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The Conflicting Ethical, Legal, and Public Policy Obligations of the Government's Chief Legal Officer

The Conflicting Ethical, Legal, and Public Policy Obligations of the Government's Chief Legal Officer

By Michael A. Cardozo

(Editor's Note: This article is adapted from the Maurice Rosenberg Memorial Lecture, presented by the author April 8, 2014 at Columbia Law School.[1])

What is the proper role of the chief lawyer for a government entity? Drawing on my 12 years of experience as Corporation Counsel of the City of New York, I address in this article the ethical, moral, legal, and public policy obligations and values that should guide the actions of an attorney who is fortunate enough to be the principal lawyer for a government body.

In order to define properly the chief government lawyer's role as advocate and legal counselor, he or she must answer fundamental questions of policy and ethics. First, does that lawyer have an obligation to "do justice" when prosecuting civil litigation that affects his or her duty to the governmental client? And if so, what does "doing justice" mean? Second, what obligation does a government lawyer have to protect the long-term institutional interests of the governmental entity when those interests arguably conflict with the short-term policy goals of the present chief executive or incoming mayor-elect? And third, what does a government lawyer who is generally charged with defending the law do when faced with a challenge to an arguably illegal law that the executive does not like?

The common thread that runs through my answers to these questions is that, in my opinion, the responsibility of the chief government lawyer is to ensure that the government entity he or she represents enjoys all the benefits of vigorous advocacy. In this respect, the relationship between lawyer and government entity is no different than the relationship between attorney and client in private practice. Indeed, only through zealous advocacy can the government lawyer optimally advance the interests of the government entity and the rights of its citizens.

Who Is the Client?

The obvious starting point for this debate is defining who is the government lawyer's client. Most commentators agree that the client is whatever governmental entity the lawyer represents, in my case the municipal corporation known as the City of New York.[1] What this means is that the chief government lawyer must never forget that his or her first obligation is to the governmental entity itself and that lawyer's job is not simply to advocate on behalf of individual members of the executive or legislative branch. Just as counsel for a corporation takes day to day direction from the duly authorized con-stituents that are the corporate officers, but nevertheless has an overarching obligation to protect the interests of the corporation, even against the wishes of those officers, so, too, must the government lawyer represent in the first instance a city or state and not its mayor or governor.

In the corporate setting, Rule 1.13(f) of the Model Rules of Professional Conduct, to take but one example, requires the general counsel to make clear to board members and officers that his or her primary responsibility is to protect the interests of the corporation, when it appears that those interests may differ from those of the individual constituents with whom the lawyer is dealing. However, while the rules of professional conduct for lawyers offer some general guidance to government lawyers, the authority and obligations of government lawyers are modified and sometimes augmented by charter and statutory provisions. This similar-but-different quality of governmental lawyering is apparent from the relationship between government lawyer and the client entity.

As a practical matter, the government lawyer's job is almost invariably to advance the objectives and defend the interests of whoever is in charge of

making final decisions on the particular issue in question.[5] Since most litigations against the government challenge the legality of the actions of the governor, mayor, agencies they control, or their appointees or employees, it follows that these democratically elected or duly appointed officials, after receiving appropriate legal advice, should make the key decisions about the litigation objectives in particular cases. The means by which the entity pursues these objectives remains within the professional judgment of the lawyers.[6] Of course, if the challenged actions are clearly illegal, ethical rules would require the government lawyer, like one in private practice, to decline to defend them.[7]

It is worth pausing to consider what happens when two branches of government are on opposite sides of a dispute. In such cases, it is vitally important that both sides receive adequate representation. As the Preamble to the Rules of Professional Conduct makes clear, government lawyers may represent various government entities.[8] Unlike the private lawyer, the government lawyer may continue to represent multiple entities generally, even though in a particular legal controversy between two entities, he may represent one, but not the other. Thus a government lawyer could litigate on behalf of the mayor and be adverse to the city council in a legal dispute between the two, even though he still represents both entities outside the litigation. This would not be true in the private practice context: a private lawyer could not represent one client against another client in a single litigation and still represent both outside that litigation, because that would create a conflict of interest. In New York City, therefore, whenever the mayor and the city council are adverse in litigation, and consistent with New York Court of Appeals precedent,[9] the city council will retain private counsel or rely on its own in-house attorneys.

But identifying the client, and the relevant decision-maker for the client, does not tell us whether the chief government lawyer, in conducting civil litigation, has obligations beyond representing that client's interests and expressed objectives to the best of his or her ability. Phrased another way, does the government lawyer have an independent duty to "do the right thing" by virtue of his or her official position that limits the single-minded dedication with which the government lawyer can pursue litigation on behalf of a government entity?

[I]n the absence of a special constitutional or statutory duty to represent the public interest, there is no overarching responsibility for government lawyers to "do justice" that might temper their vigorous advocacy on behalf of the entity or its elected officials.

"Doing Justice"

The Attorney General of the United States recently suggested that some government lawyers have an independent duty "to do justice" whenever the government entity is party to civil litigation. Attorney General Eric Holder stated that "[t]his, after all, is the essential duty to which all of us—as attorneys general—have been sworn: not just to win cases, but to see that justice is done."[10] Several commentators share this position and extend the "do justice" admonition beyond elected attorneys general and place an additional ethical responsibility upon all government lawyers.[11] They have suggested that it may be wrong for government lawyers to make aggressive motions and assert every possible defense without regard to how sympathetic the facts of plaintiff's particular case may be. In my view, such a position is incorrect. It is not only a dangerous precedent to allow appointed government attorneys to determine what is just and what is not, but unwarranted restraint is also a disservice to the government entity the attorney represents.

The responsibilities of state attorneys general—especially elected ones—are distinguishable from those of their appointed counterparts, such as corporation counsels or city attorneys. Elected state attorneys general are often independent office holders who draw their authority directly from the state citizenry. This creates concomitant duties, derived from the statutes and constitutions that define the attorney general's duties and responsibilities, to protect the public interest. For example, the California Supreme Court has observed that the state attorney general "is often called upon to make legal determinations both in his capacity as a representative of the public interest and as statutory counsel for the state ... [but] that his paramount duty [is] to represent the public interest."[12] In such cases, there may be a special duty to "do justice" and act in the public interest. The nature and extent of such obligations will vary from state to state according to the terms of statutes and constitutions, and precise answers are beyond the scope of this article.[13]

By contrast, in the absence of a special constitutional or statutory duty to represent the public interest, there is no overarching responsibility for government lawyers to "do justice" that might temper their vigorous advocacy on behalf of the entity or its elected officials.[14] The various formulations of ethical rules offer some, but hardly definitive, guidance. The ABA Model Rules, for example, mandate that all lawyers, specifically including government lawyers,[15] should "zealously assert[] the client's position under the rules of the adversary system" and take "whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."[16]

The government lawyer is, of course, an essential participant in internal government policy debates, which adds an extra dimension of responsibility to what

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Michael A. Cardozo is a Partner with Proskauer Rose LLP and served as New York City Corporation Counsel from 2002 to 2013.

he or she does. I cannot emphasize strongly enough that the government lawyer must not only give legal advice, but must also forcefully express views on the desirability and morality of the particular policy question at issue. Indeed, Model Rule of Professional Conduct 2.1 has a special resonance in the government lawyer context:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

While the Model Rule therefore makes clear that the government lawyer should always make his or her moral stance clear to decision-makers at the advisory level, the Rule is permissive and puts the law first. In my opinion, the rule allows government lawyers to use morality as a reference point but does not enable them to elevate moral concerns above sound legal analysis.

The rule makers are perfectly capable of curbing single-minded advocacy if they so desire. In a different context, the Model Rules state that a criminal "prosecutor has the responsibility of a minister of justice and not simply that of an advocate."[17] But they impose no comparable standard on civil government lawyers. The only vestigial trace of such a responsibility, found in the old Model Code of Professional Responsibility, is a non-mandatory ethical consideration that the "government lawyer in a civil action... has the responsibility to seek justice. ... "[18] Yet the rule makers signaled their disapproval even of this non-binding suggestion when they elected not to include it in the new Model Rules. It is clear to me that, at least, there is no mandatory ethical duty per se that requires a government lawyer to exercise restraint in civil litigation for the purpose of "doing justice."

This issue is far from academic. The government lawyer's decision whether or not to pursue litigation zealously on behalf of a government entity has a clear impact on the entity and its citizens. To put this more concretely, should New York City, in an effort to reduce the more than $500 million it annually pays in damages from the more than 8,000 cases filed against it, insist on taking weak cases to trial rather than paying small settlement amounts to make them go away? Or, alternatively, should the Corporation Counsel's Office, to take but one of many examples, have "done justice," despite the City's overwhelming likelihood of prevailing at trial, and settled suits brought by innocent bystanders who were injured in the crossfire when the police shot at and killed a gunman, who had just murdered another man outside the Empire State Building?[19] Similarly, when over 10,000 cases, seeking in excess of $3 billion in damages, were brought against the city by people, described by many as "the heroes of 9/11," who alleged they had become ill as a result of their Ground Zero clean-up efforts, were city lawyers wrong to defend that mass tort case by raising every possible defense, including that of immunity under the New York State Defense Emergency Act?[20]

Clearly, it is in New York City's best interests to reduce the amount it pays out as a result of litigations. And it was my judgment that insisting on the trial of cases in which we believed the City would likely prevail would result in such a reduction. Therefore, Mayor Bloomberg and I determined that cases where Corporation Counsel was confident the city would prevail should be tried on their merits, or settled on very favorable terms, despite the sympathetic facts presented by a particular plaintiff.[21]

In my view, the government lawyer must give the needed legal advice to the government decision-maker, and then, barring a contrary directive from that individual, try or settle the case based on the lawyer's assessment of the ultimate litigation result.

I recognize that some feel deeply uneasy whenever the government takes on a sympathetic citizen in court. Yet this discomfort is an inevitable byproduct of the adversarial system through which the victim of an alleged wrong must seek compensation from the government. To paraphrase Judge Jack Weinstein, so long as government lawyers are playing this game by the present rules, we owe it to the taxpayer to play to win.[22]

The courts and the legislature set the rules of the litigation game by which the government must play. It is the courts and the legislature that decided the city is immune from liability when an innocent bystander is wounded by a cop's bullet unless negligence can be established.[23] Similarly, it is the legislature that has determined that the government is not liable in a civil defense emergency such as 9/11, even if there was negligence.[24] And certainly, if the long-term interests of the city and its citizens include reducing the amount paid out in litigation, and if one of the ways to achieve that goal is by refusing to settle weak cases, can the lawyer do anything other than insist on taking such cases to trial?

Under our judicial system and absent some statute or constitutional provision imposing a duty to protect the public interest, "the court, not the government lawyer, will declare what 'fairness' and 'justice' require."[25] More importantly, for a government lawyer to ignore these rules, as some have advocated, and litigate certain civil cases, but not others, based on personal preconceptions of fairness and without invoking available defenses, suggests the worrisome possibility that the appointed lawyer, rather than the elected decision-maker, makes the potentially dispositive policy decisions. We must not promote a government of lawyers above our government of laws.

The Client's Long-Term Interests

Another example of the ethical and policy tensions inherent in governmental lawyering arises when the long-term interests of the government institution are perceived to conflict with the policy desires of the present chief executive. To be more concrete: What should the chief lawyer for the governmental entity do if he or she concludes that the long-term interests of the city conflict with the chief executive's short-term policy preferences?

For example, was it proper for the Corporation Counsel's Office, relying both on arguably applicable public policy and precedent, to contend that

a particular state statute favored by the mayor was constitutional even though the statute's enactment had not been preceded by a home rule message from the city council, as was arguably required by the state constitution? Judicial acceptance of the lack of need for such a home rule message might weaken the city's long-term interest in resisting interference from future state legislatures in the operations of New York City, to the dismay of future mayors and corporation counsels.[26]

Other examples of this tension between short- versus long-term goals abound. If a city has a long-term interest in improving safety and the environment by restricting signs abutting city highways, what should the government lawyer do when a city commissioner wants to make an exception to allow for a particular sign, an exception that future would-be-sign-posters might point to as showing discriminatory treatment? Or, if it is not in a city's long-term interests to agree to consent decrees that put the city under the supervision of the courts for a period that in some cases have extended more than 30 years,[27] what should the lawyer do when a mayor, to solve a particular political and legal problem, decides to agree to another long-term consent decree?

One of my most distinguished corporation counsel predecessors, Fritz Schwarz, has answered these questions by arguing that government lawyers have a special responsibility to care for the long-term interests of the institutions they serve, which politicians will not do sufficiently.[28] I agree. The government lawyer must carefully explain to the elected official the potential adverse long-term consequences to the governmental entity of making a particular argument or taking a particular action. But this duty is advisory in nature.[29] The final decision of whether the short-term policy gain is worth the potential long-term consequence to the city—even assuming the lawyer could comfortably identify the long- versus the short-term gains involved—is one for the elected official, not the government lawyer, to make.

A slightly different example of the tension between short- and long-term goals can arise in the final days of a particular elected official's tenure, when the government lawyer is faced with deciding what course of action to take if he or she knows that a policy shift is imminent. This situation was presented in the waning days of the Bloomberg administration when it became clear that some of Mayor-Elect DeBlasio's policy goals differed sharply from those of Mayor Bloomberg. While changes of policy from one mayor to the next are the essence of democracy, the impact of the changes contemplated by the mayor-elect were complicated by the fact that many of those changes—including the controversial stop and frisk police tactics—were the subject of litigation.[30] This meant that the Corporation Counsel's Office might soon have to take different legal positions on issues it had advanced under Mayor Bloomberg. While some commentators suggested that Mayor Bloomberg's agenda should not have been advocated by the corporation counsel through the final hour of the mayor's tenure, in my view the last days of the administration were no different from the previous 12 years—my office and I had a client to serve, and it was our obligation to advance persuasive legal arguments on behalf of the present mayor.[31]

While the final decisions on litigation settlements, and whether or not to take positions that may not be in the government's long-term interests, should be made by the elected executive, not by the government lawyer, it does not follow that ... the attorney general, corporation counsel or city attorney must always do the executive's bidding.

Let me add that while I personally would have preferred for the now changed Bloomberg policies to have remained in effect, it was perfectly proper, when the new mayor took office, for my very able successor, Zachary Carter, to signal a "U-turn" and announce, as he did, that it is "the prerogative of the mayor and of the city to assert legal positions" even if this requires changing tack. [32]

The Ethical Limits on the Chief Government Lawyer

While the final decisions on litigation settlements, and whether or not to take positions that may not be in the government's long-term interests, should be made by the elected executive, not by the government lawyer, it does not follow that whatever the elected executive wants, he or she should get, or that the attorney general, corporation counsel or city attorney must always do the executive's bidding. As discussed earlier, the chief government lawyer has an overriding duty to represent the government institution and to see that its laws are defended. That obligation trumps his or her duty to the elected official.

This is best illustrated through one of the most difficult decisions I faced at the Corporation Counsel's Office. In 2005, a State Supreme Court justice declared the New York State Domestic Relations Law's prohibition of gay marriage unconstitutional.[33] Accordingly, she ordered the city clerk, represented by the corporation counsel, to issue a marriage license to the plaintiffs, a gay couple. Four other state Supreme Court justices had reached the opposite legal conclusion and had upheld the law's gay marriage ban.[34] The mayor strongly favored legalizing gay marriage, as did I.[35] Given the court's finding of unconstitutionality, I was faced with a dilemma. Should I file a notice of appeal and invoke the city's automatic right to a stay, which would have had the effect of preventing the decision from going into effect until the appeal was decided? Or instead, should I have "done justice" and declined to invoke a stay, which would have meant that the trial court ruling would go into effect allowing gay couples to be married even before the

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appellate courts had had the opportunity to determine the law's constitutionality? If the mayor, and I suspect the city council, favored gay marriage and wanted the ban to be nullified, how could I, as their lawyer, invoke the city's automatic right to a stay? [36]

In fact, I did invoke the stay, and ultimately the New York Court of Appeals, in a 4-2 decision, upheld the constitutionality of the gay marriage ban. [37] I invoked the stay and pursued the appeal, even though the mayor wanted the ban voided, because in my view I had been sworn to uphold the laws of the State of New York.[38] Until the Court of Appeals had declared the law unconstitutional, it was my obligation to defend it. I was very troubled by the possibility that Michael Cardozo, by failing to invoke a stay, would, as a practical matter, have arrogated to himself the unilateral power to nullify a long-standing and duly enacted state law, the constitutionality of which was clearly subject to debate.

Let me pause here to contrast my position with that of Attorney General Holder in the *Windsor* Defense of Marriage Act (DOMA) case. The attorney general took the position then, the basis for which he articulated in a recent speech, that in "exceptional circumstances" government lawyers may at their discretion refuse to defend arguably unconstitutional laws. He argued that:

> Any decisions—at any level—not to defend individual laws must be exceedingly rare. They must be reserved only for exceptional circumstances. And they must never stem merely from policy or political disagreements—hinging instead on firm constitutional grounds. But in general, I believe we must be suspicious of legal classifications based solely on sexual orientation.
> And we must endeavor—in all of our efforts—to uphold and advance the values that once led our forebears to declare unequivocally that all are created equal and entitled to equal opportunity. [39]

Accordingly, the attorney general declined to defend the Defense of Marriage Act before the Supreme Court in *Windsor*. In *Windsor*, Justice Kennedy, writing for the majority, noted the Court's discomfort that the "Executive's failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions has created a procedural dilemma." [40] While a narrow majority of the Court nevertheless reached the merits and declared the law invalid, three dissenting justices concluded the Court lacked jurisdiction to decide the case because no one from the executive branch was defending the law. [41] From a practical standpoint, Attorney General Holder's position nearly deprived the Supreme Court of the opportunity to declare DOMA unconstitutional once and for all.

The potential consequence of a government lawyer's refusal to defend a law was strikingly illustrated in the companion case involving a California state law enacted by referendum that prohibited gay marriage in that state. There the Supreme Court declined to review the lower court's finding of unconstitutionality because, although the proponents of the referendum had sought review, the relevant state officials with the responsibility of defending the validity of state laws agreed that the law was unconsti- tutional and did not appeal.[42] Thus, the lawyers for the State of California, by failing to appeal the lower court's constitutionality ruling, took it upon themselves to void a law, duly enacted by referendum, thereby preventing the courts from resolving the issue.[43]

In my opinion, the failure of Attorney General Holder and the California attorney general to defend the anti-gay marriage laws, and Mr. Holder's recent encouragement to state attorneys general to do the same,[44] was a mistake. Certainly government attorneys do not leave their legal or moral consciences behind when they take their oaths of office, and have the absolute right to disqualify themselves personally from a particular case. They might even have an ethical obligation to do so under Rule 1.7(a)(2), which recognizes a conflict of interest when a lawyer's personal interests (or sympathies and biases) "materially limit[]" the effectiveness of his or her representation and create a risk of punch-pulling. However, it is fundamentally important that government lawyers recognize their special duty to ensure that duly enacted and not clearly unconstitutional laws are adequately defended whenever challenged, so that the courts can review the issue. Such a defense can be accomplished either by the government lawyer's office, that office's hiring of special counsel, or, if the law permits, by another party.

To do otherwise means, as was the case in California, that the government lawyer effectively has the power to abrogate duly enacted legislation. In my view, that is wrong. Moreover, while the decision not to appeal in the California case achieved the immediate policy goal of invalidating the gay marriage law, it prevented the Supreme Court from achieving Attorney General Holder's objective of establishing once and for all "that all measures that distinguish among people based on their sexual orientation must be subjected to a heightened standard of scrutiny."[45] In a recent and related case, the Virginia attorney general took what I believe to be the proper approach when the constitutionality of Virginia's gay marriage ban was challenged in federal court. Although the state attorney general declined to defend the ban himself, two members of the executive branch responsible for granting or denying marriage licenses under the law were entrusted with the responsibility of providing a defense for the statute.[46] This approach is entirely consistent with the duties and responsibilities of the government lawyer and is far preferable to an unchecked policy of discretionary abandonment of duly enacted laws.[47] Moreover, following the rules in such cases creates a firmer foundation for definitive resolution and progress.

The duty to defend a duly enacted law is somewhat similar to the duty a criminal lawyer owes to the defendant he or she represents. While concededly the details of the rights and responsibilities at stake differ in each situation, on a macro level the adversarial system of justice demands unfailing advocacy on both sides of the courtroom. Just as the criminal defendant is entitled to a defense until his or her guilt is proven beyond a reasonable doubt and all appeals are exhausted, so, too, must the government lawyer provide a defense for a law until the highest court

declares it invalid. This analogy, while imperfect, does make clear the centrality of balance to the adversarial system, balance which the government lawyer has a duty to maintain. Maintaining this balance and defending potentially unconstitutional laws is not an obstacle to progress. Rather, it is a necessary component of the adversarial process. Paul E. Wilson, an assistant Kansas attorney general, who was a member of the losing defense team in *Brown v. Board of Education*,[48] has written:

> [T]o me it was clear that the state's position was supported by existing law. The doctrine of separate but equal still controlled . . . . If I had been . . . a member of the Topeka Board of Education, I should have been pleased to vote to repeal the segregation statute and repudiate the public school policy that it permitted. But I was not a legislator, . . . I was a lawyer committed to uphold the law and the adversary process. The appellants were represented by able counsel prepared to attack wherever they sensed vulnerability. As I saw it, the task of counsel for the state was to rebut that effort by bringing to the Court's attention all data and theories favorable to the state's position. . . . Justice Oliver Wendell Holmes is reported to have said that the job of the judge is not to do justice but to play the game according to the rules. The lawyer's task is to inform the court as to what his client believes the rules to be. Whatever the outcome, the lawyer who has been faithful to his responsibility will have made a useful contribution to the result.[49]

Wilson and his colleagues, by defending the "separate but equal" doctrine overruled in *Brown*, contributed to the adversarial process that enabled the Supreme Court to overrule *Plessy v. Ferguson* and the separate but equal doctrine it had created.[50] To have done otherwise might have prevented, as almost occurred in *Windsor*, and did occur in the companion California case, the Court from making a final decision on the law's unconstitutionality.

But this leads to another, related question: what if the elected official thinks that a law is illegal and wants the government lawyer to sue to have it declared invalid? This problem was highlighted when Mayor Bloomberg, late last year, represented by the corporation counsel, brought suit against the city council seeking to have the so-called racial profiling law invalidated.[51] But there was a further complication. In addition to the mayor's suit, two police unions brought a similar suit against New York City asserting the law's illegality.[52]

Given, as I stated, the government lawyers' obligation to defend duly enacted legislation, how could the corporation counsel decline to defend the law's validity in this latter suit? Leaving aside the obvious impossibility of the office arguing, on the one hand, the law's invalidity and on the other hand defending it, what should or could be done? The answer, as alluded to above, is that there was another government entity with a genuine stake in defending the law, here the city council, which could and did intervene in the case—to argue the law's validity and to ensure judicial review of the issue.

Conclusion

Serving as New York City Corporation Counsel is not only an honor but the greatest job any lawyer can ever have. The legal issues facing New York are vast and challenging. The lawyers in the office are terrific. And the opportunities to make a difference in your role as a government lawyer are enormous. But extraordinary pressures come with the job satisfaction. As another former high level government lawyer has observed, "[I]t is harder to be a government attorney than it is to be an attorney in private practice. It's more complicated, it's more challenging, the environment is far more rigorous. You live in a world, in a fish bowl-like world, where public scrutiny is intense."[53]

> You cannot be afraid to call them as you see them. You have to be able to tell the policy makers your views, and not be afraid to say a proposed course of conduct may be illegal or in any event unwise. But in the end, I believe the ethical rules you need to observe are no different whether you are a private or public lawyer—at least outside the special context of criminal prosecution or for attorneys general in certain respects. At the same time, you must remember that you have a duty to ensure that the laws you have been sworn to obey are defended when challenged, and that you cannot unilaterally act to annul them.

The words of Judge Jack Weinstein, who before taking the bench served as the chief government attorney for Nassau County, offer a fitting coda to this article. "[W]hile the government's attorney is a political figure," Judge Weinstein observed, "he operates within a framework of professional and ethical responsibility that limits what he can and should do. *There is no inconsistency between sound ethics and good politics.*" [Emphasis added.] Indeed, Judge Weinstein concluded, "Government service, while it furnishes some of the hardest ethical problems, affords a lawyer many of the greatest opportunities for professional fulfillment."[54]

Notes

1. The author acknowledges with thanks Proskauer Rose Professional Responsibility Counsel Charles Mokriski, Proskauer Associate Jack Browning, and Assistant Corporation Counsel Andrew Fine for their assistance in preparing this article.

2. The New York City Charter provides that the Corporation Counsel "shall be attorney . . . for the city and every agency thereof... ." New York, N.Y., Charter ch. 17, § 394 (2012). *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. f (2000) ("A lawyer for the government is required to act ... in a manner reasonably calculated to advance the governmental client's lawful objectives and with reasonable competence and diligence. Those objectives are normally defined by authorized officers of the governmental client acting within constitutional, statutory, and other legal limits."). See also Frederick A.O. Schwarz, Jr., *Lawyers for Government Have Unique Responsibilities and Opportunities to Influence Public Policy*, 53 N.Y. L. SCH. L. REV. 375, 377 (2008) ("For all government lawyers, the [client] is always, it seems to me, the overall greater governmental entity that the lawyer serves: the United States, the state, or for Corporation Counsels, 'the city'"); Jeffrey D. Friedlander, *The Independence of the Law Department*, 53 N.Y. L. SCH. L. REV.479, 482, 487 (2008) ("It is the Law Department that determines the position of the city in litigation.... The ability of the Law Department both to defend the validity of local laws and at

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times to challenge them—indeed, maintaining the office's independence and authority in interpreting the Charter and advising our clients in the making of city policy—requires the office to demonstrate the qualities of competence, integrity, and what I call 'institutional loyalty.'").

3. *See also* N.Y. RULES OF PROF'L CONDUCT R. 1.13(a) (2009).

4. "Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority." MODEL RULES OF PROF'L CONDUCT pmbl. 18 (2013).

5. *See generally* Robert P. Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 FED. B.J. 61 (1978); *see also* Michael J. Glennon, *Government Lawyering: Who's the Client? Legislative Lawyering Through the Rear-View Mirror*, 61 LAW & CONTEMP. PROBS. 21, 27 (1998) ("In one sense, I always viewed the client as the Chairman [of the Senate Foreign Relations Committee] ... I never undertook any activity at odds with what I knew to be the Chairman's position, or even what I thought might be the Chairman's position."); Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1298 (1987) ("[Q]uestions of intra-branch conflicts can be subtle and complex, but in principle their answer is easy: the attorney's duties run to the officer who has the power of decision over the issue."); Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 155, 158 (1966) ("The chief government law officer must and should attempt to please some politicians: he is, by virtue of his position, a political or policy-making figure, a member of a government administration which achieved office by a political-governmental program.").

—Model Rules of Prof'l Conduct R. 1.2 (2013).

—*See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.1 (2013).

8. "[L]awyers under the supervision of [government law] officers may be authorized to represent several government agencies in intergovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients." MODEL RULES OF PROF'L CONDUCT pmbl. 18 (2013); *see also* N.Y. RULES OF PROF'L CONDUCT pmbl. 10 (2009).

9. Cahn v. Town of Huntington, 29 N.Y.2d 451, 456 (1972) (holding that the Planning Board of the Town of Huntington could retain the services of outside council in litigation against the Town Board of Huntington because the town attorney could not represent both sides in the litigation and the "only possible recourse for the [Town] Planning Board was to employ special counsel.").

10. Eric H. Holder, Att'y General, Remarks as Prepared for Delivery at the National Association of Attorneys General Winter Meeting (Feb. 25, 2014), transcript *available at* http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-1402251.html

11. *See* Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 813-35, 844-45 (2000) ("Just as the public prosecutor under the 'do justice' maxim owes a duty to the defendant to work towards a substantively fair outcome to the proceedings, so too does the civil government litigator owe a duty of substantive fairness to the defendants ..."); Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation*, 9 WIDENER J. PUB. L. 235, 280 (2000) ("[S]urely the question of whether government lawyers have a duty to 'seek justice' is sufficiently important for them to give the issue serious consideration, before they reflexively assume the mantle of the zealous advocate.").

12. D'Amico v. Bd. Of Med. Exam'rs, 11 Cal. 3d 1, 14-15 (1974). The California constitution also requires the attorney general to assist district attorneys when "required by the public interest." CAL. CONST. art. V, § 13. *See also* N.Y. EXEC. LAW § 63(8) ("Whenever in his judgment the public interest requires it, the attorney–general may ... inquire into matters concerning the public peace, public safety and public justice.").

13. This does not mean, however, that the state attorney general can neglect his or her responsibility to uphold the laws of the state he or she represents. Indeed, the California state constitution also states that "[i]t shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced." CAL. CONST. art. V, § 13.

14. It is worth noting that the New York City Charter, in setting out the powers and duties of the corporation counsel, does not mention the public interest at all. New York, N.Y., Charter ch. 17, § 394 (2012). See also Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 1013 (1991) ("The intrinsically different nature of the government client cannot alone justify a departure from the traditional duty of zealous advocacy. Indeed, the opposite may well be true."); Miller, *supra* note 5, at 1294 ("Despite its surface plausibility, the notion that government attorneys represent some transcendental 'public interest' is, I believe, incoherent."); William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 HOWARD L.J. 539, 569 (1986) ("The public interest approach ... leads to a government of lawyers, not of laws, a result as objectionable as a government of people, not of law.").

15. MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 9 (2013); *see also* N.Y. RULES OF PROF'L CONDUCT R. 1.13 cmt. 1 (2009) ("The duties defined in this Rule apply to governmental organizations.").

16. MODEL RULES OF PROF'L CONDUCT pmbl. 2, R. 1.3 cmt. 1 (2013); *see also* N.Y. RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2009) ("A lawyer should pursue a matter on behalf of a client ... and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.").

17. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2013); *see also* N.Y. RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

18. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-14 (1980) ("A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair.... A government lawyer in a civil action... has the *responsibility to seek justice and to develop a full and fair record,* and he should not use his position or the economic power of the government to *harass parties or to bring about unjust settlements or results.*") (emphasis added). The New York Bar has recognized this issue, but has not weighed in one way or the other: "Whether a government lawyer may have an ethical obligation to identify and seek a substantively 'just' result in a particular case, even where that may be at odds with the agency's legally authorized litigation position, is beyond the scope of this opinion." N.Y. City Bar Ass'n Comm. on Prof'l & Judicial Ethics, Formal Op. 2004-03 (2004).

19. J. David Goodman, *Bystanders Shot by the Police Face an Uphill Fight to Win Lawsuits*, N.Y. TIMES, Nov. 10, 2013, at A19.

20. *See In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520 (S.D.N.Y. 2006).

21. The Preamble to the Model Rules of Professional Conduct recognizes that a government lawyer may have more discretion than his private counterpart in making settlement decisions, noting that "[u] nder various legal provisions, including constitutional, statutory and common law, the responsibil-ities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide whether to agree to a settlement or to appeal from an adverse judgment." MODEL RULES OF PROF'L CONDUCT pmbl. 18.

22. Weinstein, *supra* note 5, at 170. *See also* Lanctot, *supra* note 14, at 985 ("The central principle that purportedly underlies the adversary system is that 'justice' can best be achieved by the battle of two zealous advocates before a neutral decision maker. Allowing a government lawyer to sit in judgment of the justice of a client's cause would be inconsistent with the fundamental principles underlying the adversary system. If the adversary system is truly the best way to achieve fair results in court, a proposition that is dubious to many, then presumably the government lawyer should zealously advance the agency client's goals in court in the same way that a private practitioner would.").

23. Johnson v. City of New York, 15 N.Y.3d 676 (2010).

24. N.Y. UNCONSOL. LAW SDEA § 9193 (McKinney 2006).

25. Lanctot, *supra* note 14, at 985 ("The ethical codes therefore do not impose a duty on the government lawyer to behave differently than a private lawyer."). As British Lord Chancellor Henry Brougham declared in 1820, "[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client." 2 TRIAL OF QUEEN CAROLINE 8 (1821).

26. *Greater N.Y. Taxi Ass'n v. New York*, 21 N.Y.3d 289, 301 (2013). *See* Richard Briffault, Closing Remarks at the Fordham Urban Law Journal Symposium: The Bloomberg's Legal Legacy (Dec. 4, 2012), *available at* http://urbanlawjournal.com/bloomberg-symposium-closing-remarks/ ("[A]s a teacher of local government law, and a believer in the importance of home rule, I find it a little unsettling when New York City's Mayor argues before the state courts that a state law preempts a City initiative. It is even more unsettling when, in order to win a policy dispute, the Mayor asks the state to turn what had long been a field of City regulation into a matter of state concern and a subject for state legislative determination. Once a state has taken over a subject, it may be hard for the City—and for future Mayors—to get it back. Perhaps naively, I think the Mayor ought to be fighting to expand City power, not seeking laws and court rulings that would limit it.").

27. *See, e.g.*, Benjamin v. Fraser, 264 F.3d 175 (2d Cir. 2001) (upholding consent decree pursuant to prison conditions).

28. *See* Schwarz, *supra* note 2, at 391-93.

29. *Id.* at 377-78 ("That a chief government lawyer represents the governmental entity and not the chief executive does not, of course, mean that the lawyer can wander off and make on his or her own all sorts of policy judgments").

30. *See, e.g.*, Floyd v. City of New York, 813 F. Supp. 2d 457 (S.D.N.Y. 2011). Although the De Blasio administration clearly had a right to advance its own litigation agenda, individual corporation counsel lawyers, as an ethical matter, might be precluded from switching position. Note, *Professional Ethics in Government Side-Switching*, 96 HARV. L. REV. 1914 (1983).

31. *See* James C. McKinley Jr. & Benjamin Weiser, *In Final Weeks, a Push to Put Bloomberg's Stamp on Major Legal Cases*, N.Y. TIMES, Dec. 26, 2013, at A22.

32. *See* J. David Goodman, *De Blasio Drops Challenge to Law on Police Profiling*, N.Y. TIMES, Mar. 6, 2014, at A25.

33. Hernandez v. Robles, 7 Misc. 3d 459 (N.Y. Sup. Ct. 2005), *rev'd*, 26 A.D.3d 98 (1st Dep't 2005), *aff'd*, 7 N.Y.3d 338 (2006).

34. Kane v. Marsolais, 808 N.Y.S.2d 566 (N.Y App. Div. 2006), aff'd sub nom. Hernandez v. Robles, 7 N.Y.3d 338 (2006); Samuels v. N.Y. State Dep't of Health, 811 N.Y.S.2d 136 (N.Y App. Div. 2005), aff'd sub nom. Hernandez v. Robles, 7 N.Y.3d 338 (2006); Seymour v. Holcomb, 790 N.Y.S.2d 858 (N.Y. Sup. Ct. 2005), aff'd 811 N.Y.S.2d 134 (3rd Dep't 2006), aff'd sub nom. Hernandez v. Robles, 7 N.Y.3d 338 (2006). Shields v. Madigan, 5 Misc. 3d 901 (N.Y. Sup. Ct. 2004), aff'd, 2006 N.Y. App. Div. LEXIS 11425 (2d Dep't Sept. 26, 2006).

35. In fact, eight years earlier, as President of the City Bar Association, I had approved a report that argued the law's gay marriage ban was unconstitutional. *Same-Sex Marriage in New York*, 52 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 343 (1997).

36. In a somewhat related context, I had defended a law, which the city council had passed over the mayor's veto, that banned the use of metal baseball bats in high school games. *See* Ray Rivera, *Council Bans Metal Bats in High School*, N.Y. TIMES, Mar. 15, 2007, at B2, *available at* http://www.nytimes.com/ 2007/03/15/ nyregion/15council.html?_r=0.

37. *Hernandez v. Robles*, 7 N.Y.3d 338 (2006).

38. It was my duty as Corporation Counsel of New York to uphold and defend the laws of New York City and of New York State. Therefore, it was not possible for me to decline to defend the gay marriage ban on the grounds that it was a state, rather than a city, statute.

39. Holder, *supra* note 10.

40. United States v. Windsor, 133 S. Ct. 2675, 2688 (U.S. 2013).

41. Justice Scalia wrote for three dissenting Justices: "The final sentence of the Solicitor General's brief on the merits

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[filed on behalf of the government appellants] reads: 'For the foregoing reasons, the judgment of the court of appeals *should be affirmed*.' That will not cure the Government's injury, but carve it into stone. One could spend many fruitless afternoons ransacking our library for any other petitioner's brief seeking an affirmance of the judgment against it. What the petitioner United States asks us to do in the case before us is exactly what the respondent Windsor asks us to do: not to provide relief from the judgment below but to say that that judgment was correct ... Since both parties agreed with the judgment of the District Court for the Southern District of New York, the suit should have ended there ... We have never before agreed to speak—to 'say what the law is'—where there is no controversy before us." *Windsor*, 133 S. Ct. at 2699-700 (emphasis in the original) (citations and footnotes omitted).

42. Hollingsworth v. Perry, 133 S. Ct. 2652 (U.S. 2013).

43. This approach seems to conflict with California law. Specifically, the California constitution states that "[i]t shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced." CAL. CONST. art. V, § 13. In addition, the California Supreme Court had previously ruled that the attorney general "has the duty to defend all cases in which the state or one of its officers is a party." *D'Amico*, 11 Cal. 3d at 15. That court had also held that in "the exceptional case the Attorney General, recognizing that his paramount duty to represent the public interest cannot be discharged without conflict, may consent to the employment of special counsel by a state agency or officer." *Id.* at 14. No such special counsel was appointed in the California gay marriage case.

44. Holder, *supra* note 10.

45. *Id.*

46. Bostic v. Rainey, 970 F. Supp. 2d 456, 468 (E.D. Va. 2014) ("Defendant Schaefer is a proper defendant here because he is a city official responsible for issuing and denying marriage licenses and recording marriages .... Defendant Rainey is a proper defendant because she is a city official responsible for providing forms for marriage certificates.").

47. As other challenges to various state laws barring gay marriage work their way through district courts, a variety of approaches to their defense have emerged. In Indiana, Utah, Oklahoma and Texas, government officers are defending the laws themselves. The Governor of Kentucky hired a private firm to defend its law after the state attorney general refused to do so. Brett Barrouquere, *Kentucky Gay Marriage Appeal Will be Handled by Ashland Firm Under $100K Contract*, THE COURIER-JOURNAL (Mar. 13, 2014),http://www.courier-journal.com/story/news/local/2014/03/13/Kentucky-gay-marriage-appealwill-be-handled-Ashland-firm-under-100K-contract/6388039. Outside the context of gay marriage, the Ohio Attorney General advanced a novel approach: file briefs on both sides. The Attorney General's office filed one brief to defend an Ohio law that makes it a crime to knowingly lie during an election campaign and another brief arguing that the law violates the First Amendment. The Attorney General argued that his dual constitutional obligations—to uphold the laws of Ohio and to protect the rights of its citizens—compelled his decision. Adam Liptak, *In Ohio, a Law Bans Lying in Elections. Justices and Jesters Alike Get a Say*, N.Y. TIMES, Mar. 25, 2014, at A16.

48. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

49. PAUL E. WILSON, A TIME TO LOSE: REPRESENTING KANSAS IN BROWN V. BOARD OF EDUCATION 100-01 (Univ. Press of Kan. ed. 1995).

50. Plessy v. Ferguson, 163 U.S. 537 (1896).

51. Mayor of New York v. City Council of New York, 451543/2013 (N.Y. Sup. Ct. 2013).

52. Patrolmen's Benevolent Ass'n of N.Y. v. City Council of New York, 654550/2013 (N.Y. Sup. Ct. 2013). Mayor De Blasio subsequently reversed Mayor Bloomberg's position and withdrew the office's challenge to the racial profiling law. J. David Goodman, *De Blasio Drops Challenge to Law on Police Profiling*, N.Y. TIMES, Mar. 6, 2014, at A25.

53. Henry M. Greenberg, *A Principled Discussion of Professionalism: Lawyer Independence in Practice*, 6 N.Y. JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW 21 (2013).

54. Weinstein, *supra* note 5, at 172 (emphasis added). ML

Eminent Domain *Cont'd from page 17*

revealed no concrete development plans. Two months after its opinion in *Valsamaki*, the Maryland Court of Appeals issued, *Sapero v. Mayor and City Council of Baltimore*, 398 Md. 317 (2007), emphasizing that the CODE OF PUBLIC LOCAL LAWS OF BALTIMORE CITY, §21-16 requires that, in order to use quick-take condemnation, the City of Baltimore must demonstrate why, because of some exigency or emergency, it is necessary and in the public interest for the City to take immediate possession of a particular property. *Sapero* also went on to emphasize the need to make certain that the quick take process did not abridge a property owners' fundamental rights and that the due process requirements of the Maryland Real Property Article had to be followed. *Sapero, supra.*

A & E North, LLC vs. Mayor & City Council of Baltimore City (2013)

Last year, the *A & E North, LLC* case arose from a regular condemnation action filed in the Circuit Court for Baltimore City to acquire the former Parkway Theatre. The theatre is an historically and architecturally significant structure. At the time of the lower court proceedings, the A & E North, LLC ("Owner") stored a significant amount of personal property in the theatre. Prior to trial, the Owner requested the lower court to postpone the scheduled trial date and to order the City to pay the Owner's expenses to move the personal property from the theatre to another location. The lower court denied both requests.

At trial, the jury took a view of the property, heard testimony from the City's sole witness (an appraiser), and awarded damages in an amount consistent with the City's evidence as to value. The Owner appealed initially to the Court of Special Appeals (the intermediate appellate court) and subsequently to the Court of Appeals. Both courts sustained the lower court's ruling, holding that an owner challenging the right to take is not entitled to relocation benefits, and that he was not a displaced person under the statute.

A&E North, LLC v. Mayor and City Council of Baltimore, 427 Md. 605 (2013).

Makowski vs. Mayor and City Council of Baltimore (2014)

In a case decided in June of this year, the property involved was one of 150 properties in a square block that the City of Baltimore set out to acquire either through negotiated sales or regular condemnation for a redevelopment project as part of the East Baltimore Development Initiative (EBDI). To acquire the property, the City of Baltimore initially filed a regular condemnation case. The commercial property had been rented as a church. A year had passed, and all of the other properties had been acquired. The church tenant had been relocated and the city continued to pay rent to the owner. The City converted the regular condemnation case to a quick take because of the time that had elapsed since the filing of the case and the urgency to proceed with the project.

The owner challenged the quick take action. At a hearing on the challenge, the Circuit Court for Baltimore City granted the City's petition for immediate possession and title. Upon direct appeal to the Court of Appeals,[12] the Court unanimously concluded that the evidence was sufficient to support the trial court's finding that the property owner was a "hold out" and that the City's quick take action was warranted. *Edward J. Makowski v. Mayor and City Council of Baltimore*, 2014 WL 2853818 (June 24, 2014).

Conclusions:

What the Future Holds-Practice Pointers and Policy Considerations

Focusing on Maryland law with reference to trends in other states, this paper merely scratches the surface regarding the issues involved in an eminent domain practice representing governmental clients/agencies. Basic constitutional standards require that no property be taken without just compensation for a "public purpose," through a fair process which requires notice and opportunity to be heard. Even the most supportive court system requires a legislative process providing authority, a well thought-out plan and a clear process when subdivisions seek to acquire property through eminent domain. While we have raised several issues, our advice to overcome the charges of eminent domain abuse, and to facilitate government's redevelopment of blighted and/or undeveloped areas, is to make certain that:

1. Legislative authorization, which by its very nature includes notice and opportunity to be heard, should be current.
2. Property should be acquired pursuant to a well-reasoned plan that is supported by a legitimate legislative process.
3. Public purpose should be grounded in public benefit, if not public use.
4. Relocation should assist in making the property owner whole.
5. Valuation of the property is best achieved through a mediated process. It is always better to have the parties decide the valuation instead of a disinterested person.

1. *See generally* "50 State Report Card Tracking Eminent Domain Reform Legislation since Kelo," Castle Coalition, August 2007; "The Condemnation Landscape Across the Country Post Kelo–A Maryland Perspective," Maryland State Bar Association, Real Property Section, Ground Rules, Winter 2007, James L. Thompson and Joseph P. Suntum, Miller, Miller & Canby, Chtd.; "Eminent Domain," John C. Murphy, Maryland Bar Journal, November/December 2008.
2. *See* "Public Power, Private Gain–A Five-Year, State by State Report Examining the Abuse of Eminent Domain," by Dana Berliner, Castle Coalition–Citizens Fighting Eminent Domain Abuse, April 2003.
3. *See* "The Legitimacy and (Un)Fairness of Public Land Banking, The Unarticulated Issues of Eminent Domain, "Jonathan Cheng, Maryland Legal History Publications, August 2007.
4. See on line document at msa.maryland.gov/msa/mdmanual.
5. *See* on line document at msa.maryland.gov/msa/mdmanual.
6. *Id.*
7. Thompson and Castle Coalition publications, *supra*.
8. *Id.*
9. *See* Maryland State Bar and Castle Coalition publications, *supra*.
10. *See* "Eminent Domain Bill Passed in Maryland Senate," *Sunpapers*, Baltimore, Maryland, April 3, 2007.
11. *See* Chapter 305 (Senate Bill 3), "Real Property–Condemnation–Procedures and Compensation," Approved by the Governor, May 8, 2007 (by adding to Article–Real Property Section 12-105.1 and 12-205.1, ANNOTATED CODE OF MARYLAND (2003 Replacement Volume and 2006 Supplement); By repealing and reenacting with amendments, Article–Real Property, Section 12-202, 12-204 and 12-205 ANNOTATED CODE OF MARYLAND (2003 Replacement Volume and 2006 Supplement).
12. The *Code of Public Local Laws of Baltimore City*, §21-16 provides for an immediate right of appeal to the Court of Appeal of Maryland from the decision of the trial court in a quick take condemnation case. **M**

Code Enforcement *Cont'd from page 19*

at the end of rainbows by having as many establishments and machines as possible. Could you imagine your downtown storefronts all taken up by video gaming cafes? Unfortunately for my community, our downtown has many vacant storefronts where this could be a reality if these types of businesses are allowed to open. Additionally, if a significant number of these types of businesses were to open, fraternal and veterans' organizations could see the result they were trying to avoid with the gaming revenue, namely closing their doors. And, we could also realistically see a decline in locally-owned taverns due to loss of customers and revenue.

One aspect of the State statute – a provision entitled "undue economic concentration" – could impact these possibilities. The State would look at whether this type of requested operation (video gaming cafes) would impede or suppress competition, adversely impact the economic stability of the video gaming industry, and/or would negatively impact the purposes of the State video gaming act. The potential problem with this posture is that it relies on the State to follow through on this examination prior to issuing licenses for these sorts of gaming businesses. Given the State's hesitancy to expand casinos, I would hope they would involve themselves in discussions about these types of businesses. At a minimum, municipalities should discuss the potential impact video gaming cafes would have and determine the need for additional licensing, regulations or other ordinances that could impede

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their proliferation or minimize their potential negative effects. I think this could be one of those circumstances where unrestrained competition, if allowed to be the driving force, may have a negative impact on existing local businesses.

So, for us the question is: once the door to video gaming is open, how far should it get pushed? ML

Ordinances *Cont'd from page 26*

The Michigan Supreme Court acknowledged that the Bonners had "a significant property interest within the protection of the Due Process Clause." However, the court's substantive due process analysis turned on the proposition that *property owners do not have a fundamental right to repair a structure that has been declared unsafe by a municipality*. Accordingly, governmental intrusion into that (non-fundamental) right only needs to be reasonably related to a legitimate governmental interest. Under this standard, the Brighton ordinance was not facially deficient; the "unreasonable-to-repair" presumption was reasonably related to the City's legitimate governmental interest in preserving the health and welfare of Brighton residents, reducing crime and maintaining property values. Demolition of an unsafe nuisance was not an arbitrary act; it was a legitimate exercise of the City's police power.

The Michigan Supreme Court also found adequate procedural due process in the Brighton ordinance scheme. While the Bonners had argued that BCO § 18-59 failed to give property owners the procedural protection of a repair option before demolition, the court stated that due process merely requires impartial "adjudication . . . preceded by notice and an opportunity to be heard . . . granted at a meaningful time and in a meaningful manner" before the deprivation of a property interest. The court held that procedural due process "was satisfied by giving plaintiffs the right to an appeal before the city council and the opportunity to appeal that decision to the circuit court."

Bonner v. City of Brighton, no. 146520 (Mich. Apr. 24, 2014). ML

Inside Canada *Cont'd from page 20*

Implications-

Together, *Wainfleet Wind Energy Inc. v Wainfleet (Township)*, 2013 ONSC 2194, *Suncor Energy Products v. Town of Plympton-Wyoming*, 2014 ONSC 2934 and *East Durham Wind Inc.*, are strong judicial authority for the proposition that provincially approved renewable energy projects may be constructed despite municipal opposition.

City of Burnaby- Kinder Morgan At Odds Over Pipeline.

The Supreme Court of British Columbia has rejected the City of Burnaby's bid for a temporary injunction to stop survey work for an oil pipeline expansion project proposed by Kinder Morgan.

Kinder Morgan is proposing a $5.4 billion project to triple the capacity of its Trans Mountain pipeline, which currently carries oil products to a terminal in Burnaby from Alberta. The City of Burnaby has expressed its opposition with such expansion, and has attempted to block Kinder Morgan's survey work on Burnaby Mountain. The City of Burnaby alleges that Kinder Morgan violated municipal bylaws that protect trees and parkland, when Kinder Morgan workers toppled 13 trees, although Kinder Morgan indicated it was only seven trees. The City of Burnaby filed with the British Columbia Supreme Court to issue an injunction on the survey.

The City of Burnaby's action follows a previously upheld decision by the National Energy Board of Canada last month, allowing Kinder Morgan to access the Burnaby Mountain land under federal law. The National Energy Board Act stipulates that a company may enter into the land of any person that lies on the intended route to survey or otherwise ascertain whether the land is suitable. There is no requirement for companies to reach agreement with landowners, the Crown, or otherwise, before exercising the right to access land. Therefore, the National Energy Board held that Kinder Morgan does not need the City of Burnaby's permission to access Burnaby Mountain and can proceed with necessary studies of its preferred pipeline route through the mountain without the City's consent. In response to this holding, Kinder Morgan has filed a motion asking the National Energy Board to forbid the City of Burnaby from obstructing its crew. This decision is imminent.

On September 17, the British Columbia Supreme Court judge dismissed the application for an injunction against the Kinder Morgan survey crews on Burnaby Mountain. At the time of this publication, Judge Brenda Brown had not yet given her reasons for dismissing the injunction. ML

Federal *Cont'd from page 21*

employees was not required under the PDA even though it was offered to employees injured on the job.[15] The court reasoned that it was not Congress' intent to provide pregnant employees with greater rights than non-pregnant employees, which would be the result if the court adopted the employee's rationale.[16]

The employee in *Young* appealed to the Supreme Court and certiorari was granted on July 1, 2014. Oral arguments will be heard in December.

The EEOC's Guidance Conflicts with Fourth Circuit's Holding and Creates Controversy

As noted above, the timing of the Guidance is controversial given the impending Supreme Court decision on the subject, and in addition to that, some of the substance of the Guidance has garnered criticism. In fact, two EEOC Commissioners provided separate written dissents to the Guidance.[17] One point of contention is that according to the Guidance, Title VII requires that employers treat pregnant workers the same for all employment related purposes as other non-pregnant individuals who are similar in their ability or inability to work.[18] The Guidance therefore reasons that if an employer provides an accommodation to an employee with a disability, a pregnant employee who has similar limitations would be entitled to the same accommodation, regardless of whether the pregnant employee is actually disabled for ADA purposes.[19] This conclusion was one of the central points of criticism by Commissioner Victoria Lipnic in her dissent:

> The Guidance takes the novel position that under the language of the PDA, a pregnant worker is, as a practical matter, entitled to "reasonable accommodation" as that term is defined by the Americans with Disabilities Act ("ADA"). No federal Court of Appeals has adopted this position; indeed, those which have addressed the question have rejected it. Moreover, the Pregnancy Guidance

states that non-pregnant workers receiving such reasonable accommodations are the appropriate comparators for purposes of PDA compliance. This, too, is a position rejected by the majority of courts which have considered it. These positions represent a dramatic departure from the Commission's prior position, and perhaps more important, contravene the statutory language of the PDA.[20]

Although acknowledging that the amendments to the ADA broadened the ADA's coverage, Commissioner Lipnic continues her criticism of the Guidance's position that the PDA requires employers to provide the same accommodations for pregnant and non-pregnant employees, stating she is "hard-pressed to conclude that the ADAAA somehow 'back-doored' reasonable accommodation into the PDA."[21] On this point, she notes:

> In fact, the Commission's position for years has been consistent: a routine pregnancy is not a covered disability under the ADA (or ADAAA). While acknowledging that the ADAAA extends the ADA to cover a broader range of pregnancy-related impairments, the Commission has never in regulations or sub-regulatory guidance suggested that a routine pregnancy which is *not* a disability somehow entitles a pregnant worker to rights identical to those who have covered disabilities under the ADA. In light of this clear and consistent precedent, and the potential for confusion if contradicted, the Commission is ill-advised to take this position now.[22]

Another issue critics point to is the Guidance's position regarding light duty for pregnant workers. The Guidance specifically notes that a policy that only provides light duty for employees injured on the job would run afoul of the PDA as it would discriminate against pregnant workers who are similar in their ability or inability to work as the injured worker.[23] This point is contrary to the Fourth Circuit's holding in *Young* and may be mooted by the Supreme Court's decision this fall.

Suggestions for Employers

Until the Supreme Court's decision in *Young*, employers are left with conflicting information from the courts and the EEOC as to how to handle certain situations involving pregnant workers. While the EEOC guidance does not carry with it the force of law, employers should note that any pregnancy discrimination actions brought between now and when *Young* is decided would be subject to that Guidance at the Commission. However, for lawsuits brought in court, the EEOC Guidance is merely that, guidance. That being said, until *Young* provides the definitive rule on this issue, employers would be wise to review their policies and consider offering pregnant employees light duty as an accommodation if it is offered to other employees who are similar in their ability and inability to work.

Notes

1. Young v. United Parcel Service, Inc., 707 F.3d 437 (4th Cir. 2013).
2. EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues, available at: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last accessed on September 25, 2014). This was the EEOC's first guidance on pregnancy discrimination in over thirty years. See EEOC Press Release, available at: http://www.eeoc.gov/eeoc/newsroom/release/7-14-14.cfm (last accessed on September 26, 2014). The EEOC also issued a Question and Answer document and Fact Sheet, available at: http://www.eeoc.gov/laws/guidance/pregnancy_qa.cfm (last accessed on September 25, 2014); http://www.eeoc.gov/eeoc/publications/pregnancy_factsheet.cfm (last accessed on September 25, 2014).
3. *See* EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues, available at: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last accessed on September 25, 2014).
4. *Id.*
5. *Young, Supra.*
6. *Id.* at 439.
7. *Id.* at 439-40.
8. *Id.* at 440.
9. *Id.*
10. *Id* at 440-41.
11. *Id.*
12. *Id.* at 442.
13. *Id.* at 442-43.
14. *Id.* at 445. The PDA provides:
    > The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, ore related medical conditions: and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes...as other persons not so affected but similar in their ability or inability to work. 42 U.S.C. §2000e(k).
15. *Id* at 446-49.
16. *Id.* at 448. For example, the court noted that an employee who injures himself off the job as a volunteer firefighter would not be entitled to the light duty accommodation under the company's policy. Id.
17. *See* Commissioner Constance Barker, Public Statement of Commissioner Constance S. Barker (July 14, 2014), available at: http://op.bna.com/dlrcases.nsf/id/kmgn-9lznp5/$File/barkerdissent.pdf; Commissioner Victoria Lipnic, Statement Of The Honorable Victoria A. Lipnic Commissioner, U.S. Equal Employment Opportunity Commission "Enforcement Guidance On Pregnancy Discrimination And Related Issues," (July 14, 2014) (hereinafter, "Lipnic Dissent"), available at: http://op.bna.com/dlrcases.nsf/id/kmgn-9lznpp/$File/lipnic.pdf.
18. *Id.* On this point, the Guidance states:
    > ...consistent with the statutory language, a pregnant worker with a work restriction who challenges a denial of light duty should be able to establish a prima facie case of discrimination...by identifying any other employee who is similar in his or her ability or inability to work and who was treated more favorably, including employees injured on the job and/or covered by the ADA. EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues, available at: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last accessed on September 25, 2014) (emphasis added).
19. *See* EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues, available at: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last accessed on September 25, 2014).
20. *See* Lipnic Dissent
21. *Id.*
22. *Id.*
23. EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues, available at: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last accessed on September 25, 2014). ML

The ordinance at issue in the First Circuit was meant to "combat the ill effects of aggressive solicitation and prohibits continuing to solicit from a person *after the person has given a negative response to such solicitation . . .* or soliciting someone in a manner . . . likely to cause a reasonable person to fear immediate bodily harm." (emphasis in original) (internal citations omitted). Thus, the majority got it wrong because "what was criminal in the City of Springfield is legal in the First Circuit."

In Springfield's situation, the dissent noted, a police officer enforcing this ordinance must listen and determine what the speaker says in order to determine a violation: was it a request for money or other gratuity? Was it a request for immediate money or future donations? Was it a request for a personal donation or a commercial one? For the dissent an "officer must listen to and understand the speech to determine if the ordinance has been violated [and that] means that the ordinance is content-based, unlike those laws which can be imposed based merely on the volume, location, or conduct accompanying the speech." Such a content-based law would not survive strict scrutiny.

***Don Norton v. City of Springfield*, No. 13-3581 (7th Cir. Sept. 25, 2014)**

Qualified Immunity: Absence of Specific Precedent in State-Created Danger Case does not prevent "Clearly Established" Finding

Where law enforcement officers allegedly revealed the identity of a confidential informant to organized crime, resulting in the informant's murder, they cannot avoid a finding that their behavior violated a "clearly established" constitutional right merely because the specific fact pattern had not yet been the subject of a judicial determination.

Frank Lagano became the subject of an organized crime investigation in Bergen County, New Jersey and in 2004 the Bergen County Prosecutor's Office ("BCPO") executed a search warrant for his home. Thereafter, the BCPO charged Lagano with several crimes including racketeering, promoting gambling, criminal usury and conspiracy. Chief of Detectives Michael Mordaga allegedly met with Lagano and instructed him on two occasions to hire a specific attorney, which he promised would make his "legal problems go away." Lagano refused the offers and instead became a confidential informant for the state Attorney General's Office. In 2007 Lagano was shot and killed. His estate claimed the sometime after Lagano became an informant and refused Mordaga's offers the BCPO and Mordaga disclosed his confidential informant status to organized crime figures, resulting in his murder. The estate filed suit against BCPO and Mordaga alleging a due process claim under the state-created danger theory.

The District Court rejected the theories and dismissed the case. The estate appealed.

HELD: The Third Circuit vacated the lower court holding and remanded to the District Court with instructions to apply the standard articulated by the by the Circuit.

DISCUSSION: The Third Circuit addressed the lower court's dismissal on the grounds that neither BCPO nor Mordaga were "persons" under §§ 1983 and 1985. The District Court found BCPO was an arm of the state and Mordaga, as BCPO Chief of Detectives, was a state official – neither of which conferred personhood to them as that term is understood under the applicable federal statutes. The Circuit noted however that local governmental bodies and their officials are "persons" under the statutes when the prosecutors perform administrative functions "unrelated to the duties involved in criminal prosecution." Taking the allegation in the light most favorable to the plaintiff-estate, the Circuit Court noted the complaint showed Mordaga and others within BCPO were not operating as criminal investigators because Mordaga met Logano in his home, advised him to hire a specific attorney, and advised that doing so would eliminate his legal problems. In short, his relationship with Lagano extended beyond that of his official role as the Chief of Detectives, thus making him and BCPO "persons" under §§ 1983 and 1985. Moreover, Mordaga had been sued personally, as well as in his official capacity. The Circuit reversed the lower court on this issue.

As for the novel claim that the defendants violated Logano's due process rights under the state-created danger theory, the Court vacated the lower court holding. To prove a state-created danger claim the plaintiff must show "(1) the harm ultimately caused was foreseeable and fairly direct; (2) a state actor acted with a degree of culpability that shocks the conscience; (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all." (internal citation omitted). Mordaga responded to this claim by asserting qualified immunity, with which the lower court had agreed since "[t]here are no published cases that extend the state created danger right to confidential informants in the Third Circuit[,] . . . it would be unfair to hold that a constitutional right was 'clearly established.'"

The Third Circuit rejected this reasoning. It noted that for nearly two decades the Circuit had established that a state-created danger violates due process and the simple fact that it had not yet been applied "in the context of a confidential informant is not dispositive on the qualified immunity defense." The issue was whether the facts proffered by the estate fell within the theory and whether "it would be clear to a reasonable officer that the alleged disclosure was unlawful under the circumstances." (internal citations omitted). The court declined to provide an opinion the qualified immunity issue, but given the lower court's failure to apply the proper standard, vacated the holding and remanded with the proper standard set forth.

***Estate of Frank P. Lagano v. Bergen County Prosecutor's Office*, No. 13-3232 (3d Cir. Oct. 15, 2014)** ML