayor turning over your memo has the mayor waived the privilege? You gave her a memo of law that said, here's a construct of law, as to what the mayor can do about beaches, and the public necessity standard and appropriate attire in that regard. And has the mayor, on behalf of the town, by releasing what, essentially, is a privileged memo... has the mayor waived, on behalf of the town, the confidentiality around all the discussions around that issue? That's a question you'd have, and, certainly, I think it's a question that the average listener might have.

Because someone listening to the mayor delivering this, no doubt, rather puzzling press conference, would say, "Here's a memo from a lawyer. There's the lawyer standing over there, perhaps doing the face thing." I don't know, I forget the doctor who was on stage during the last administration's COVID press conferences used to do that. We used to hear about bleach, and light, and all. Someone's going to ask, is that all that there is, basically? And so one question to explore is, by the mayor releasing this memo, has she released the underlying discussions around it?

I think that the law, generally, is that she has not, because there's still a deliberative privilege that belongs to the town about discussions and advice that you as counsel give the town about whether something is a good idea or not, which is definitely the type of discussion that was had here. And so I think that you still may be stuck with only having the memo out there.

REBECCA ROIPHE

I would say also, I think I used the language of privilege, as well. But really, this is a question about confidentiality, since there's been no court order or request for the information, and confidentiality really is so broad. What I should have said is, instead of waivers, client consent. Has the client consented, in some way, to the revelation of this material? Because if there isn't any implicit consent, or consent that you can find in any other structure of the laws, then I think you're stuck, as well. I don't think that there was a way in which you can reveal this information, even though it may, in fact, be damaging to the town and to your reputation. So I go back to Loretta's original position, which is,

you've tried to go back to the mayor and see if you can get her to agree to change her mind on this, which is unlikely, but that, probably, is the best course.

STEVEN BANKS

Going back to the memo, though, it just raised the issue. I'm a recovering lawyer, not serving as a lawyer in government. But various of you have been lawyers in the government. Do you need to think, in writing the memo, yes, the mayor has this authority, but is there anything else that circumscribes that authority? So therefore, you've got, as we like to say, a piece of parol evidence. You don't have to look beyond the memo of what the advice was. And if the mayor is going to reveal the advice, the mayor has got to reveal the advice in its entirety, not simply the part that the mayor might like.

MICHAEL A. CARDOZO

Well, let me go back to something that Loretta said at the beginning, saying it's clear that the client was not just the mayor, the client was the town. Now, why is that so clear? If when he was hired, she said to him, "You are my lawyer, and I'm expecting you to keep attorney-client privilege," and didn't allude to the fact that he was also representing the town. Is it as a matter of law, or is there a question as to whether, in fact, he was the attorney for the town?

HON. LORETTA E. LYNCH

I think that the mayor's words, upon the hiring, are what we, in the legal field, colloquially call wrong. But leaving that aside, the facts that the lawyer is paid directly by the town, and the title is the general counsel of the town, I think, are indicative of the position. As general counsel, it wouldn't be unusual to be hired by one particular city representative. Then the issue when the mayor makes those statements, that I view you as my lawyer, and what you and I talk about is confidential and privileged, and can only be waived by, presumably, me, and is whether or not you have a duty to correct her then and there, which I think you do, because you don't want a representative of the client having a misunderstanding of the position.

We've certainly have seen litigation over this issue. It typically is more, obviously, in internal investigations, when you're interviewing

employees of the client company, clarifying that you represent the company, and not them individually. And these *Upjohn* warnings are the result of litigation, because individuals had the perception that a lawyer talking to them about their work was, in fact, representing them individually. And so there's no legal requirement for an *Upjohn* warning when you're hired by a municipality, when someone clearly has a misapprehension of role. Certainly, as a lawyer representing an entity, when you're faced with someone who so clearly has a misunderstanding of your role, it would be wise to correct them right away. But even their misapprehension, I don't think would change the actual rules of confidentiality surrounding your engagement by the town.

MICHAEL A. CARDOZO

And let's assume now that she said what she said, and you go try to persuade her. What should you do? We've established what the ground rules, the principles are, but what should you as the lawyer do, other than saying to her, "You really should withdraw this statement"?

HON. LORETTA E. LYNCH

I'd do another memo, because I think that the verbal discussions that you have are the most difficult to disclose. But I would do a memo, expanding upon the first one, saying that here are the limitations, as Rebecca was mentioning, the legal limitations, not to mention the commonsense limitations, but the pure legal implications of the action. I would do a memo, because at some point that may be FOIA'd. And it may or may not come out, but I think you want to have your advice to the client down in writing, so that they can consider it fully, and that in case you do have to expand it to the city council so that your reasoning and thinking are clear.

MICHAEL A. CARDOZO

Let's take it to the next step. You write the memo, and she ignores it, and the ban is about to go into effect. What do you do, then?

REBECCA ROIPHE

One choice is to quit. At a certain point, if your hands are tied, and you're in a situation where you're representing a client, and it's

putting you in a complicated position, you can withdraw from that position. Now, the question is, if you suddenly withdraw right after her press conference, is that itself a violation of the obligation of confidentiality that you owe to the town? Because by doing that, you're signaling, as we were just talking about in the analogy in the corporate world, a noisy withdrawal, such that you're now signaling to town members or to council members something has happened? And if so, is that okay?

Again, I really think that that's a complicated question, and goes to this, is there anything in the laws where you can find some kind of consent to withdrawing this information? And I think with regard to privilege and, more importantly, with confidentiality, and a government client, you really have to look in a detailed way at these kinds of laws to see if there's any suggestion that you have permission to reveal that information. But, certainly, at a later point, if you think you're going to be asked to be involved in a more active way, and you are uncomfortable with that, you certainly have the power to step out. And to me, that seems like a good idea, you have a complicated situation with a complicated client.

CATHERINE O'HAGAN WOLFE

I'm going to interrupt for a moment, because we have a question from one of our attendees, that might be relevant here. She inquires about the value of reducing your counsel to your clients in writing, and how, by that writing, the client may have cause as to whether they should proceed against your best advice. She also notes that maybe the writing covers the attorney in the event there are allegations of misconduct against the attorney, ultimately. If you have any comments on that, I'm sure the attendee would appreciate that.

HON. LORETTA E. LYNCH

Well, I certainly think that in a number of contexts, probably more so in private practice, but even in government practice, people will do a memo to the file. They'll do a memo to the client and say, here's what we're thinking about, and here's the answer to your question. But if you have a client who's specifically going against your advice, a memo to the file can be a helpful thing, depending upon what you think your liability here would be. I think a lawsuit, in this case, would be against the town and the mayor in her capacity as mayor, maybe the city

council, but it wouldn't necessarily be against the general counsel. Your question, we're probably anticipating Michael's question, is, do you defend this stupid law? And how do you do that consistent with the bounds of ethics and confidentiality? But you should think of doing a memo to file, particularly where there might be, at some point, a break between you and the client, and particularly where you know that your client is misrepresenting your advice. Because at some point, there could be some ethical considerations for you there.

Now, I think the issue that that's going to raise is, if you really feel that you and the client have such a break, that they misrepresent what you say for their agenda, and you have to protect yourself to that degree, is there now a conflict of interest between you and the client, such that you are not able to continue in this representation? If your focus is now going to shift from protecting the client's interests to protecting your own, validly so, I think you really have to think about whether that conflict has ripened to the point whether or not you can stay on.

MICHAEL A. CARDOZO

But is your first interest to protect your own rear end, or is the first interest to say the city, the town is, obviously, going to face a lawsuit and going to pay substantial damages, and what should I do to prevent that from happening?

REBECCA ROIPHE

I think the question, in part is, has the mayor breached her fiduciary duty. You have a fiduciary duty as a lawyer, but the mayor, also, has a fiduciary duty to the town, and has the mayor breached her fiduciary duty, or has she just done something, in your mind, that's dumb? Because mayors may frequently do things that are dumb, and you as a lawyer cannot really second guess that decision, because this is the elected official. Really dumb decision, but what can you do about it if you disagree with it? Or is this a breach of fiduciary duty?

Now, this seems so egregious because it's so obvious. You don't even have to have gone through a first year of law school to understand that this is bad and wrong, that maybe it constitutes that kind of breach of fiduciary duty. And if it does, then you have to do what's in the best interest of your client here, the town, and you figure out what that is,

because the person who's supposed to be representing the town is no longer doing so in a competent way.

I just got an interesting email from one of the participants asking, "Can you just go out and give a press conference saying this law is clearly unconstitutional? Without saying anything about what you said to your client, could you give that particular press conference, just in direct conflict?"

Now, I personally think that would be problematic from the same perspective, which is, as long as this mayor is still the representative of your client, it's harmful to your client to go out and give contrary advice. Not only do you have a duty of confidentiality, but you also have a duty of loyalty. At this point, while that's a really clever suggestion, it doesn't really get you out of this, because it would, to me, as long as the mayor is still the fiduciary, be in, somewhat, a breach of obligation to her. If you really think the mayor has breached her fiduciary duty, maybe that's a possibility.

STEVEN BANKS

Right, isn't it that we've moved from like dumb policy, which we do all the time, to unlawful policy? And so isn't it all really going to come to a head, because somebody like I used to be is going to file this lawsuit to enjoin the city and seek damages on behalf of somebody that couldn't use the beach because of any of the various aspects of this? So it's all going to come to a head pretty quickly. And then you're going to be confronted with a choice of are you going to represent the city and litigate? And who is the city? The mayor, or the council, or the fiduciary duty to the people of the city who are now going to pay money for a dumb lawsuit or an avoidable lawsuit?

MICHAEL A. CARDOZO

Under Rule 1.13, if you're representing the organization, and you know that this is going to impose major harm on the organization, don't you have an obligation to take steps, under the rule, to try to prevent this from happening, to get to your own personal interest here? Shouldn't we be looking at Rule 1.13 to see whether that would give us the ability to take some other steps?

REBECCA ROIPHE

I think that's right. That's how we get to Loretta's first suggestion, which was to go to the city council. You've decided that there is an individual who is engaged in unlawful conduct, that will end up hurting your client, and you're going over that person's head, essentially, going up the ladder. But it's just a question, to me, of whether or not the council really is over the mayor. How is this town organized? Is the council really reporting up over the mayor? What is the structure of government? And if there is somebody higher up than the mayor, then absolutely, 1.13 or an analogy to 1.13 would allow you to do that under these circumstances, if you really felt like this was illegal conduct that was going to hurt your client, the town.

MICHAEL A. CARDOZO

Well, if the town board didn't do anything, is that it, or is there some other further obligation or step you could take to prevent this from happening?

REBECCA ROIPHE

Under 1.13, if the town board doesn't act, or if the entity with authority, under the bylaws of the company or the organization, you raise it to them and they don't act, then you are permitted to reveal information pursuant to what 1.13, to the extent necessary, to prevent the harm. So being very careful to do it in such a way as limiting the amount of information that you reveal. Perhaps you could give that press conference or a similar press conference to protect your client.

HON. LORETTA E. LYNCH

What's the harm that you're revealing that's going to prevent future harm? If that's your on-ramp, to giving that press conference and saying, actually, as a matter of law, this is actually unconstitutional, and illegal, and it violates a few other New York State human rights laws, you still aren't preventing the harm, you're actually inviting the lawsuit. And in fact, you've now made yourself a witness in a lawsuit that you are likely going to be constrained to defend. So I don't think that gets you to the steps of the appellate division to have your press conference. As a lawyer, I think it just deepens your issue

Again, if the rule allows disclosure to prevent the kind of harm, honestly, in this situation, I don't see a way to prevent this harm. Because the reality is, the mayor does have a certain discretion in terms of crafting executive orders. And mayors craft executive orders that are either clearly unlawful, or found to be unlawful, all the time. So I don't think that that particular rule is the on-ramp to preventing the harm to the institution, which is the town. If the mayor has the authority to issue the order, just by virtue of being the mayor, the order's out there.

I think what throws you in this hypo is that no lawyer likes the fact that the mayor has misrepresented their advice, and is essentially saying, "Oh, well, my esteemed General Counsel, Michael Cardozo said, I could do this. And if Mike says it's true, look at his reputation, and therefore, it must be so." No one wants that when it's so clearly false. So the real issue that we're grappling with is because the mayor has lied about you, does that give you the ability to correct that record? And the sad reality is, certainly not many politicians that we know, but politicians do lie all the time, and their counsel are usually constrained from saying so publicly.

STEVEN BANKS

I was smiling at everything that Loretta said. But I hate to beat a dead horse. Rebecca talked about it, and Loretta talked about it -- it comes back to the very beginning of the relationship. And although you're peppering us with, yes, but what do you do at this point, it's a good lesson about what to do at the beginning points here. And there were two points that seemed to be important flashing lights: who do you work for, and what do you put in the memo? Do you just put the memo narrow on the powers of the mayor, or do you point out that there are some limitations? You can keep the beaches safe, or whatever the language was, but you can't do it if you violate these other things.

So I think it's sort of like a “drive defensively” lesson for all of us about when you get hired and when you're writing something for an elected official, or anybody who is in government. I get memos from our general counsel, and I know why it's being laid out. It's so that I can focus on it and make sure that I understand what all the challenges are. And so I do believe that encouraging people to put their advice in writing is an important takeaway from this wonderful hypothetical.

MICHAEL A. CARDOZO

Just one thing that I'm not sure we've exhausted here is, if under Rule 1.13, you start reporting up and nothing happens, you can keep going up, and you can, ultimately, I think, go public. So I suspect that the town board in a small town is not necessarily going to move quickly, but this order may be going into effect the next day. Couldn't you go to the attorney general of the State of New York, for example, if it's in New York, and say, you got to start a proceeding right away to prevent lots of damage, et cetera? Wouldn't that be a possibility, rather than just worrying about your reputation?

REBECCA ROIPHE

I think that goes back to Loretta's earlier point, which is damage. You can say to prevent a lot of damage, but damage to what and whom? Are you really preventing damage to your client, which is this particular town? Or are you bringing on more damage by going forward? And I think that that's a real question. Because unless you're preventing that harm, if you read 1.13 carefully, I don't think you're permitted. Even if we view government lawyers as required to, or allowed to, follow those rules, to what extent are you preventing harm? To what extent are you just going out there and bringing on these lawsuits that are ultimately going to hurt your client?

I think that it would be different -- I hate when my students fight the hypothetical -- but if you had had an option to do something before this came out, it would be a different story, because that's preventing harm that is going to come from this going public. But you didn't have that heads-up in our hypothetical. The whole thing happened, and now you're trying to figure out how to clean it up, and there just may not be a particularly good way to clean it up.

HON. LORETTA E. LYNCH

One potential way to clean it up, which is, again, more of a practical issue than anything else, is after you've gone to see the mayor that afternoon, wearing your beautiful new burqa, the next day, you put on a beautiful shalim, and you go see the town police chief and you say, "Just so you know, enforcement of this order is unconstitutional."

Again, I know you're not supposed to fight the hypothetical, and this is all a little bit tongue-in-cheek, but there's also a real enforcement

issue here, as well, because you're going to have to use town resources to enforce this. Presumably, the mayor wants someone in a public safety or law enforcement capacity to go onto the beach and pick up, not just women wearing burqas and shalims, but women wearing one-piece bathing suits, and either fine them, issue them a ticket, or arrest them. It's a little unclear as to what the remedy is that the mayor is requesting, but there'll be some sort of government recourse against people. I could see the police chief reading this and turning to the general counsel of the town and saying, "Michael Cardozo, say it isn't so." You also are the legal adviser for other town representatives.

MICHAEL A. CARDOZO

Okay. Let's change this a little bit. Well, first of all, let me ask, she told him that she was going to issue this order before she issued it, and he didn't do anything. Should he have done something at that stage, rather than waiting till after she read the misleading order? Because she originally just told him she was going to issue an order on this, that would have banned these things. She didn't say it was going to be ascribed to his memo. So should he have spoken up earlier, rather than waiting for the order to actually be issued?

STEVEN BANKS

Would have helped. Going back to one of the questions earlier, now you know, as the lawyer, that your client is about to do something that you told her not to do. She's given you a little bit of leeway, maybe it's a good moment to say, "Could you just pause on that and let me get back to you on whether that's permissible for you to do?" With this mayor, maybe that doesn't help you, but at least you're trying.

MICHAEL A. CARDOZO

Well, let's make it a little bit more interesting. While this is all going on, you learned that the mayor's cousin owns the only bikini store in the town, where the bathing suits mandated by this order could be purchased. How does that change the facts? What would you do, then?

HON. LORETTA E. LYNCH

Well, now I'm calling the Public Corruption Unit of the US Attorney's Office. I'm sorry.

MICHAEL A. CARDOZO

Make it easier?

STEVEN BANKS

It makes it easier to stop this, it gives you places to go to. Public corruption the AG, public corruption in the US Attorney's Office. Lots of places to go to. They might even be a local public corruption unit.

MICHAEL A. CARDOZO

Does it give you more leeway to go completely public on this?

HON. LORETTA E. LYNCH

I don't know that it does, actually. Regardless of what this ordinance is or says, or what the mayor said or didn't say about you, and falsely representing your opinion, what you have now is a mayor who's engaged in self-dealing, who has set up a system to require that public enforcement funds be used to set up some way to funnel money to a family-related business. So now what you've got is official misconduct. So I think the issue just shifts to, what do you do when you see that the person who is the face of the town, the mayor, is engaged in some kind of misconduct?

And then I think you certainly have an obligation to raise it with the city council in that vein not just she's issued this executive order that's going to cause significant liability to us. But now we have someone who may, themselves, be involved directly in public corruption. And so I think what you would want to do is consider, would you advise someone else who represents the town to make a report to a law enforcement authority upon the advice of counsel, meaning you? Or you could also consider getting separate white-collar counsel for the town to advise, probably, the city council separately and say, "You all need to look at this, maybe even do an investigation yourselves, and

then consider some sort of referral to a law enforcement agency." But I don't think it means that you can go public with it.

REBECCA ROIPHE

It makes the question a little bit easier, about whether or not... If you take the analogy of a corporation, you're working for, generally, you defer to the CEO of that corporation, because the CEO is the representative of that organization in all ways. But at a certain point, if it becomes clear that that CEO is not acting in the best interest of this organization, and it's not a judgment call, because they have actually betrayed their fiduciary obligation to the organization, then you do have an obligation to serve your client.

And so now you have gotten us with this additional wrinkle in the story closer to that in my mind, where this is no longer just a stupid decision made by an elected official, in which you still have to defer to this person, because they're still the elected official, but rather, a situation in which this person has breached their obligation to your client. And so therefore, you do then, in a certain way, have an obligation to decide what is in the best interest of your client. You can no longer defer to this person who has a conflict.

MICHAEL A. CARDOZO

Steve or Loretta, you want to add to that?

STEVEN BANKS

I totally agree with what Rebecca said.

MICHAEL A. CARDOZO

Does the fact that the FOIA laws, and other laws, Freedom of Information Act laws, which want to shed light on alleged wrongdoing, do they play any role in the analysis of how we'd handle this problem, distinct from what you might do in the private sector?

REBECCA ROIPHE

So I would say that the FOIA laws are, in some ways -- or at least some scholars believe that the FOIA laws can be -- an expression

of the client's desires when it comes to transparency in government. And so essentially, can be consent to the revelation of what would otherwise, clearly, be confidential information. And so there is at least an argument that if the information would be subject to a FOIA request, that would be discoverable that way, that that is an indication that perhaps the duty of confidentiality ends there. There are other people who say evidence of wrongdoing is never subject to government confidentiality. I'm not sure I'm in agreement with those people, but there are certainly people who argue that if there's clear evidence of wrongdoing, it's never confidential information.

MICHAEL A. CARDOZO

Well, if his original opinion had not been released by the mayor, and a FOIA request was served, would she have to disclose it even though it's privileged, otherwise privileged? In other words, would the FOIA law have overruled the attorney client privilege?

HON. LORETTA E. LYNCH

Typically, it doesn't.

REBECCA ROIPHE

Yes.

STEVEN BANKS

Yes, I don't think so.

HON. LORETTA E. LYNCH

It doesn't overrule privilege; it doesn't apply to something that might be an open or an ongoing investigation. If you, as general counsel, have decided that you need to have the auditors look into this, you may have commissioned, or had the city council commissioned the auditors to look into this financial issue, that would not be FOIA-able until it was resolved. So I don't think the FOIA is going to get your original memo out, assuming the original memo is clear and is helpful in this situation.

I think the sentiment that FOIA certainly stands for the principle that government wrongdoing should not be concealed is an admirable

one, and it is, in fact, the basis for FOIA and many other disclosure obligations, both civil and criminal. But there is a FOIA process, and that principle and policy, no matter how laudatory, doesn't overrule the process that somebody would need to go through. Certainly, as counsel to the town, I don't think you're in a position to say, "Well, if someone were to FOIA this, they would likely get it. So let me go ahead and turn it over anyway." Because you are making a number of assumptions about a number of actions and conclusions that have yet to come to fruition.

MICHAEL A. CARDOZO

So, let me ask you a question that really pervades all the panels. Should we have different ethical rules or supplemental ethical rules for government lawyers, when they're faced with these kinds of issues, as distinct from lawyers in private practice?

REBECCA ROIPHE

I wouldn't be in favor of something more. I think the standards are better, because it would be very hard to reduce these things which are so complicated, and really depend on government structure, and the particulars of each government entity, and the laws of that jurisdiction. It would be very hard to reduce these things to rules in any way that would ultimately be helpful for lawyers in this situation. As we've been saying, and I think as Neal Katyal began the whole program with, procedures are really important. That following procedures are a very good way of assuring that you're following your ethical obligations in these situations.

Procedures are better, in my mind, then ethical rules in terms of assuring that that government lawyers are actually abiding by their ethical obligations. Otherwise, we really need to just elect and choose people with really good judgment, because it's extremely complicated. Like yourself and all three of you, who have been in these positions, it's very important that people have good judgment, because all these questions are so hard.

HON. LORETTA E. LYNCH

Yes, and judgment is the one thing that is hard to teach. If you ask anyone who runs a government office, what's the most challenging

issue they face, they'll tell you, it's personnel. And what's the most important thing you can do? It's whom you hire to fill the seats around you, because they do have to come to the position, understanding the gravity and the power that they have. I agree with Rebecca. I don't know that more rules are necessary. In fact, government have a huge number of rules, governing their conduct, in so many ways.

Certainly, it would, obviously, come from the federal system, but federal lawyers are some of the most highly regulated lawyers on the planet, already. Making sure that those principles are clear is what's really key. But there's a variety of government practices, such that it's hard to have a one size-fits-all rule. But certainly, having a clear set of processes laid out, having clear principles laid out, is always helpful. And look, these things are also always changing, as different scenarios come up.

The background reading was excellent in positing the various scenarios that do come up when government lawyers are working very hard to protect the public fisc and to protect all of us, and the fact that these rules require interpretation. So I would say more along the lines of standards, as well. But I don't know that more specific rules are necessary.

STEVEN BANKS

I agree with that. Michael, in the days when we were adversaries, you might remember that government argued that there should be different rules for contempt with government officials

MICHAEL A. CARDOZO

I have no recollection of that rule.

STEVEN BANKS

I didn't think you would. It must have been a rare loss. We prevailed on the point that government officials are held to the same standards, when it comes to contempt, that a private party would be held to. It's the wrong route to go to create a different rule for government lawyers. Guardrails, in terms of standards, are always good for lawyers, no matter what role they are in -- private, public lawyers -- guardrails for particular kinds of lawyering help in terms of giving people a pathway forward.

MICHAEL A. CARDOZO

Do any of the three of you have any overall additional thoughts you wanted to add before we wrap up on this very interesting subject.

HON. LORETTA E. LYNCH

I knew you were going to throw in something at the end, and the public corruption angle, I think, is a great one. I thought you were going to say, "What if two towns, over at a beach, someone who was neither Jewish nor Muslim had used a burkqa or a shalim and hidden a weapon underneath it, and had harmed people? How would you view the mayor's order in that regard? How would you handle the issues in that regard? Suppose a White supremacist trying to, in fact, throw blame on various groups, used the coverings of religion to disguise hateful or violent activity, how would you then view the mayor's executive order?"

I still think it's incredibly problematic, because way over broad in terms of preventing that sort of harm, but it's the type of thing that people do as almost a knee-jerk reaction when there's some sort of public safety threat. And it really is the more dangerous type of executive order, one that might have this veneer of necessity, but is but it's still going to be just as unconstitutional.

MICHAEL A. CARDOZO

That's an excellent point. Next time we do this, we'll add that hypothetical, too.

HON. LORETTA E. LYNCH

Well, everyone knows it now, Michael.

REBECCA ROIPHE

Yes, I thought you were going to add the wrinkle of, what if you were asked, instead of something that was so clearly unconstitutional, to give advice to write a memo supporting government action that was a little bit more borderline, but you, personally, thought was unconstitutional, and that's a whole other panel, so I won't go there. But I did think that that was where we were going next. There are endless number of permutations we could have explored

MICHAEL A. CARDOZO

I'm sure we can. Unfortunately, we've run out of time. So I want to thank very much our three panelists for spending their valuable time with us.

CLOSING REMARKS
PAUL C. SAUNDERS

On behalf of our co-sponsor and all the members of the Judicial Institute on Professionalism in the Law, I want to thank all of the participants in this program. I thought that it was extraordinarily incisive. I thought it was, not only informative, but informed, and I can't thank you enough for helping us present this program. I thought it was just absolutely spectacular. I would also like to thank those who attended today's program. And we all collectively hope that you found the presentations in this program not only interesting, but challenging, and somewhat troublesome. The issues that were discussed are not only important, but there seems to be a consensus that the existing principles or standards for government lawyers may be insufficient to deal with all of the ethical challenges that government lawyers face. So our mutual challenge is to continue the dialogue and to make meaningful recommendations for change. And on behalf of the New York State Judicial Institute on Professionalism in the Law, I can assure you that we will do our part in this important endeavor.

It's impossible to thank everyone who helped us put this program together, but I must mention and thank a few people whose contributions were far above the call of duty. Our ethics advisors included Professor Stephen Gillers from NYU, Professor Bruce Green from Fordham, Professor Brad Wendel from Cornell, Professor John Barrett and Dean Michael Simons from St. John's. Their collective advice and wisdom, and guidance, was invaluable, and we thank them for all of that. I would also like to recognize our Chief Judge, Janet DiFiore, for her generous and thoughtful introduction to our program, and for her continuing encouragement and support for the work of the Judicial Institute, and the commission to reimagine the future of New York's courts. Most of all, I would like to thank the person without whom this program could not have succeeded as well as it has. Our Counsel, Rochelle Klempner. Always on the job, her assistance and advice was intense, meticulous, and careful. Thank you Rochelle very much for everything you have done to make this program a reality and a success.

Thank you all very much. Good afternoon.

CLE MATERIALS

PANEL 1:

- *W. Bradley Wendel, Government Lawyers in the Trump Administration, 69 Hastings L.J. 275 (2017).*

- *Kathleen Clark, Government Lawyers and Confidentiality Norms, 85 Wash. U. L. Rev. 1033 (2007).*

PANEL 2:

- *W. Bradley Wendel, Government Lawyers, Democracy, and the Rule of Law, Cornell Law Faculty Publications. 2 (2009).*

- *W. Bradley Wendel, Law and Nonlegal Norms in Government Lawyers' Ethics: Discretion Meets Legitimacy, 87 Fordham L. Rev. 1995 (2019).*

PANEL 3:

- *Michael A. Cardozo, The Conflicting Ethical, Legal and Public Policy Obligations of the Government's Chief Legal Officer, The Professional Lawyer, Vol. 22 No. 3 [ABA Center for Professional Responsibility] (2014).*

- *Kathleen Clark, Government Lawyers and Confidentiality Norms, 85 Wash. U. L. Rev. 1033 (2007).*