

Transcript of Panel 1 at the October 14, 2021 Convocation:
Watchdogs or Lap Dogs? The Ethical Challenges Facing Government Lawyers

Paul C. Saunders:

Randy Eng, if he would begin with the presentation of Panel 1. Thank you all very much.

Hon. Randall T. Eng:

And thank you very much. 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.

Hon. Randall T. Eng:

We have Karen Griffin, who is the Chief Ethics Officer in the New York City Law Department, Office of the Corporation Counsel.

Hon. Randall T. Eng:

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.

Hon. Randall T. Eng:

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.

Hon. Randall T. Eng:

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.

Hon. Randall T. Eng:

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."

Hon. Randall T. Eng:

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.

Transcript of Panel 1 at the October 14, 2021 Convocation:
Watchdogs or Lap Dogs? The Ethical Challenges Facing Government Lawyers

Hon. Randall T. Eng:

Now, 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 its 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?

Hon. Ellen N. Biben:

Judge Eng, can you hear me? It's Ellen Biben.

Hon. Randall T. Eng:

Yes, I can. Loud and clear.

Hon. Ellen N. Biben:

I know that one of our co-panelists is having some technical difficulties, so maybe I'll start. I'll just get us kicked off, and then while she gets back she can join.

Hon. Ellen N. Biben:

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.

Hon. Ellen N. Biben:

Should I pause there because I see that our colleague has joined us.

Karen M. Griffin:

Thank you, after a little tech... Can you hear me?

Hon. Ellen N. Biben:

Yeah, yeah.

Karen M. Griffin:

Thank you. I had a little mute/unmute issue, but I would agree. I think here, again, we would evaluate this under a 1.3 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:

Hi, it's Deb Scalise. Can you hear me?

Karen M. Griffin:

We can.

Deborah A. Scalise:

Oh, good. Sorry, I wasn't sure if I was in as an attendee, or as a presenter. So 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.

Deborah A. Scalise:

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 they're in a rock and a hard place. This is their boss, but yet they have 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 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.

Deborah A. Scalise:

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, and when the Committee on Standards of Attorney Conduct made the recommendations as to the rules, the rules are rules and the Office of Court Administration, with the Chief Board have endorsed those rules, but the commentary is really guidance through the bar association, the state bar committees have started standards of attorney conduct about how you can proceed.

Deborah A. Scalise:

Transcript of Panel 1 at the October 14, 2021 Convocation:
Watchdogs or Lap Dogs? The Ethical Challenges Facing Government Lawyers

So you look at the rule and you 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. So 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. So I think sometimes there's a tension between professions as to what you're obligated to do and what your client, meaning the Commissioner and the organization, are obligated to do. So I think that's where I would start.

Hon. 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.

Hon. Ellen N. Biben:

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 Special 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.

Speaker 5:

Judge Eng, I think you're muted.

Hon. Randall T. Eng:

I am now unmuted alright. 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."

Hon. Randall T. Eng:

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.

Hon. Randall T. Eng:

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?

Hon. Ellen N. Biben:

I'll start because 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."

Hon. Randall T. Eng:

Thank you.

Deborah A. Scalise:

I would like to add something from the defense side. As you, 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.

Transcript of Panel 1 at the October 14, 2021 Convocation:
Watchdogs or Lap Dogs? The Ethical Challenges Facing Government Lawyers

Deborah A. Scalise:

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.

Hon. 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 the aggravation that goes along with it.

Hon. 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?

Hon. 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 arises 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's 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.

Hon. 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.

Transcript of Panel 1 at the October 14, 2021 Convocation:
Watchdogs or Lap Dogs? The Ethical Challenges Facing Government Lawyers

Hon. Randall T. Eng:

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 memorandums 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.

Hon. Randall T. Eng:

The IG wants advice from the deputy on how to compel supervisors to answer and wants to be present and wants the deputy 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? The question-

Karen M. Griffin:

Well...

Hon. Randall T. Eng:

Yes.

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 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 inspector general could assist, I'm sorry, deputy counsel could assist the inspector general in guiding her on the best ways to conduct these investigations.

Hon. Ellen N. Biben:

Just to follow up on that, and you're absolutely right, in New York State employees are required to cooperate public... the 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 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.

Hon. 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.

Hon. 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-type immunities where people are compelled, and must... 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.

Hon. 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?

Transcript of Panel 1 at the October 14, 2021 Convocation:
Watchdogs or Lap Dogs? The Ethical Challenges Facing Government Lawyers

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 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 say 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?

Deborah A. Scalise:

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.

Hon. 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.

Hon. 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 under 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.

Hon. 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 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?

Hon. Ellen N. Biben:

I think that's essentially right. There's 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.

Hon. Ellen N. Biben:

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:

And I agree just procedurally-

Transcript of Panel 1 at the October 14, 2021 Convocation:
Watchdogs or Lap Dogs? The Ethical Challenges Facing Government Lawyers

Catherine O'Hagan Wolfe:

Folks on the panel-

Hon. Randall T. Eng:

Yes, yes.

Catherine O'Hagan Wolfe:

...I'm just going to interrupt for a minute to let you know that this is your 10 minute warning.

Hon. Randall T. Eng:

Ten minute warning. All right, good.

Speaker 6:

Thank you.

Hon. Randall T. Eng:

Thank you.

Deborah A. Scalise:

As I was saying, 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.

Deborah A. Scalise:

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.

Deborah A. Scalise:

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.

Hon. 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.

Hon. 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 that's 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 if something is subject to disclosure under FOIL, so 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, 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.

Hon. Ellen N. Biben:

Proactively, right.

Karen M. Griffin:

Proactively, yes.

Deborah A. Scalise:

Transcript of Panel 1 at the October 14, 2021 Convocation:
Watchdogs or Lap Dogs? The Ethical Challenges Facing Government Lawyers

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 better 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's 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.

Hon. 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.

Karen M. Griffin:

And of course, and at one point-

Speaker 6:

Folks, I'm going to interrupt again, this is your two-minute warning. It's probably a minute and 30 seconds at this-

Hon. Randall T. Eng:

All right, the two-minute warning. Very, very quickly, and thank you. All right. 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? Very quickly.

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:

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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, who's 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 in house until you've gone back and dealt with the chain of command.

Hon. 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. I had six more issues I could have developed here, but we simply couldn't get to it. So with that, I thank you very much. I turn the program back over.

Hon. Ellen N. Biben:

Thank you so much.

Karen M. Griffin:

Thank you.

Paul C. Saunders:

Thank you very much Judge Eng and-