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SOME REFLECTIONS ON CONFLICTS BETWEEN GOVERNMENT ATTORNEYS AND CLIENTS*

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Any public attorney responsible for the people's legal business faces unique ethical problems. Disclosure requirements and public expectations place them, like all public officials, under increasing and searching public scrutiny.[1] Conflicts between a practicing gov-

* Based upon a speech delivered to the Annual Seminar of the New York State Attorney General's Staff on November 14, 1984 in Albany, New York, by Jack B. Weinstein. Throughout this paper, the pronoun "I" is used since the views were expressed by the first author listed in this article and were elaborated on and authenticated by footnotes provided in large part by the second named author.

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1. Media attention has recently focused on the alleged failures of former presidential advisor, now United States Attorney General, Edwin Meese, and former vice presidential candidate Geraldine Ferraro to comply with federal disclosure requirements. More serious concern has been raised over the indictment of former Labor Secretary Raymond Donovan, the first issued against a sitting Cabinet member, *see* N.Y. Times, Oct. 2, 1984, at A1, col. 5, and the conviction of Judge Harry Claiborne, the first one of a sitting federal judge. *See* N.Y. Times, Oct. 4, 1984, at A18, col. 1.

ernment attorney and his or her pecuniary involvement in investments or outside employment are also a source of concern.[2] The longstanding and well-documented problem of conflicts of interest facing government attorneys who subsequently enter private practice has never been fully and satisfactorily resolved.[3]

What I want to discuss is a more subtle form of ethics:[4] how shall good men and women act in the life of our great profession, the law? One issue in this broader context is the proper manner in which a government attorney should deal with conflicts between the "cli-

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2. *See, e.g.*, Staff Memorandum of the New York Attorney General's Office Regarding Conflicts of Interest For Employees and Officials Working in the Public Sector (on file in the office of Touro Law Review). *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 8-101(A)(3) (1984).

3. *See, e.g.*, Graceffa, *Ethical Concerns of the Federal Lawyer Upon Entering Private Practice*, 4 W. NEW ENG. L. REV. 199 (1981); Kaufman, *The Former Government Attorney and The Canons of Professional Ethics*, 70 HARV. L. REV. 657 (1957); Comment, *Conflict of Interests Involving Private Practitioners Representing Cities and Counties*, 6 J. LEGAL PROF. 251 (1981); Note, *Attorney's Conflict of Interests: Representation of Interest Adverse to that of Former Client*, 55 B.U.L. REV. 61 (1975). The recent trend appears to be toward favoring a "Chinese Wall" solution. *See, e.g.*, Note, *Government Service and the Chinese Wall: An Accomodation Founded on Practicality*, 52 U. COLO. L. REV. 499 (1981). For a case applying the "Chinese Wall" approach to find no disqualifying conflict, see Greitzer & Locks v. Johns Manville Corp., 710 F.2d 127 (4th Cir. 1982). *Compare* Paul E. Iacono, Inc. v. Humphrey Structural Eng'r, Inc., 722 F.2d 435 (9th Cir. 1983) (firm disqualified because of associate's previous involvement in investigating the matter while working for the National Labor Relations Board).

4. Whatever the source of a theoretical approach to ethics, *see* THE NEW COLUMBIA ENCYCLOPEDIA, 896-97 (4th ed. 1975), we use the term as including "the department of study concerned with the principles of human duty," and "the rules of conduct recognized in certain associations as departments of human life." 3 THE OXFORD ENGLISH DICTIONARY 312 (1961). The subject has fascinated many, both inside and outside government, ready to offer advice and guidance. *See, e.g.*, S. Stanley Kreutzer, Chairman (undated publication), Ethics Resource Center, Inc., 1730 Rhode Island Avenue, N.W., Washington, D.C., 20036, National Mun. League, 9 Public Officials and the Public Trust (Feb. 1979); J. Bernard, of the Institute of Society, Ethics and the Life Science, Revising the United States Senate Code of Ethics, Hastings Center Report (Feb. 1981) (Special Supplement ed. by C. Levine & J. Bermel).

Ethics is often thought of as synonymous with checking such abuses as taking graft, favoring prospective employers with the hope of gain after leaving office, misusing election funds, and the like. *See, e.g., Establishment of a Commission on Ethics in Government: Hearings Before a Subcomm. to Study Concurrent Resol. 21, Before the Comm. on Labor and Public Welfare*, United States Senate, 82d Cong., 1st Sess. 1 (1951) (statement of Sen. Paul H. Douglas); Address by S. Stanley Kreutzer, *A National Ethics Commission: The Public Official and the Public Trust, Conference of State Ethics Officials*, Watergate Hotel, Washington, D.C., Dec. 18, 1974 (copy on file at the office of the Touro Law Review); Millus, *Ethics in Federal Public Service*, 55 N.Y. ST. B.J. 26 (1983). But ethical dilemmas faced by a public lawyer are more subtle than these, for they deal with conflicting duties to the law, clients, the public, and ultimately to his or her own sense of self and the independent role of each of us in assuring fairness and justice wherever we can decently do so.

ent's"[5] position or conduct and his or her own view of the law, the public interest, and morality.[6]

The conflict between those responsible for carrying on government and those who consider the laws unjust is not limited to lawyers and has almost always been with us.[7] When Saul ordered his servants to kill the priests, they refused, but the order was ultimately carried out.[8] When David ordered Joab to have Uriah murdered because he coveted his wife, the evil deed was done by the King's general.[9] Would there have been a difference if Saul and David had King's counsel to advise their client on the law? Watergate suggests not.

The fact that wrongful conduct is omnipresent does not excuse attorneys for the government from addressing their special role. In a sense, the lawyer, along with clergy, teachers, and parents, is the keeper of the modern conscience, with some of the prophets' duties to warn the people of transgressions.

A conflict is readily discerned when an official or department that a lawyer represents insists on a position that seems unfair or not fully supported by existing law. The situation may also arise when the agency, or one of its members, engages in corrupt, illegal, or *sub rosa* practices[10] and the government attorney must decide whether to

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5. One of the central conflicts in this area involves whether the "client" of the government attorney is the government agency or the "people." *See infra* note 25 and accompanying text. In this article, we use the term "client" in its more conventional sense to mean the government agency. We do not, however, endorse the strict view of the role of the government attorney that this definition implies.

6. *See generally* Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 155 (1966) [hereinafter cited as Weinstein]; *see also* Josephson & Pearce, The Ethical Obligations of Public Officer Lawyers When the Interests of Public Officers and Agencies Conflict (Sept. 30, 1984) (unpublished manuscript on file in the office of the Touro Law Review) [hereinafter cited as Josephson & Pearce]. This issue is part of a larger question: why should individuals obey the law? For a provocative discussion of this subject, see Ball, *Obligation: Not to the Law But to the Neighbor*, 18 GA. L. REV. 911 (1984); Greenawalt, *Promise, Benefit, and Need: Ties That Bind Us to the Law*, 18 GA. L. REV. 727 (1984). Recently, "war tax resisters"—those who refuse to pay federal income tax because it supports the defense budget—have been required to comply with government tax subpoenas. *See, e.g.*, United States v. Bassett, No. 84-4998 (E.D.N.Y. filed Dec. 28, 1984). *See also* Weinstein, *On the Teaching of Legal Ethics*, 72 COLUM. L. REV. 452 (1972).

7. *See, e.g.*, J. PRIEST, GOVERNMENTAL AND JUDICIAL ETHICS IN THE BIBLE AND RABBINIC LITERATURE 232 (1980) ("in postbiblical Judaism there was a rather consistent effort on the part of the Sages to mitigate some of the harsh features of the law found in the Bible").

8. 1 *Samuel* 22:17. Doeg the Edomite committed the act. *Id.* at 22:18.

9. 2 *Samuel* 11:14-17. *See, e.g.*, B.F. HERRING, JEWISH ETHICS AND HALAKHAH FOR OUR TIME, SOURCES AND COMMENTARY, 124-48 (1984).

10. *See, e.g.*, City of New York v. Heckler, 578 F. Supp. 1109 (E.D.N.Y.) (outlawing covert policy of Social Security Administration to deny all benefits when claimed disability resulted from mental impairment), *aff'd*, 742 F.2d 729 (2d Cir. 1984); *see also* Weinstein, *Equality and the Law: Social Security Disability Cases in the Federal Courts*, 35 SYRACUSE

disclose it to the public. In a compelling case, the attorney may be afforded an opportunity to temper justice with mercy[11] contrary to the client's policy. Such conflicts pose severe ethical problems in a legal system that is both adversarial and democratic.

Problems arise because, unlike any other attorney, the government attorney is tied to the client, which is the particular agency or branch of government that he or she represents.[12] The government entity that is flouted usually cannot fire its lawyers and they cannot get rid of their client.

At first blush, the government attorney's choices would seem limited to protecting and defending the government's interest as zealously as possible or resigning. But while a conflict may be sometimes so severe as to leave attorneys no alternative but resignation,[13] other choices are usually available. Alternatives exist because of the mixed role of government attorneys. They represent not only the government entity, but also the public.

The point is illustrated by the response of the United States Attorneys for the Southern and Eastern Districts of New York when faced with the government's insistence upon defending all of the recent cutbacks in disability benefits;[14] they refused to comply with their clients' wish that the fisc take precedence over law and justice. In my position as County Attorney for Nassau County,[15] I took a similar view: that under certain circumstances, the government attorney must stand up to his client in the interest of a larger cli-

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L. REV. 897 (1984). Congress recently enacted a law that should ameliorate the problems of the mentally ill who seek Social Security benefits. Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 1794.

11. Weinstein, *Justice and Mercy—Law and Equity*, 28 N.Y.L. SCH. L. REV. 817 (1984) [hereinafter cited as Weinstein, *Justice and Mercy*].

12. *See supra* note 5. Griffin Bell has stated that, in effect, the agencies are "captive clients." Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator or One Among Many?*, 46 FORDHAM L. REV. 1049, 1061 (1978).

13. The Civil Rights Division of the Justice Department has been plagued by numerous resignations under the Reagan Administration. *See* N.Y. Times, June 22, 1984, at A14, col. 3 (discussing conflict between William Bradford Reynold's "mission of limiting federal civil rights jurisdiction and redirecting enforcement actions to fit Reagan Administration policies . . . [and] the goals of many of his subordinates, and not only on the conspicuous issue of busing and quotas").

14. *See* N.Y. Times, Sept. 9, 1984, § 2, at 38, col. 1; *see also* letter from United States Attorney for the Southern District of New York, Rudolph W. Giuliani, to Chief Judge Constance Baker Motley (June 25, 1984) (on file in the office of the Touro Law Review) [hereinafter cited as letter]. The United States Attorney for the Eastern District of New York instituted the same policy quietly and without a press release about the same time. *Cf.* Weinstein, *supra* note 10 (describing steps involved in disability determination and the Administration's recent efforts to reduce disability roles).

15. Judge Weinstein served as Nassau County Attorney from 1963 until 1965.

ent—what the attorney conceives to be the proper service of the law, the public interest, or morality.

This may seem to be, and often is, a somewhat arrogant attitude. Any agency head, legislator or executive officer may well ask, "Who are you to tell me what is right? Could you not be wrong in your judgment?" The answer to the first question is that lawyers for the people have a right to protect the people's interests. The answer to the second is "Yes, I could be wrong and therefore I have taken a humble position of researching the matter thoroughly, considering the alternatives, discussing it with those whose wisdom I trust and then acting." No less than a certified public accountant, the public's lawyer has the ultimate professional responsibility to "call the shots" as he or she sees them.

This obligation to the public includes requiring disclosure of illegal activity. The government attorney, bound as he or she is by the highest ethical standards, must be one of the chief whistle blowers of the government.[16]

Lawyers in elective offices such as that of the New York State Attorney General may ask why independently electing an Attorney General or other official does not resolve this problem altogether. It is true, as a recent scholarly internal memorandum of the New York Attorney General's Office demonstrates, that the Office of the New York State Attorney General "was intended to have significant, independent discretion in the conduct of litigation on behalf of the state and its instrumentalities."[17] The memorandum concludes that the Office's history as well as its common law and statutory underpinnings support the Attorney General's right to disagree with agencies' litigation positions and to exercise independent judgment and discretion in conducting the litigation.

This sound conclusion does not completely resolve the problem I am discussing, except perhaps for the Attorney General himself in the clearest of cases. Attorneys in his Office, in the Office of the

16. Some suggest that whistle blowing to reveal crimes or corruption should be encouraged, except that a clerk for a judge should never reveal confidential information. *See* Abramson, *Should a Clerk Ever Reveal Confidential Information?* 63 JUDICATURE 361 (1980); *see also* Comment, *The Law Clerk's Duty of Confidentiality*, 129 U. PA. L. REV. 1230 (1981) (arguing for law clerk confidentiality based on legal and ethical rationales and setting forth specific guidelines governing the law clerk-judge relationship). My view is that the law clerk should report illegal activity. In my opinion there is no privilege and various state and federal judicial disciplinary statutes require the clerk's testimony.

17. *See* Attorney General's Memorandum, Powers of the Attorney General in the Conduct and Control of Litigation for State Agencies 13 (on file in the office of the Touro Law Review).

Corporation Counsel of the City of New York, or in municipal and state law departments throughout the country may have occasion to disagree with the position that the Attorney General adopts. Or they may, through superior knowledge of an agency's internal workings, discover illegal practices.

In seeking a solution to these problems, I will briefly describe situations in which conflicts between loyalty to the state entity-client and the lawyer's perception of this duty to the public have arisen. Almost anyone in public service could supply many other examples from his or her personal knowledge. After outlining the various conflicts of this kind that may confront the government attorney, I will describe the major criticism levelled against the approach I advocate.

I reject the argument that government attorneys must disavow any use of discretion in ethical matters in order to safeguard democratic representation. Instead, I argue that the statutes and rules governing the ethical obligations of government attorneys support independent ethical decision-making by them. Finding that these resolve some but not all of the possible conflicts, I conclude that a government lawyer must rely in the last analysis upon a blend of conscience and good sense operating against a background of compliance with the Code of Professional Responsibility and other professional rules and traditions.

I. REPRESENTATIVE CONFLICTS BETWEEN THE GOVERNMENT ATTORNEY AND HIS OR HER CLIENT'S INTEREST

Conflicts between what a government attorney views as the public interest, the morally correct position, or the correct interpretation of the law, and the position of the client may arise because of a systematic policy decision or the facts of a particular case. As County Attorney for Nassau County, I frequently experienced the latter kind of conflict.

For example, condemnation cases sometimes presented an ethical dilemma. Shortly after I took office as County Attorney, one of our negotiators presented me with a proposed settlement that was much less than the land's value as indicated by our appraiser's report. The condemnees, an elderly couple who had purchased their property many years before, were not represented by an attorney and had no idea of the extent to which their property had increased in value. In an extensive telephone conversation, I finally convinced them that

they were entitled to much more than they wanted.[18] Yet this approach to the case would seem to be at odds with the view that a government attorney should further his client's interest as zealously as he would a private client's.[19]

In another condemnation situation, the court award seemed too large by several million dollars. The condemnation resolutions adopted by the Board of Supervisors, the local legislative body, and my client were exceedingly and unusually favorable to the condemnee, but there was no evidence of fraud. A reversal on the ground of excessiveness of the award was unlikely. Over the Board of Supervisors' opposition, I utilized a number of procedural devices to overturn the award. After numerous motions and appeals, the case was settled and the county saved a substantial sum.[20] Here, I served the public interest, yet displeased my client; was it correct to achieve this result by procedural tactics where no clear-cut legal authority existed?

Tort cases also present fairness problems. They sometimes involve more complex ethical questions than condemnation cases do because it is more difficult to evaluate injury, causation and negligence objectively. Under my tenure as County Attorney, no case arose in which the government's position was so wrong as to justify refusing to support it. Nassau County was self-insured, and our lawyers took pride in securing low settlements and defendants' verdicts in close cases. In a number of instances, we won dismissals against widows and orphans who, under any sensible system, should have obtained some compensation.[21] Yet we attempted to mitigate the harshness of this result by consistently offering substantial settlement amounts that the plaintiffs declined.

The recent bankruptcy of the First National Bank of Midland, Texas, illustrates another fact-specific conflict in which a government attorney must serve his client while exercising discretion to avoid unfairness. Once large and influential, the bank collapsed under the weight of bad energy loans and turned over most of its assets to the Federal Deposit Insurance Corporation. If agency officials chose to strictly enforce the rules, they could have immediately

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18. *See* Weinstein, *supra* note 6, at 169.

19. *See* Fein, *Promoting the President's Policies Through Legal Advocacy: An Ethical Imperative of the Government Attorney*, 30 FED. B. NEWS & J. 406 (1983) [hereinafter cited as Fein].

20. *See* Weinstein, *supra* note 6, at 169.

21. *Id.* at 170. *Cf.* Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984).

foreclosed on 365 homes, 12 commercial buildings, a million acres of land, and 139 drilling rigs. The result would have been to close 451 businesses and put 6,500 people out of work in the Midland area.[22] The Liquidator in Charge tried to avoid such severe consequences. Yet, as he recently said: "Our responsibility is to collect as quickly as possible to maximize recovery, but we have to temper that with the impact on the community. I am caught in a tug-of-war between my superiors in Washington and the community."[23] Contrast this view with that presented in the current movie "Country." It depicts, in the most heart-rending way, the effect on a farm family of a purely legalistic enforcement of the government's right to call in loans.

A similar dilemma over the government attorney's proper use of discretion to achieve fairness may result when government implements a system-wide policy. Sometimes the solution is not self-evident, such as when Nassau County was sued for its malapportionment. The one person-one vote rule in my view probably applied to local legislative bodies, but I was not able to persuade the local legislative body to comply with this constitutional principle.[24] Ultimately the New York Court of Appeals and the Supreme Court decided the client, not I, was right.[25] Had the matter come to litigation during my tenure, I would have appointed special counsel to defend the position of the Board of Supervisors.

Similarly, the United States Attorney for the Southern District of New York, Rudolph Giuliani, has stated that he will not comply with the Health and Human Services Administration's policy of refusing to honor precedents within the Second Circuit. In other words, he will uphold guidelines set by the Circuit in disability cases even if his client objects.[26] Such courage deserves praise. Its exercise

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22. *See* N.Y. Times, Oct. 14, 1984, § 1, at 1, col. 3.

23. *Id.* at 36, col. 2.

24. *See* Weinstein, *supra* note 6, at 163; *see also* Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 COLUM. L. REV. 21 (1965).

25. *See, e.g.*, Franklin v. Krause, 32 N.Y.2d 234, 298 N.E.2d 68, 344 N.Y.S.2d 885 (1973); Shilbury v. Board of Supervisors of the County of Sullivan, 46 Misc. 2d 837, 260 N.Y.S.2d 931 (Sup. Ct. Spec. T. Sullivan County 1965); *see also* WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964).

26. *See* letter, *supra* note 14. Litigation over the "nonacquiescence" policy is currently pending before Judge Sand in the Southern District of New York. Steiberger v. Heckler, No. 84-1302 (S.D.N.Y. filed Feb. 24, 1984). *See generally* Note, *"Respectful Disagreement": Nonacquiescence by Federal Administrative Agencies and United States Courts of Appeals Precedents*, 18 COLUM. J.L. & SOC. PROBS. 463 (1985) (arguing that nonacquiescence is undesirable in the social security disability context); Note, *Administrative Agency Intracircuit*

poses problems, however, especially in situations where the law is not crystal clear—as it seldom is. Such a conflict, some claim, has existed between implementation of the present Administrations's civil rights policies and Justice Department lawyers schooled in a different view of affirmative action and other controversial issues.[27]

Finally, conflicts over the proper use of discretion in representing the government arise in the criminal context. Prosecutorial discretion is the most prominent example. Largely unreviewable,[28] it serves "both as a check on the harshness of the law and as a safety valve to cope with overloaded dockets."[29] At the same time, prosecutorial discretion implies difficult choices for the prosecutor and requires a refined sense of the interplay between serving the client and promoting fairness. These problems are exacerbated under proposals to provide flat sentences which would reduce the courts' moderating influence on harsh prosecutorial decisions.[30]

All of these situations pose difficulties and often force the government attorney to undertake independent action in the face of opposition. My position has always been that a government attorney should exercise discretion to achieve fairness and, if necessary, stand up to the client. The charge that this view subverts our theory of separation of powers and democratic control of policy by legislative and executive bodies does, it must be conceded, have merit. Yet there is an answer. The necessary exercise of lawyers' discretion is not standardless. Moreover, relevant statutes and regulations support the notion of independent action by government attorneys when confronting ethical dilemmas of the kind I have described.

II. A FALSE DICHOTOMY

Writers in this field pose the problem as presenting a dichotomy between the "autonomy" approach and the "public interest" approach.[31] The former contemplates treating the government agency

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Nonacquiescence, 85 COLUM. L. REV. 582 (1985) (suggesting congressional and judicial responses to unjustified administrative agency nonacquiescence).

27. *See supra* note 13.

28. *See* A. GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA 9-24 (1981).

29. Weinstein, *Justice and Mercy*, *supra* note 11, at 819.

30. *See generally* Comprehensive Crime Control Act of 1984, Pub.L. No. 98-473, 98 Stat. 1976 (1984). The Act sets up a United States Sentencing Commission, *id.* § 991, whose duties include the establishment of sentencing guidelines for the promulgation and distribution "to all courts of the United States." *Id.* § 994.

31. *See, e.g.*, D'Amato & Eberle, *Three Models of Legal Ethics*, 27 ST. LOUIS U.L.J. 761, 762-64 (1983) (arguing that analysis of legal ethics has usually been divided between the

as the sole client whose decisions are consequently entitled to absolute respect. The latter advocates viewing the public as the ultimate client and consequently placing loyalty to the law above loyalty to the agency-government's position.

Critics of the public interest approach generally argue that allowing government lawyers to disregard their agency-client's position in order to serve what they conceive to be the public interest endows them with too much power and undermines representative democracy. This view is best illustrated by the comments of Bruce Fein, General Counsel of the Federal Communications Commission. Mr. Fein concludes that the "constitutional right of the people to self-government" and "decent respect for the outcome of Presidential elections" compel the government attorney to support the Administration's position.[32] Similarly, John K. Carlock, former Fiscal Assistant Secretary to the Department of the Treasury, rejects the notion that an agency lawyer has some inherent and compelling authority to determine whether a course of action is proper. Such a decision, he argues, lies with the agency head alone; an attorney who disagrees strongly had best resign. Even then, Mr. Carlock concludes, "time and history have a way of vindicating the rightness of actions responsible officers have found necessary."[33] An extreme example of this view has been embedded in an unusual provision of New York's General City Law, which provides that a city has "no power to waive the defense of the statute of limitations."[34] This harsh provision is tempered as a practical matter by other aspects of the law,[35] but in

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"autonomy" model, placing prime importance on the autonomy of the client, and the "socialist" model, placing emphasis on serving the public interest and advancing enforcement of the law; authors propose a third model called "deontological"). William Josephson and Russell Pearce follow a dichotomous approach in their recent article, *supra* note 6. The authors contrast the "ethical" model of conduct by government attorneys, which requires them to resign when a conflict of interest arises that would persuade private attorneys to withdraw, and the "public interest" model of conduct, which would allow continued representation in some circumstances of two government agencies whose interests conflict. Although the authors prefer the former approach, the topic that they address differs somewhat from ours. We do, however, agree that appointment of independent counsel to the particular agency is often an appropriate solution. *See infra* note 126 and accompanying text.

32. Fein, *supra* note 19, at 408.

33. Carlock, *The Lawyer In Government*, in LISTEN TO LEADERS IN LAW 257, 269 (1963).

34. N.Y. GEN. CITY LAW § 20 (McKinney 1968 & Supp. 1984-1985).

35. NEW YORK, N.Y. ADMIN. CODE ch. 5, § 93d-3.1 (1976) (granting power to comptroller to extend the time for commencement of suit upon claims). *But cf.* 35 Park Avenue, Inc. v. City of N.Y., 64 Misc. 2d 418, 315 N.Y.S.2d 205 (Sup. Ct. App. T. 1st Dep't 1969) ("strong public policy in [New York] against payment by public bodies of claims barred by the Statute of Limitations"); N.Y. GEN. MUN. LAW § 51 (McKinney 1977) (an official who fails to defend a claim against a city or town may be required to pay restitution). For an insight into the

my opinion, it is unsound to bind the corporation counsel when reliance on the defense would be unjust.

No one disagrees that the executive should be allowed to implement its policies, and has a right to an attorney who in most cases should litigate zealously.[36] The difficulty usually arises, however, when it adopts a position not supported by precedent or blatantly unfair in light of the facts. In these murky situations, a government lawyer has enormous discretion.

The first argument against a rigid rule of obedience to the government entity is a pragmatic one. As Eric Schnapper has pointed out,[37] the usual check on overzealous litigating in the private arena is absent in government litigation. The government attorney need not assess whether litigation costs will exceed the recovery in a lawsuit—his resources are virtually limitless. Given the unavailability of the usual powerful inducement to settlement, the government attorney's own judgment must step in to prevent a mad abuse of the right to litigate to the death.

Another practical concern counsels against a governmental decision to advance all claims and defenses no matter how little their merit. Although the justification for such hard tactics is commonly to save the taxpayers' money, it may in fact have the opposite effect. The policy is often counterproductive because the costs of doing business with the city or state and of running the judicial system increase substantially.

Finally, the very prestige of the government attorney's office counsels in favor of restraint.[38] An assistant attorney general or county attorney is not an ordinary lawyer. His or her arguments often carry extra weight with the courts and in a close controversy may tip the

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practical effect of these restrictions by a former New York City Corporation Counsel, see Richland, *Leaks and Assorted Mischief*, N.Y.L.J., Feb. 8, 1980, at 1, col. 2. General comments on the duties and responsibilities of a government lawyer to his client, as well as to the public, may be found in Schwarz, *Lawyers for Government Face Unique Problems*, N.Y.L.J., May 1, 1984, at 25, col. 5.

36. For example, when I was Nassau County Attorney, the District Attorney seized an entire edition of a magazine as obscene although it seemed to appeal to less prurient interest than the average perfume advertisement. But when the County was sued before a federal three-judge court for $100,000 and an injunction, my office defended. Our client was bound to us by statute and not so clearly wrong that we could turn him out of our office. Still, I lost friends in the civil liberties movement who could not understand that a government official is entitled to counsel even if his lawyer is not enthusiastic about the merits of the government position. *See* Weinstein, *supra* note 6, at 170-71.

37. Schnapper, *Legal Ethics and the Government Lawyer*, 32 REC. A.B. CITY N.Y. 649 (1977) [hereinafter cited as Schnapper].

38. *Id.* at 651.

scales in favor of the government's position. It is no secret that the United States Supreme Court is more likely to grant certiorari if the Solicitor General urges it to do so. One of the reasons for that influence is that the Solicitor General urges review only in the most pressing matters. The Court probably believes that this public officer is representing an interest broader than the narrow partisan one.[39]

The prestige and influence that attend the position of lawyer for the government require that particular care be taken before forcefully advocating an uncertain position. An attorney's conscience and knowledge of law and facts must serve as a check. To postulate a public lawyer slavishly obedient to the governmental or agency policy is to create a sense of grave discomfort. As one United States Attorney General put it over one hundred years ago, "in the performance of . . . his duty . . . [a government attorney] is not counsel giving advice to the government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation."[40]

Some guidance on the proper exercise of the government attorney's discretion as well as support for its existence may be found in the statutes and regulations governing this area. Such rules, especially those found in the Code of Professional Responsibility, further define the scope of an attorney's exercise of independent judgment.

III. REGULATIONS AND RULES GOVERNING THE ETHICAL CONDUCT OF GOVERNMENT ATTORNEYS

A. *The Model Code of Professional Responsibility*

The preeminent source of ethical guidance in the situations I have described is the Model Code of Professional Responsibility. The Code speaks specifically of the special obligations of government attorneys in civil and criminal matters.

1. Civil Litigation

Ethical Consideration 7-14 is the strongest support for the position I am advocating. The Consideration begins by distinguishing between a government attorney who has discretionary power over the

39. *See generally* Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 YALE L.J. 1442 (1969).

40. Zimmerman v. Schweiker, 575 F. Supp. 1436, 1440 (E.D.N.Y. 1983) (quoting Cushing, *Office and Duties of Attorney General* 6 OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL OF THE UNITED STATES 326, 334 (1854)).

conduct of litigation and one who does not. A government lawyer with such power "should refrain from instituting or continuing litigation that is obviously unfair."[41] A government lawyer who lacks such power "should so advise his superiors and recommend the avoidance of unfair litigation."[42] The Consideration concludes with the general admonition that the "government lawyer in a civil action or administrative proceeding 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 settlement or results."[43]

As one commentator has pointed out, this Consideration is a descendent of earlier rules designed to offset the special advantages enjoyed by public prosecutors in England. He concludes that the Consideration "unambiguously asserts that attorneys for public bodies have an obligation to make and enforce an independent judgment as to the merits of government claims or defenses."[44]

Unlike the Code's Disciplinary Rules, Ethical Considerations are not binding. Moreover, Bruce Fein of the Federal Communications Commission has recently attacked this Consideration as capable of enfeebling the Executive Branch by placing "the personal views of a government attorney above those of the President."[45] This provision has been deleted from the parallel provision in the proposed Model Rules of Professional Conduct.[46]

Yet the Code, which governs in virtually all of the states,[47] represents a consensus among the members of the bar. The Code's strict admonitions regarding zealous representation of one's client and client confidentiality were intended to be tempered by the edicts of Ethical Consideration 7-14. The adoption of this Consideration represents the profession's judgment that the interests of the people do not always coincide with those of the government and their expectation that government attorneys will in such situations exercise some independent judgment.

Other portions of the Code further support limitations on the traditional notion that government attorneys should always do their

41. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14 (1984).
42. *Id.*
43. *Id.*
44. Schnapper, *supra* note 37, at 652.
45. Fein, *supra* note 19, at 408.
46. *Id.*
47. Hazard, *Rules of Legal Ethics: The Drafting Task*, 36 REC. A.B. CITY N.Y. 77, 81 (1981); *see also*, Reaves, *Bar Rules Rile U.S.*, A.B.A. J., Nov. 1984, at 29 (both New Jersey and Arizona recently adopted the ABA Model Rules).

client's bidding. Ethical Consideration 7-4 states that a lawyer is not justified in asserting a litigation position that is frivolous.[48] Ethical Consideration 7-5 specifically provides that a lawyer shall not knowingly assist his client in engaging in illegal conduct or taking a frivolous legal position.[49] The Consideration further prohibits a lawyer from counseling his client "on how to violate the law and avoid punishment therefore."[50] These general edicts are carried through in the Disciplinary Rules.[51] Although these Ethical Considerations are deleted in the Model Rules, the prohibition on frivolous litigation is expressed in Model Rule 3.1, forbidding a lawyer from advancing claims or contentions that are not meritorious.[52]

Finally, a more specific application of the Code has been highlighted by recent events in which attorneys for the United States have switched sides in litigation after a change in Administrations. Specifically, commentators have addressed the conflict that arose when Justice Department attorneys who litigated in favor of a Washington school board's pro-busing initiative in the lower courts filed briefs in the Supreme Court arguing against the initiative.[53] While the Supreme Court did not address the problem,[54] at least one commentator has concluded that Canons 4[55] and 9[56] should have forced the government to withdraw once it reconsidered its prior position.[57] Otherwise the government would have had the opportunity of disclosing confidences garnered in the course of the representation in violation of Canon 4. More important, while few question the ability of a newly elected administration to implement its policies by withdrawing from a case, actively furthering the other side creates the appearance of impropriety in violation of Canon 9.

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48. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-4 (1984).

49. *Id.* EC 7-5 (1984).

50. *Id.*

51. *See id.* DR 7-101(B)(2) (lawyer may refuse to engage in conduct he considers unlawful); *id.* DR 7-102(A)(1) (lawyer may not file a suit or assert a position merely to harass); *id.* DR 7-102(A)(7) (lawyer may not counsel his client to engage in illegal acts).

52. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983).

53. *See, e.g.*, Comment, *Ethical Considerations for the Justice Department When It Switches Sides During Litigation*, 7 U. PUGET SOUND L. REV. 405 (1984); Note, *Professional Ethics in Government Side-Switching*, 96 HARV. L. REV. 1914 (1983).

54. *See* Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982).

55. "A Lawyer Should Preserve the Confidences and Secrets of a Client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1982).

56. "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." *Id.* Canon 9 (1981).

57. Comment, *supra* note 53, at 412-16, 418-22.

2. Criminal Litigation

The special view that the Code takes of government attorneys is further expressed in Ethical Consideration 7-13, which describes the heightened obligations of prosecutors. The Consideration spells out the rule that a public prosecutor's responsibility differs from that of the usual advocate; "his duty is to seek justice [and] not merely to convict."[58] The Consideration explains that this special duty exists for three reasons. First, the prosecutor represents the sovereign and should exercise restraint in exercising discretionary governmental power. Second, the prosecutor during the trial may make decisions normally made by an individual client that affect the public interest and should be fair to all. Finally, in our system of criminal justice, the accused enjoys the benefit of all reasonable doubts.

The Consideration then spells out some specific contours of the prosecutor's heightened obligation: he or she must make timely disclosure to the defense of evidence that "tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce punishment."[59] Moreover, the Consideration enjoins a prosecutor from avoiding the pursuit of evidence merely because he or she believes it will damage the prosecution case or aid the defense case.

The Model Rules would go even farther in defining a prosecutor's special role.[60] They require the prosecutor to instruct investigators and law enforcement personnel to avoid making statements that violate pretrial publicity standards. In addition, Model Rule 3.6 eliminates the prosecution's previous ability to reveal the existence and description of evidence seized at the time of arrest.[61] Finally, the Model Rules prohibit a prosecutor from seeking waivers of "important pretrial rights" from an unrepresented accused.[62]

Even under the existing Code, however, prosecutors have heightened responsibilities that come into play in many aspects of criminal litigation. Prosecutors found to have tampered with evidence face severe consequences.[63] Overzealous prosecutors may find their actions reversed as incompatible with due process, as in the recent Supreme

58. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1984).

59. *Id.*

60. *See generally* Austern, *Ethics*, TRIAL, Oct. 1984, at 12 [hereinafter cited as Austern].

61. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 model code comparison (1983).

62. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(c); *see also* Austern, *supra* note 60.

63. *See* Price v. State Bar of Cal., 30 Cal. 3d 537, 638 P.2d 1311, 179 Cal. Rptr. 914 (1982) (suspension of prosecutor who tampered with evidence in a criminal trial).

Court case of *Thigpen v. Roberts*.[64] There, the Court applied a presumption of "prosecutorial vindictiveness" to overturn a conviction rendered upon a manslaughter indictment issued only after defendant had appealed misdemeanor charges.[65] Similarly, the Appellate Division of New York's Supreme Court has on at least one occasion reversed a jury verdict after a trial in which the prosecutor engaged in improper and biased comments. The court stated that when a prosecutor's zeal overstepped "the bounds of fair and proper cross-examination and summation, it raises the specter of lack of good faith and serves to undermine justice."[66] Courts also take seriously the Consideration's admonition that prosecutors have a duty to disclose information to the defense.[67] Finally, prosecutors should not be allowed to benefit from evidence gained in violation of the disciplinary rules.[68]

B. *Federal Rules 11 and 37*

If the Code embodies some of the highest obligations of government attorneys, then Federal Rules of Civil Procedure 11 and 37 represent a minimum threshold of ethical conduct with which they must comply. Federal Rule 11, as recently amended, requires an attorney to certify that pleadings, motions or other papers filed with the court are, to the best of his or her knowledge, "well grounded in fact and . . . warranted by existing law or a good faith argument for [its] extension [or] modification."[69] The Advisory Committee Notes

64. 104 S. Ct. 2916 (1984).

65. *Id.* at 2918-20. For a criticism of courts' attempts to raise the ethical standards of prosecutors by exclusionary rules and reversals, see Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984). Professor Beale may not give sufficient weight to ethical mandates that all branches of the profession, including the courts, are obliged to enforce.

66. People v. Nunez, 74 A.D.2d 805, 806, 426 N.Y.S.2d 2, 4 (1st Dep't 1980).

67. *See generally* Brady v. Maryland, 373 U.S. 83 (1963); *see also* People v. Brown, 66 A.D.2d 158, 162-63, 412 N.Y.S.2d 522, 525 (4th Dep't 1979) (suppressing defendant's confession where District Attorney concealed location of accused from member of the Public Defender's Office). *But cf.* People v. Jones, 87 Misc. 2d 931, 387 N.Y.S.2d 779 (Sup. Ct. Bronx County 1976) (no obligation on part of prosecutor to reveal death of complaining witness to defendants prior to their decision to enter guilty plea), *aff'd*, 44 N.Y.2d 76, 375 N.E.2d 41, 404 N.Y.S.2d 85, *cert. denied*, 439 U.S. 846 (1978).

68. *See* United States v. Jamil, 546 F. Supp. 646 (E.D.N.Y. 1982), *rev'd on other grounds*, 707 F.2d 638 (2d Cir. 1983). In *Jamil*, United States customs agents surreptitiously recorded an incriminating conversation between a business associate who had been indicted and a government informant. The court held that introduction of the recording at trial by the United States Attorney would violate DR 7-104(A)(1), which forbids a lawyer from communicating with a party he knows to be represented by a lawyer.

69. FED. R. CIV. P. 11.

stress that while the rule was not intended to chill an attorney's enthusiasm or creativity, it demands a "reasonable inquiry" by the attorney into the merit of the lawsuit.[70] "This language represents an attempt to increase litigators' responsibility to keep ill-founded complaints and defenses out of court."[71]

Justice Story has traced the origins of requiring an attorney's signature on his pleadings back to the time of Sir Thomas More, once Lord Chancellor of England. Justice Story concluded that an attorney's signature served to inform courts that there were "good grounds" for the suit.[72] Some say that signing was used to ensure that the attorney received his fees before appearing. Whatever the historical facts, a commentator has noted that Story's interpretation is embodied in Federal Rule 11.[73] Its recent amendment may serve to reduce frivolous lawsuits in the federal courts. Violation of the rule enables a court to impose an "appropriate sanction."[74]

Federal Rule 37 offers another check on improper conduct by attorneys. The Rule provides that courts may impose sanctions for failure to comply with discovery orders.[75] Sanctions may include awarding the expenses of the motion, striking a pleading, holding the offending side in contempt, and entering a default judgment.

There is no question that Rules 11 and 37 apply to government attorneys. As one court observed, "[T]he United States comes before the court on an equal basis, the same as any other party. The responsibility expressed in F. R. Civ. P. 11, applies to the United States as it does to private parties."[76] Holding government attorneys to the same Rule 11 standards as other litigants is doubtless the correct result.

Rule 37 sanctions in the form of costs and attorneys' fees have been assessed against state government entities notwithstanding possible Eleventh Amendment objections.[77] Thus, the possibility of

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70. FED. R. CIV. P. 11 advisory committee note.

71. Zimmerman v. Schweiker, 575 F. Supp. 1436, 1441 (E.D.N.Y. 1983).

72. J. STORY, EQUITY PLEADINGS, ch. 11, § .47 (1838), *cited in* Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Procedure 11*, 61 MINN. L. REV. 1, 9-14 (1976).

73. Risinger, *supra* note 72, at 53.

74. FED. R. CIV. P. 11.

75. *Id.* 37.

76. United States v. R. J. Reynolds Tobacco Co., 416 F. Supp. 316, 325 n.3 (D.N.J. 1976). *See also* Zimmerman v. Schweiker, 575 F. Supp. 1436 (E.D.N.Y. 1983) (United States' pleadings in social security case barely met Rule 11 minimum; helped establish government's liability for attorneys' fees under the Equal Access to Justice Act).

77. *See, e.g.*, Hawkins v. Fulton County, 96 F.R.D. 416 (N.D. Ga. 1982) (County Attorney who failed to comply with discovery request held liable for attorneys' fees and costs of motion;

sanctions under these rules stands as a deterrent against frivolous litigation by government attorneys litigating in federal court.[78]

More important, these rules embody the special duty the public's lawyers, as litigators, owe to the judicial system not to burden the courts with unnecessary litigation. To comply with this obligation, they are expected to stipulate whenever possible, to avoid offering clearly unacceptable or inadmissable evidence, and to cooperate in supplying documents and in preparing impartial experts under Rule 706.[79] These attitudes will ease the burdens placed on the court system.

C. *The Equal Access to Justice Act and the Civil Rights Attorneys Fee Awards Act of 1976*

Statutes designed to impose the costs of litigation on government attorneys serve a related purpose. For example, in 1980, Congress enacted the Equal Access to Justice Act.[80] It provides that attorneys' fees should be awarded to a "prevailing party" in an action against or by the United States "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."[81] Federal courts have differed in interpreting the Act's key statutory terms "prevailing party" and "substantially justified." Perhaps in part because of narrow judicial interpretation, the Act has not led to as many fee awards as once anticipated.[82] Too narrow an interpretation fails, however, to ad-

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Eleventh Amendment not mentioned); *cf.* Bryant v. City of Marianna, Fla., 532 F. Supp. 133 (N.D. Fla. 1982) (awarding attorneys' fees and costs against city pursuant to Rule 37).

78. Of course, Rule 11's general presumption that an attorney's signature implies sufficient deliberation may aid the government in some instances. The rule stood former Attorney General Ramsey Clark in good stead in a civil rights suit against the International Brotherhood of Electrical Workers. In United States v. International Brotherhood of Electrical Workers, Loc. No. 683, 270 F. Supp. 233 (S.D. Ohio 1967), the union moved to dismiss the case because the Attorney General had not asserted in his complaint "reasonable cause" to believe that the union was engaged in discriminatory activity. The court dismissed the motion because the Attorney General had signed the complaint which pursuant to Rule 11 certified his belief that there were good grounds for the suit. The court assumed that the Attorney General had made deliberations similar to those made by a private attorney prior to bringing the suit.

79. FED. R. EVID. 706. *See also* Weinstein, *Judicial Notice and the Duty to Disclose Adverse Information*, 51 IOWA L. REV. 807 (1966).

80. Equal Access to Justice Act, Pub. L. No. 96-481, title II, 1980 U.S. CODE CONG. & AD. NEWS 4984 (1980) (codified as amended in scattered sections of 5, 15, 28, and 42 U.S.C.) (28 U.S.C. 2412, subsection (D), which allowed for the recovery of fees against the United States, was repealed effective October 1, 1984).

81. 28 U.S.C.S. § 2412(d)(1)(A) (amended 1980).

82. *See* Note, *The Equal Access to Justice Act in the Federal Courts*, 84 COLUM. L. REV. 1089, 1090, 1093-94 (1984).

vance Congress' policy of cautioning "agencies to carefully evaluate their case and not to pursue those which are weak or tenuous."[83]

In a recent case involving denial of Social Security disability benefits, the Act's "substantially justified" language was interpreted to mean that the government's position must not be unreasonable in law or fact.[84] Such a standard means that if private counsel would have advised a client that the matter should not be litigated, then *a fortiori* it is unreasonable for the government to oppose the claim.

This standard—higher than that imposed by Rules 11 and 37—is necessary to solve the special problem of the government attorney alluded to earlier. Because he or she is wed to the client (except in the limited number of cases when outside counsel may be retained), the government attorney must sometimes defend a suit without much confidence in its merit. The Equal Access to Justice Act steps into this breach by ameliorating the cost and effect on the citizen opposing the government and by making such action more expensive to the government. "The hope is that government officials in charge will be less apt to take unreasonable positions against the advice of government lawyers."[85] In sum, the Act suggests that standing up to the government client is justified and even required in certain circumstances.

The Equal Access to Justice Act, although now expired, continues to apply to litigation commenced prior to October 1984, and may soon be reenacted.[86] Still, the Act may not seem relevant except to litigation against the federal government in federal court.[87] With the exception of California's private attorney general statute,[88] no state has enacted an Equal Access to Justice Act equivalent. The failure to do so probably stems in part from the existence of the Civil Rights

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83. H.R. REP. NO. 1418, 96th Cong., 2d Sess. 14, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4993.

84. Zimmerman v. Schweiker, 575 F. Supp. 1436 (E.D.N.Y. 1983).

85. *Id.* at 1440.

86. Nader & Schultz, *Public Interest Law with Bread on Table*, 71 A.B.A. J. 74, 76 (1985).

87. City of New York v. Heckler, 578 F. Supp. 1109 (E.D.N.Y.), *aff'd*, 742 F.2d 729 (2d Cir. 1984), was a lawsuit by the City of New York and others against the federal government. The non-government plaintiffs brought a motion for fees under the EAJA but subsequently settled with the government on a fee. For a description of guidelines applicable to cases arising under the EAJA, see National Assoc. of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982).

88. CAL. CIV. PROC. CODE § 1021.5 (West 1980). For judicial interpretations of the Act, see Slayton v. Pomona Unified School District, 161 Cal. App. 3d 538, 207 Cal. Rptr. 705 (1984); San Bernardino Valley Audubon Society v. County of San Bernardino, 155 Cal. App. 3d 738, 202 Cal. Rptr. 423 (1984); Schmid v. Lovette, 154 Cal. App. 3d 466, 201 Cal. Rptr. 424 (1984).

Attorney's Fees Award Act of 1976,[89] which makes state statutes largely unnecessary. This act enables a court in its discretion to award attorneys' fees to the prevailing party in an action under the civil rights statutes.[90] State courts, including New York's, have frequently applied the Act in litigation involving various state agencies and governmental bodies alleged to have violated federal constitutional guarantees.[91] At least one state court has held that challengers to a state executive order were entitled to fees under section 1988 even though they prevailed on state rather than federal grounds.[92] Efforts by state legislatures to avoid payment of section 1988 awards have been rebuffed by the courts.[93]

Unlike the Equal Access to Justice Act, section 1988 empowers courts to award fees against the government to the prevailing party regardless of whether the government position was "justified" or not. Because section 1988 awards are easier to obtain, they may serve as an even stronger check on the adoption of unsupportable litigation positions by state attorneys. While government attorneys will, of course, defend their client unless its position is clearly wrong, the

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89. 42 U.S.C. § 1988 (1976).

90. Reliance on section 1988 alone will not necessarily entail neglect of state constitutions. Interpretations of most of these still track the Federal Constitution to a large degree. *See* Note, *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982). *See also* Collins, *State Constitutional Law*, NAT'L L.J., Mar. 12, 1984, at 25, col. 1 (8-page supplement containing extensive bibliography and citations); L. Cooke & K. Goodman, *The State of the Nation's State Courts*, NAT'L L.J., Mar. 19, 1984, at 23, col. 1; Rosen, *A Bold Court Forges Ahead*, NAT'L L.J., Nov. 5, 1984, at 1, col. 3.

91. *See, e.g.*, Odell v. Eagan, 348 N.W.2d 792 (Minn. 1984) (denying fees under section 1988 because plaintiffs did not prevail); Filipino Accountants' Assoc., Inc. v. State Bd. of Acct., 155 Cal. App. 3d 1023, 204 Cal. Rptr. 913 (1984) (granting fees); Kreutzer v. County of San Diego, 153 Cal. App. 3d 62, 200 Cal. Rptr. 322 (1984) (denying fees even though plaintiff was prevailing party); Rains v. State, 100 Wash. 2d 660, 674 P.2d 165 (1983) (en banc) (denying fees); Novick v. City of Los Angeles, 148 Cal. App. 3d 325, 195 Cal. Rptr. 747 (1983) (denying fees); City of Amarillo v. Langley, 651 S.W.2d 906 (Tex. Ct. App. 1983) (awarding fees); Dickerson v. Young, 332 N.W.2d 93 (Iowa 1983) (awarding fees); Zmija v. Baron, 119 Mich. App. 524, 326 N.W.2d 908 (1982) (remanding to trial court to determine reasonable attorneys' fees); Logan v. Johnson, 162 Ga. App. 777, 293 S.E.2d 47 (1982) (awarding fees to defendant); Gumbhir v. Kansas State Bd. of Pharmacy, 231 Kan. 507, 646 P.2d 1078 (1982) (denying fees to a non-prevailing party), *cert. denied*, 459 U.S. 1103 (1983); Cooper v. Morin, 49 N.Y.2d 69, 399 N.E.2d 1188, 424 N.Y.S.2d 168 (1979) (denying fees where plaintiffs did not prevail on federal constitutional grounds), *cert. denied*, 446 U.S. 984 (1980).

92. County Exec. of Prince George's County v. Doe, 300 Md. 445, 479 A.2d 352 (1984).

93. *See, e.g.*, Serrano v. Priest, 131 Cal. App. 3d 188, 182 Cal. Rptr. 387 (1982) (state cannot refuse to pay fees approved in a final court judgment); Shadis v. Beal, 520 F. Supp. 858 (E.D. Pa. 1981) (contractual provision barring state-funded legal service program from receiving attorneys' fees for litigation against the state void as against public policy), *aff'd*, 685 F.2d 824 (3d Cir. 1982), *cert. denied*, 459 U.S. 970 (1982).

possibility of fee awards—sometimes substantial, as the recent *Society for Goodwill to Retarded Children v. Cuomo*[94] case shows—may provide leverage in persuading the government client not to take an unreasonable stance. At the same time, careful evaluation and advocacy by the government attorney will prevent unjustified awards against the state and save taxpayers money.

D. *Disclosure Statutes*

An additional source of the government attorney's special obligation to the public grows out of the various disclosure statutes. The federal government, as well as at least thirty-four states,[95] has enacted statutes requiring public officials, judges and legislators to disclose information concerning their personal finances. The constitutionality of such statutes has generally been upheld.[96] Under federal law, for example, the Ethics in Government Act of 1978 directs employees and officers of the executive branch (including the President and Vice-President),[97] federal judges,[98] and members of Congress[99]

94. 103 F.R.D. 169 (E.D.N.Y. 1984).

95. *See, e.g.*, Duplantier v. United States, 606 F.2d 654, 673 n.40 (5th Cir. 1979) (citing state disclosure statutes), *cert. denied*, 449 U.S. 1076 (1981). Of these state disclosure statutes, twenty-three apply to judges.

96. *See, e.g., Duplantier*, 606 F.2d 654 (upholding constitutionality of federal Ethics in Government Act of 1978 insofar as it requires filing of personal financial reports by judges, their spouses and dependent children); Plante v. Gonzales, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979) (upholding constitutionality of Florida's "Sunshine Amendment" requiring that certain elected officials make public detailed information about their personal finances). *See also id.* at 1124 n.8 (citing and describing state court decisions upholding the constitutionality of similar statutes).

97. 5 U.S.C. app. §§ 201-211 (1982) (Executive Personnel Financial Disclosure Requirements). The Act requires officers and employees of the Executive Branch to file a "full and complete statement" describing "the source, type, and amount or value of income . . . from any source," including dividends, rents interest and capital gains, *id.* § 202(a)(1)(A), (B). Persons covered must also disclose gifts of entertainment, lodging, or food received whose value exceeds $250, any property that "has a fair market value which exceeds $1,000," and any liabilities exceeding $10,000 (excluding home mortgages and personal loans secured by automobiles or home furnishings that do not exceed their purchase price), *id.* § 202(a)(2)(A), (D)(3), (4)(A), (B). The Act further requires information regarding a spouse's assets, *id.* § 202(e)(1)(A)-(C), and provides for enforcement by the Attorney General who may bring an action for a civil penalty in an appropriate district court against an individual who knowingly falsifies a report or fails to comply with the reporting requirements, *id.* § 204(a). Finally, Congress has established the Office of Government Ethics to provide "overall direction of executive branch policies related to preventing conflicts of interest" on the part of Executive Branch officers and employees. 5 U.S.C. app. § 402(a) (1982) (Office of Government Ethics).

98. *See* 28 U.S.C. app. §§ 301-309 (1982) (Judicial Personnel Financial Disclosure Requirements). Although the scope of the requirements placed on the judiciary resemble those placed on members of the Executive Branch, one difference is that judges must file a copy of the report with the clerk of the court on which he or she sits. *Id.* § 303(b).

to file detailed personal financial reports annually in order to "preserve and promote the accountability and integrity of public officials. . . ."[100]

Although New York City has adopted far-reaching disclosure legislation,[101] New York State's requirements are somewhat less stringent than the federal mandate. The State relies on ethics committees in the Senate and in the Assembly to assure ethical conduct by legislators.[102] Similarly, the State Commission on Judicial Conduct exists to investigate charges of judicial misconduct.[103]

Governor Cuomo's Executive Order No. 3 implements disclosure requirements similar to the federal ones for executive employees.[104] The order extends to all heads of State departments, divisions, and agencies; their deputies and assistants; officers and employees who hold policymaking positions; and other members of the executive branch. In addition to requiring that a Financial Disclosure Statement be filed with the Board of Public Disclosure, the Order proscribes serving as an officer in a political party and holding other employment.

The requirements of the Governor's Order seem to apply to lawyers for the State of New York. Whether they apply or not, they suggest one important aspect of the proper ethical response to the conflict a government attorney may perceive between the interests of government and the public. The disclosure requirements, by placing responsibilities on government attorneys not shared by the citizenry

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99. *See* 2 U.S.C. §§ 701-709 (1982) (Legislative Personnel Financial Disclosure Requirements) (imposing disclosure requirements similar to those applicable to Judiciary and Executive Branch). *See also id.* § 704(a) (clerk shall make reports "available for public inspection at reasonable hours").

100. *See* S. REP. NO. 170, 95th Cong., 2d Sess. 1, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4216-17, *quoted in* Duplantier v. United States, 606 F.2d 654, 657 (5th Cir. 1979).

101. *See, e.g.*, Hunter v. City of N.Y., 88 Misc. 2d 562, 566, 391 N.Y.S.2d 289, 294 (Sup. Ct. Spec. T. New York County 1976) (despite plaintiffs' claim that New York City had a "far-reaching financial disclosure law," the court upheld the constitutionality of the law against a challenge premised upon the right to privacy), *aff'd as modified*, 58 A.D.2d 136, 396 N.Y.S.2d 186 (1st Dep't 1977). On a statewide level, municipal officers and employees in New York are precluded from presiding over transactions in which they have a conflict of interest. N.Y. GEN. MUN. LAW § 801 (McKinney 1974). Instead, the employee must "publicly disclose the nature and extent of such interest," *id.* § 803; violation of these provisions is a misdemeanor. *Id.* § 805.

102. *See* N.Y. LEGIS. LAW § 80 (McKinney Supp. 1984-1985).

103. *See* N.Y. JUDICIARY LAW §§ 40-48 (McKinney 1983 & Supp. 1984-1985).

104. *See* [1984] 9 N.Y.C.R.R. § 4.3. The constitutionality of a similar order issued by Governor Carey was upheld in Evans v. Carey, 53 A.D.2d 109, 385 N.Y.S.2d 965 (4th Dep't), *aff'd*, 40 N.Y.2d 1008, 359 N.E.2d 983, 391 N.Y.S.2d 393 (1976). *See also* N.Y. PUB. OFF. LAW § 74-75 (McKinney Supp. 1984-1985).

at large, support the notion that government attorneys have a special obligation to the public.

E. *The New York "Whistleblower Statute"*

The special obligation of the government attorney includes a duty to disclose not only personal finances but also cover-ups by government officials. While I would argue that such a duty extends directly to the public and entails incurring the displeasure of the government client, not all would agree.[105] New York recently made clear, however, that its state employees enjoy at least some protection when they disclose government irregularity or misfeasance. On August 1, 1984, the Governor signed into law a "whistleblower protection" bill.[106] By enacting this statute, which protects both public and private employees, New York thus joins a number of other states that protect employees who disclose their employers' illegal or unsafe acts.[107]

Applicable to all employees of the State of New York or any of its subdivisions, the new law prohibits any "adverse personnel action" against an employee who discloses to a governmental body a violation of any law, regulation, or rule if the violation poses "a substantial and specific danger to the public health or safety."[108] In addition, prior to disclosing the violation, the employee must make a good faith effort to discuss the problem with his or her supervisor and allow an opportunity to correct it—unless the danger to public safety is imminent.[109]

Commentators have criticized the new law as insufficiently protective of public employees.[110] Whether it will in fact be deficient must await judicial interpretation. Conceptually, the new law represents an attempt to balance the need for loyalty by government attorneys and the public's entitlement to learn of government wrongdoing.

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105. *Cf.* Fein, *supra* note 19 (arguing that attorneys for the government owe an absolute duty of obedience to the government client).

106. N.Y. CIV. SERV. LAW § 75-b (McKinney Supp. 1984-1985).

107. *See* Feliu & Outteu, *New York's Whistleblower Law—Legislative Response to "Murphy,"* N.Y.L.J., Nov. 28, 1984, at 7, col. 2, n.6 (citing cases in 21 states recognizing public policy exception to at-will employment rule) [hereinafter cited as Feliu & Outteu].

108. N.Y. CIV. SERV. LAW § 75-b(2)(a) (McKinney Supp. 1984-1985).

109. *Id.* § 75-b(2)(b).

110. *See* Feliu & Outteu, *supra* note 107.

IV. THE INTERPLAY OF STATUTORY GUIDANCE AND GOOD SENSE: KNOWING WHEN TO STAND UP TO THE GOVERNMENT CLIENT

A. *The Spirit of Government Service*

The Code, rules, and statutes that I have described demonstrate a societal consensus that government attorneys should exercise independent judgment. Together, they add up to more than that. They embody the best tradition of the bar, what Judge Fahy once described as the "spirit of Government service."[111] This spirit, he eloquently declared, involves the "application to innumerable particular circumstances of ability, honesty, courage and fairness."[112] Judge Fahy went on to condemn overzealousness by government attorneys as leading to injustice and he concluded that "[w]here the client is the Government itself he who represents this vague entity often becomes its conscience, bearing a heavier responsibility than usually encountered by the lawyer."[113]

In my court I see many lawyers for the State and the City of New York. They are among the most skillful advocates, fully capable of rising to the challenge of their special ethical problems.[114]

Being the conscience of the state or municipal body that government attorneys represent is not an easy task. They find guidance not only in the rules and statutes, but also, and more importantly, in the examples set by other lawyers in public office. Among these are prestigious Solicitors General, such as Judge Fahy[115] and Francis Biddle,[116] who have known when to confess error before the Supreme Court.[117] They have recognized that, as Justice Jackson once said,

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111. Fahy, *Special Ethical Problems of Counsel for the Government*, 33 FED. B.J. 331, 333-34 (1974) (reprint of a lecture delivered April 11, 1950, at Columbia Law School) [hereinafter cited as Fahy].

112. *Id.* at 333.

113. *Id.* at 335.

114. Ultimately, no statute can force a government attorney to act in the ethical manner we have described. Instead, his or her sense of ethics must come from within. As Jeremy Bentham stated in a slightly different context, one must never "expect to produce a perfect compliance by the mere force of the sanction of which he is himself the author. All he can hope to do, is to increase the efficacy of private ethics, by giving strength and direction to the influence of the moral sanction." BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 320 (1948).

115. Fahy, *supra* note 111, at 337-80.

116. F. BIDDLE, IN BRIEF AUTHORITY 97-98 (1962).

117. *See generally* Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 YALE L.J. 1442, 1467-74 (1969) (describing scope of Solicitor General's capacity to confess error).

the "government does not lose any case if, by its result, justice is done. . . ."[118]

B. *Proper Exercise of Discretion*

Still, concrete examples are helpful to guide the young and even the experienced public attorney through the cases in which he or she will be forced to exercise some independent judgment.[119] Three solutions stand out: persuasion, appointment of independent counsel, and compromise.

1. Persuasion.

Discussion within a government attorney's office, paying serious attention to criticisms and suggestions by younger as well as seasoned lawyers, is important. In a large legal office, an attorney who feels strongly that a position is unfair or unwarranted should decline to sign the brief or participate in the case.[120]

Persuasion within the office is also important in the delicate area of disclosures. The carefully drafted Opinion of the Professional Ethics Committee of the Federal Bar Association concluded that an attorney discovering corrupt or criminal conduct in the Legislative or Executive branch should first report it to the head of his department or agency.[121] If the head officer is involved in the conduct, then the attorney should notify the Attorney General or other appropriate official at the Justice Department or equivalent state agency. Only after thorough investigation of the facts and ample opportunity for these authorities to take remedial steps would an attorney consider public disclosure.[122] This approach gives adequate weight to the presumption that honesty is the prevailing rule among government ser-

118. *Quoted in* Fahy, *supra* note 111, at 337. *See also* Brady v. Maryland, 373 U.S. 83, 87 n.2 (1963) ("My client's chief business is not to achieve victory but to establish justice") (quoting Solicitor General Sobeloff).

119. Of course, situations may arise where it is impossible for a government attorney to challenge an unjust law. For example, in State of Md. *ex rel.* Attorney General v. Burning Tree Club, Inc., 301 Md. 9, 481 A.2d 785 (1984), the Maryland Court of Appeals denied standing to the State's Attorney General who sought to challenge a tax break that he found offensive to his conscience.

120. *See* Schnapper, *supra* note 37, at 656 ("If the position of an attorney general's or corporation counsel's office is subject to ultimate control by a governor or mayor, an attorney who believes the position taken to be erroneous can and usually should decline to have his or her name placed on the brief involved.").

121. Federal Bar Association Ethics Committee, *Ethics Opinion 73-1: The Government Client and Confidentiality*, 32 FED. B.J. 71, 73-75 (1973).

122. *Id.*

vants and that they will take action, while retaining the attorney's ultimate responsibility to disclose corruption if necessary. Presumably this approach is implicit in the New York whistleblower statute discussed earlier.[123]

Persuasion plays a role in this area in a different way as well. Judge Fahy recalls a day in which he argued two cases before the Supreme Court that were factually related but rested on different legal grounds. In the first, he was convinced that the Government's position was correct and argued as forcefully as possible. In the second, he was unable to confess error but entertained serious doubts about the correctness of the Government's position. He frankly told the Court that he could not argue the second case as vigorously as the first, but would like to set forth the Government's position.[124]

2. Independent Counsel.

In some situations, a government attorney may have responsibility for representing two government entities whose interests conflict.[125] This is a classic example of conflict of interest. I would agree with the weight of opinion that independent counsel should be appointed to represent one of the agencies if that is at all possible.[126] A notorious example of failure to appoint independent counsel is the Bertrand Russell case, in which the New York City Corporation Counsel represented both the Board of Higher Education—wishing to hire Mr. Russell as a professor at City College—and the Mayor who opposed his appointment.[127] More recently, independent counsel was

123. *See supra* notes 104-09 and accompanying text.

124. Fahy, *supra* note 111, at 337.

125. A conflict may also arise when the Justice Department and a federal agency both assert jurisdiction over a case. For a description of the incidence of such conflicts and efforts to minimize them, see Olson, *Challenges To The Gatekeeper: The Debate Over Federal Litigating Authority*, 68 JUDICATURE 71, 73-74, 77 (1984).

126. *See, e.g.*, Josephson & Pearce, *supra* note 6; *but cf.* Interview with W. Bernard Richland, Former Corporation Counsel of New York (Oct. 30, 1984) (arguing that no such conflict existed) (notes on file in the office of the Touro Law Review). For an argument that a conflict of interest inherent in the statutorily created position of Indiana City Attorney can only be resolved through the appointment of independent counsel, see Note, *Indiana City Attorneys: A Conflict of Interests*, 51 IND. L.J. 783 (1976).

This solution has worked well on at least one occasion during my tenure as County Attorney. *See* Weinstein, *supra* note 6, at 171.

127. *In re* Kay v. Board of Higher Educ. of City of N.Y., 260 A.D. 9, 12, 20 N.Y.S.2d 898, 901 (1st Dep't), *appeal dismissed*, 284 N.Y. 578, 29 N.E.2d 657, *dismissing appeal from* 173 Misc. 943, 18 N.Y.S.2d 821 (Sup. Ct. New York County 1940). The literature on the case is extensive. *See, e.g.*, Hamilton, *Trial By Ordeal, New Style*, 50 YALE L.J. 778 (1941); Kennedy & White, *The Bertrand Russell Case Again*, 10 FORDHAM L. REV. 196 (1941); Note, *The Bertrand Russell Case: The History of a Litigation*, 53 HARV. L. REV. 1192, 1194 n.16

appropriately retained in a dispute between union trustees and city trustees over the proper distribution of pension funds. The New York Supreme Court found the conflict of interest "obvious," thereby precluding the Corporation Counsel from representing the union trustees.[128]

3. Compromise.

Finally, a government attorney should be alert to the possibility of compromise. Such compromise may be as simple as a decision not to appeal an adverse ruling. Or, as *Lora v. Board of Education of the City of New York*[129] illustrates, compromise may involve long hours of good faith negotiation. In that case, lawyers for the City of New York helped create a set of excellent regulations on the proper procedure for placing mentally disturbed children in special programs. More recently, New York State demonstrated the public spirited approach in *Society for Good Will to Retarded Children Inc. v. Cuomo*.[130] There, the case was dismissed as moot after the state's attorneys submitted an affidavit of the responsible Commissioner asserting that the state would comply fully with a prior remedial order that had been reversed by the Court of Appeals for the Second Circuit. Through this compromise, the state avoided an undesired order. At the same time, the state advanced the welfare of the plaintiff class by preventing the long delay in implementation of the plan that proceedings on remand and appeal surely would have caused.

CONCLUSION

Some still argue that complete obedience to executive command is the only approach a government attorney may take that is consistent

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(1940); Note, *The Bertrand Russell Litigation*, 8 U. CHI. L. REV. 316, 317 n.2 (1941); *Recent Decision*, 15 ST. JOHN'S L. REV. 118 (1940). For a more recent discussion of the case, see Josephson & Pearce, *supra* note 6, at nn.51-57 and accompanying text.

128. *In re* Caruso v. New York City Police Dep't Pension Funds, 122 Misc. 2d 576, 582, 470 N.Y.S.2d 963, 967 (Sup. Ct. Spec. T. New York County 1983).

One person, one vote cases present another situation in which appointment of independent counsel may be appropriate. A conflict may be discerned in the current challenge to the New York City Board of Estimate. Morris v. Board of Estimate, 592 F. Supp. 1462 (E.D.N.Y. 1984), involved a challenge by Brooklyn residents to their representation on the Board of Estimate, which equals that of the Staten Island residents, even though Brooklyn's population is six times that of Staten Island. Although the issue has not been raised in the case, it could be argued that a conflict exists in that the corporation counsel represents all five boroughs in defending the present electorial system.

129. 587 F. Supp. 1572 (E.D.N.Y. 1984).

130. 103 F.R.D. 168 (E.D.N.Y. 1984).

with ethical precepts concerning zealous representation of one's client. Certainly it is easier for a government attorney to take an unreflective view and to obey mechanically the wishes of the government agency client. Nor do I discount the danger for abuse in an approach that advocates independent thinking—and action—on the part of government attorneys. Yet, while compliance with executive policy should be the norm, a compelling need exists in this society—as in others that have come before it—to mitigate the harshness of the law through the individualization of justice.[131] Responding with courage, compassion, and good sense in the individual case places the government attorney squarely within our highest ethical and philosophical traditions.

131. *See generally* Weinstein, *Justice and Mercy, supra* note 11.