

Transcript of Panel 2 at the October 14, 2021 Convocation:  
Watchdogs or Lap Dogs? The Ethical Challenges Facing Government Lawyers

William Craco:

Welcome back, everybody. My name is William 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 and 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.

William Craco:

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.

William Craco:

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 and he is a nationally recognized and distinguished authority and distinguished scholar in the area of the regulation of the legal profession.

William Craco:

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

William Craco:

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.

William Craco:

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

Zachary W. Carter:

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.

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Zachary W. Carter:

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

William Craco:

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

Stephen Gillers:

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 where 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.

Stephen Gillers:

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:

Yeah, 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.

Sara L. Shudofsky:

But yeah, so 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 you tell 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.

Sara L. Shudofsky:

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

William Craco:

Okay, well so arguments made reference to more information that's coming along. So let's start making this a little bit more complicated. So at your law firm, one of your partners, a gentleman named Tom Teemark, 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.

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William Craco:

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.

William Craco:

So first of all, 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.

Sara L. Shudofsky:

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. That the supervisor wants to build the golf course, the town board wants to build the golf course. They do everything, and dot their Is and Ts and follow the right procedures and figure out that they in fact, want to go that route.

Sara L. Shudofsky:

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. So I think big red marker, 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.

Stephen Gillers:

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.

Stephen Gillers:

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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 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 think that needs to be disclosed. 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.

Zachary W. Carter:

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 Craco:

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

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 Craco:

Yup, okay. Well so let's move along and add some more facts, if we can.

William Craco:

So 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.

William Craco:

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,

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and you do not tell her that the members, you do not tell the board that the meeting must be open to the public.

William Craco:

So you've already taken some steps here, and made some decisions which you can reflect on now. But I think 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, I think, is a practical matter, is that if you have a client, and I think 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.

William Craco:

Sara, you're on mute.

Sara L. Shudofsky:

Yeah, certainly one other point to add here is that you have two in this scenario, I believe you have two clients. You have the supervisor, and you represent the board. And as a lawyer in this instance, has taken it upon him or herself, not to tell, to give the board advice. And you have, I think, an obligation in this instance to give advice to the full and candid, the best advice to both of your clients. And withholding information, withholding advice from your second client, the board, is a big problem here.

Sara L. Shudofsky:

Obviously if you tell the board, the meeting, your meeting must be open to the public, then you're in big trouble there by not informing one of your client's as to its obligations are. It certainly looks like a situation where there's, I don't know by any objective measure, this does not look like an emergency situation. And so, I don't know if there's any other way to read this requirement, other than that in the facts of this case, this has to be an open meeting.

Sara L. Shudofsky:

I suppose maybe there's some other information you could learn, but it doesn't look like it. I would agree that, I think 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.

Sara L. Shudofsky:

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.

Stephen Gillers:

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, in my view, 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."

Zachary W. Carter:

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 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. And 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 for 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.

Stephen Gillers:

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 Craco:

So let's get back to where we... Sara, were you going to say something.

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Sara L. Shudofsky:

No, I was just going to say that 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." And I think this is an obvious point, but 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 Craco:

Yeah, 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.

William Craco:

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? And I think that's a meaty question that I'd like to start with Sara, if we could.

Stephen Gillers:

You're on mute.

William Craco:

You turned your... you're still on mute.

Sara L. Shudofsky:

Yup. Sorry about that.

William Craco:

Giving yourself some time to think.

Sara L. Shudofsky:

No, not intentional. But I most definitely am mulling over it, because 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.

Sara L. Shudofsky:

So I don't know that you owe. I don't know that in this situation, 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

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partner's interest. If 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, I guess is a different question. And I may punt to my other panel members to see if someone has a definitive answer to this.

Sara L. Shudofsky:

But 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:

Well, 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.

Stephen Gillers:

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.

William Craco:

You're on mute, Sara.

Sara L. Shudofsky:

I just wanted 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 or not? There may be an official question about whether or not 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:

Well, 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.

Stephen Gillers:

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, to violate their fiduciary duty. And perhaps, their duty under other state and local laws, to the board and the town.

William Craco:

What would you tell 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 say that they want to do that in their individual capacities. How would you tell them to approach that analysis?

William Craco:

So if they came to you and said, "We'd like to invest in our personal capacities, and we'd like to do it correctly, if we can." What would your advice to them be?

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. So 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 Craco:

But not you?

Stephen Gillers:

Not me.

William Craco:

Yeah. 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... that you need to keep your client informed. It's right there, in the rules, 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.

William Craco:

Okay, well-

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.

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William Craco:

So Professor Gillers raised the prospect of potential inappropriate activities, so why don't we pull that thread and go there. So 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.

William Craco:

So first, actually, 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. Because now, you've heard about potentially unlawful conduct. Potentially criminal conduct. You don't know. Certainly, you've got some obligation here to bring this to somebody's attention. So I guess the question 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.

Sara L. Shudofsky:

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 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. With 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 Craco:

How far can your investigation, and 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:

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Well I think the first thing that I would do, and certainly, obviously there's no confidentiality with respect to the allegations that have been brought to your attention by these four residents. I would 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 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:

I think 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. I think that 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. But at that point, I would withdraw from the representation.

William Craco:

So, I'd like to ask-

Zachary W. Carter:

Refusal to act on that advice.

William Craco:

So I'm just 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."

Sara L. Shudofsky:

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.

Sara L. Shudofsky:

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 Craco:

But what about-

Catherine O'Hagan Wolfe:

Folks, this is your 10 minute warning.

William Craco:

Okay. What about partner, Tom Teemark, who represents the company that develops the golf course?

Sara L. Shudofsky:

Yeah, the question is there, are you talking to him. Are you bringing him in the conversation? I do think, and this is going to involve I'm sure, others at the firm who from the beginning should have appreciated, this is a conflict situation. The firm cannot be representing both of these entities so 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.

Sara L. Shudofsky:

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, then 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?

Stephen Gillers:

I would wish to investigate whether or not there are higher ups within the state organic law, to whom I could legitimately, under the New York rule, 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.

Stephen Gillers:

The other opportunity I would investigate is 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. And a final option for me, is an exception to confidentiality, to get advice on my own obligations.

Stephen Gillers:

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So 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 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. So look, 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 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, too, what you do in order to satisfy yourself in some threshold way. That there's something to the allegations though, right? 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.

Sara L. Shudofsky:

On the other hand, you got to protect yourself and the interest of the town and so, you may have to get very aggressive in how you approach it. But 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 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-

Catherine O'Hagan Wolfe:

Folks this is... go ahead.

William Craco:

Two minute warning?

Catherine O'Hagan Wolfe:

Yeah. Two minute warning. Three minute, actually.

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William Craco:

Oh three, okay, thanks. Okay. Can I get four? 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, and should you tell... 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 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 Craco:

Yes.

Stephen Gillers:

Who may come in, defensively?

William Craco:

Yeah, 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 Craco:

Sara, what would you say?

Sara L. Shudofsky:

Yeah, 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, that's a beach, or should be something else. That's not your job to make policy and 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.

Sara L. Shudofsky:

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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... you can't have the public, the meeting 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 Craco:

Zachary Carter, you were going to say something.

Zachary W. Carter:

Sure, and this gets back to the beginning. I think that the potential for this mess was apparent at the outset. And what it reminds me of, is 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, and on the first evening at your kitchen counter, and you're reading the paper. And out of the corner of your eye, you see movement.

Zachary W. Carter:

And 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. And you go back to reading. And then, a minute later, it's more plain. 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.

Zachary W. Carter:

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

William Craco:

Well so, with that good advice and observation, I think 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.