THE CIVIL GOVERNMENT LITIGATOR:
A VIEW FROM THE JURY BOX

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I. INTRODUCTION

Much has been written about the professional role and responsibilities of criminal prosecutors. Prosecutors are considered ethically and professionally exceptional. Courts and the profession expect more from them than from lawyers for private parties: We expect prosecutors to “seek justice.”

Our subject, however, is the role and responsibilities of the government’s trial lawyers in the civil arena. Less has been said on this

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2. See MODEL 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. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.”).

3. See, e.g., Berger v. United States, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”); Bruce A. Green, Why Should Prosecutors “Seek Justice”? 26 FORDHAM URB. L.J. 607 (1999); Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?, 44 VAND. L. REV. 45 (1991).
subject. There is disagreement about whether government lawyers in civil litigation have exceptional obligations comparable to those of prosecutors. Those who think civil government lawyers must “seek justice” generally focus on lawyers with exceptional responsibilities—for example, solicitors general, government lawyers bringing civil enforcement proceedings, or government lawyers pursuing litigation to promote a public “cause.”

To make the case that government lawyers in civil litigation have a role comparable to the quasi-judicial role of a criminal prosecutor, one would probably not focus on lawyers who defend the city in garden-variety personal injury cases. The work of the city’s tort lawyers seems essentially the same as that of lawyers who defend private clients in personal injury cases. But that is the example on which we focus. Neither of us has ever been a city lawyer. We draw on different experience—that of fellow jurors in an action by a tenant in a New York City-owned building who claimed that she was injured one evening when the bathroom ceiling fell on her head.

One of us, Karen Bergreen, is a stand-up comedian, novelist, and teacher. She regards herself as a recovered lawyer, having received a law degree from the University of Minnesota, served as a federal law clerk, and practiced briefly in New York fifteen years ago. The other, Bruce Green, is a legal ethics professor at Fordham Law School. Although we do not put aside our experiences in legal practice, the principal perspective we bring to the subject is that of jurors who spent more than a week observing a New York City government lawyer in operation. We were asked to bring our common sense and everyday experience, not any specialized training or knowledge, to the juror’s role. So together with six other jurors, we watched the work of the other players, including the city’s lawyer, in an ordinary, common sense way. Our thesis is that, even from an ordinary public perspective, more should be expected of government litigators, even in the most unexciting case, than is expected of lawyers for private clients. Unlike prosecutors, government civil litigators may not be considered exceptional, but they should be.

We proceed in several parts. First, Karen tells the story of the trial. Second, we raise and respond to possible questions about our project’s legitimacy: Does it matter what the public expects of the city’s trial lawyers and, in any event, can two lawyers infer anything about public expectations from their experience as jurors in a single case? Finally,
having persuaded at least ourselves that this project has some legitimacy, we reflect on civil government lawyering based on our experience.

II. A JUROR’S TALE

“Smoking’s good for you. It’s relaxing.”

That was the professional opinion of the city’s medical expert in the case of *Ms. Tenant v. The City of New York,*5 tried in New York State Supreme Court in July of 2009.

With wisdom like this, it’s not hard to imagine how the trial made those of us on the jury feel. Not just as jurors, but as taxpayers. We went into our jury service with the expectation that we were doing something important, and that we were valued. Once we reported for jury duty we were praised for showing up. We were told that we were an integral part of the legal process. A judge showed up in a robe and gave us a pep talk; we learned about the jury’s role by watching a film starring Ed Bradley and Diane Sawyer with bonus clips from Perry Mason. Without us jurors, disputes might be resolved with flogging. It appeared that the court wanted to make our job as painless as possible: there were coffee and snacks just outside the door, free Wi-Fi and access to laptops, and the finest air conditioning of any pre-war building in the city.

We felt important and well taken care of.

That would all change.

Within an hour of service, the first case was called. Thirty-two of us were called in for voir dire in *Ms. Tenant v. The City of New York.* Plaintiff’s attorney briefly introduced himself and informed us that his client, Ms. Tenant, was injured when a part of the ceiling fell on her in a New York City-owned building.

We were slotted to be fifteenth and twenty-first in line for questioning and were both fairly certain that a jury would be picked well before it was our turn. Moreover, even if the lawyers did select us, the case seemed simple enough. There was no reason we would not be out of there in two, at most three, days.

But the voir dire alone took two days. First, we were given about twenty minutes to fill out a form regarding our employment and our brushes with the legal system. The lawyers then took a long lunch break to review the forms.

The questioning began in a small, windowless room in the courtroom, outside the judge’s presence—although the lawyers could (and frequently did) run down the hall to ask the judge to resolve

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5. To spare them any potential embarrassment, we have opted to use pseudonyms for the plaintiff and lawyers in the case.
disagreements. Plaintiff’s attorney took extensive breaks in between the utterance of each word he spoke. Every time a question was answered, he needed to consult with his myriad papers for a reason that remains a mystery to us. He was suspicious of all the potential jurors—the newsman, the architectural preservationist, and the student. “Do you own or rent?,” he asked each of us, his voice as portentous as if Beethoven were providing the score to this query. With the exception of juror _numero siete_, who spoke no English, everyone seemed qualified to serve.

Once the plaintiff’s attorney finished questioning the first sixteen possible jurors, it was the government’s turn to ask questions. The Assistant Corporation Counsel, obviously a veteran attorney, introduced herself as Ms. L. and then introduced her rookie associate. Until she spoke, our only impression of her was that she was as bored as we were. She initially conveyed empathy with us regarding plaintiff’s counsel’s dithering, assuring us that her questions would be brief. Instead of using questions to put forth her theory of the case, she asked if we could be fair. She asked what books and magazines we read. At first, we were charmed by her initial venture into efficiency. But, looking back, we realize that the city’s lawyer asked general questions only because she knew nothing about the specifics of the case. Not to mention, she hadn’t heard of any of the books, despite the fact they were classics and bestsellers.

Her voir dire strategy was to weed out any one of us who may have had an agenda: The landmark preservationist may have had her own ideas about the manner in which the ceiling fell; the newspaper reporter might have wanted to stick it to the city.

Really? In a personal injury case? It would never have occurred to us to want to stick it to the city. We live here by choice. We love it.

Ms. L. seemed bent on finding personal hidden agendas.

“Doctor,” she asked a doctor, “would you be able to listen to the testimony of medical professionals, and even though you are a doctor, give it no more weight than it deserves?”

“I’m not sure,” the doctor responded. It was unclear whether she knew this was her ticket out of the room or she, like us, had no idea what this question meant.

Out of the presence of the other jurors, the city’s lawyer asked me if as a former lawyer, I would take my hostility out on lawyers during trial. This, despite the fact that I indicated on the questionnaire that I was married to a lawyer and had served on a jury once before.

Most of the jury pool caught on. This was not the kind of case for which you would want to be selected. This was nothing like Perry
Mason. It was more like *Survivor*, except in reverse. The idea was to get voted out of the room. The jurors saw that Ms. L. was giving them an out. At first, they simply hinted at unconscious biases, but as the voir dire spiraled into a complex interplay of boredom and incompetence, the jurors became bolder about carrying out their escape plans.

Ms. L. suggested to us that the plaintiff would potentially have a problem proving her case—clearly a guess, as Ms. L. had seemingly done no work in preparing for it. She asked something along the lines of, “If there isn’t any evidence on something—maybe the plaintiff has to prove something, but there is no testimony about it—will you agree not to assume something happened if there isn’t proof?,” but even more opaque, convoluted, and ungrammatical. The first two agreed, “Yes, yes,” but a third, slyer, more motivated (or attentive) juror said, “I’m not sure.”

On the one hand, he was simply being honest—he could not agree, because he could not understand the question (besides which, if there were no direct testimony, he still might be able to draw an inference from circumstantial evidence or make assumptions based on how people ordinarily behave). On the other hand, he had found his special way of saying, “Don’t pick me. I am trouble.”

By the end of the day, the lawyers had settled on the six jurors and one alternate. All they needed was one more alternate and the case would be good to go.

Surely, it would start the next morning.

But the jury administrator, who knew better, told the seven jurors not to show up until 12:30 the following day, and that proved to be too soon. Alas, it took seven hours to select the alternate. Again, Ms. L. kept reminding the jurors that they might not be fair. They took the bait. By day two, there were no more hints, no more pauses. The members of the pool were terrified. Hints would not be enough to ensure relief. Every member except one of that jury pool said he or she could not be fair. The math teacher said she could not be fair because she was in a car accident, a college student could not be fair because her mother was a lawyer, and an entrepreneur could not be fair because he knew about numbers. The others may have been shirking their duties and lying to get out of jury service, but more likely they may have simply wanted out of this particular case, and the government lawyer was giving them their ticket.

Those of us ultimately selected for the jury included an English professor, a kindergarten teacher, a college student, and a pharmaceutical executive. We all had busy schedules, some of us making rushed phone calls and sending breathless text messages during our breaks, others navigating childcare concerns.
When our names were called, the two of us felt the minor dread that accompanies any time-consuming, low-paying, and slightly boring project, but we also had some degree of excitement. After all, the case had the potential of being juicy. And as a law professor and former lawyer, we had a sense of pride in our profession.

Lucky for us, we thought, that the Assistant Corporation Counsel was representing the city. Regardless of whether the plaintiff’s counsel was a skilled attorney or a cliché buffoon, the city’s lawyer would guide us through the case. We had only known government attorneys to be excellent lawyers—thoroughly prepared, fair, and dynamic in the courtroom.

Or so we thought.

Okay, so finally it is day three of service. In federal proceedings where voir dire takes place in the courtroom and the judge asks the questions, this case could have been wrapped up by now. But the lawyers spent nearly the whole day making opening statements. Plaintiff’s lawyer told us in as many words and pauses as possible that his client was hit and injured by the fallen ceiling in an apartment building owned by New York City. He added that the plaintiff’s quality of life had deteriorated. In response, the city’s lawyer opened with a reminder to keep an open mind and suggested as she had at the onset of voir dire that somehow the city was not responsible for the maintenance of its own buildings because those buildings were overseen by the building’s tenant association.

We were ready for our first witness. At least we would hear what happened to the plaintiff. Instead, we heard from an employee of the city’s housing department, a supervisor of the department’s Tenant Interim Lease (“TIL”) program. The program allows renters of city apartments collectively to become owners of the apartments after the tenant association demonstrates its capacity to take over responsibility for running the building.6 Meanwhile, the TIL program trains the tenants for this responsibility, allowing them to take increasing responsibility. Eventually, if the exercise in self-governance succeeds, the association is allowed to purchase the building for $250 per apartment.7 The witness supervised the tenant association in Ms. Tenant’s building and in a number of other city-owned buildings participating in the program.

We imagine he was initially slated to testify for the city but, when deposed, turned out to be such a horrendous city representative that the

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7. Id.
plaintiff’s lawyer could not resist calling him as the plaintiff’s own witness to suggest how poorly the city operated its buildings. We imagine he was initially put on the city’s witness list to say, as Ms. L. suggested in her opening statement, that this case is between the tenant association and the plaintiff, but not the city and the plaintiff.

But that is not what happened.

He was very defensive. We learned that he was deposed some time ago and that he may have given answers that inadvertently helped Ms. Tenant. Fixing the ceiling would have cost less than $2000; the city wanted him to say that repairs costing less than $2000 were up to the tenant association. But it seems that he may have said in his deposition that the city, not the tenant association, was responsible for repairs in excess of $500. Perhaps the city’s lawyer reprimanded him for providing these answers, which he suddenly appeared to disavow. He said that he was an honorable man, several times. It became clear that he was incapable of giving a simple answer to a simple, yes-or-no question. Initially, the judge was patient. The plaintiff’s lawyer asked for an instruction that the witness answer the questions, but the judge concluded that he evidently had his “unique” style of speaking and the lawyer would have to accept that. Soon, however, the judge’s patience thinned, her eyes began to roll as the clock ticked closer to 5:00 p.m., when the trial day was expected to end, and she asked him repeatedly to keep his answers brief and respond to the actual questions. Although the judge had admonished us at the start of the trial to refrain from discussing the case, we all nonverbally expressed to one another our confusion as to the purpose served by this testimony.

What had we learned? Evidently, the supervisor had no knowledge that repairs were needed. That was about it. A few days later, the city introduced a witness who said that the tenant association was responsible for repairs of over $500. There was also a handbook and a document, but we never saw either. The issue of whether the city was relieved of anything based on the existence of the tenant association seemed flimsy. The tenant association came off as a non-entity—perhaps charged with floor sweeping or litter policy but surely not the structural integrity of the ceiling. In any event, what difference did it make? If the tenant association acted as the city’s agent, as we were told, would its failure to maintain the building really relieve the city of liability and shift it to the tenant association?

We could feel a collective sigh of relief when this witness was released. And looking back on it, if the city had done its homework, we might never have had to hear from the city representative in the first place—and certainly not at such length. The case was about the tenant
and her apartment. Did a ceiling really fall on her? And was she hurt? Juries can understand this stuff.

Finally we met the plaintiff. We also met her daughter. Through them, we learned that Ms. Tenant, a retired telephone worker, lived in the apartment in question. She was married, but Mr. Tenant lived in North Carolina in a residence also owned by his wife. The city highlighted this information because one of the requirements for residency was no ownership of real property elsewhere. Perhaps the judge would later instruct us that if Ms. Tenant was not entitled to reside in the apartment, the city was entitled to drop its ceiling on her head without compensating her for injuries. Ms. Tenant, for her part, asserted on several occasions that she and her husband did not live together, as if that relieved her from the non-ownership requirement. She did not offer any details such as problems in their marriage or problems living in the same house or separate employment opportunities. Perhaps she and her husband did not like one another; perhaps she was defrauding the Department of Housing Preservation and Development (“HPD”). We will never know.

Ms. Tenant had several grown children. Her youngest child, studying for a masters degree in North Carolina, stayed with her from time-to-time and was with her for several days leading up to the accident. Apparently, the building had water damage and there were cracks in the bathroom walls. Ms. Tenant claims that she complained about the cracks, but that her complaints were ignored. Both she and her daughter testified that her daughter complained to the president of the tenant association. The ceiling was scheduled, by coincidence, for repair on the day of the accident. No one showed up.

That evening, Ms. Tenant, her daughter, and an “aunt” (she was really a family friend) were watching a video. Ms. Tenant went to use the bathroom, and as she was walking out, the ceiling fell on her head. She dropped to her knees and then on the floor. Ms. Tenant and her daughter were adamant that she was briefly unconscious, but the ambulance report did not indicate any loss of consciousness. Immediately after the accident, the aunt got a disposable camera, the daughter snapped a slew of pictures, and the two called 9-1-1. The jury saw several of the pictures. They all showed different areas of the bathroom covered in plaster, but there were no pictures of the incapacitated, if not unconscious, Ms. Tenant. The ambulance came and took Ms. Tenant by herself to St. Luke’s Hospital where she was released two hours later. Several X-rays of her body were taken, but not of her head. When she was released sometime around midnight, she went back to her apartment by herself.
Ms. Tenant and her daughter both claimed that Ms. Tenant continued to be in pain after the accident. Her neck hurt, her knees hurt, her back hurt. At the outset of her testimony, we were led to believe that her job at Verizon was essentially that of a dispatcher. Her story changed quite a bit, however, and it began to sound as if her former job had her crawling on floors one minute and climbing poles the next. As a result of the accident, she could no longer climb poles or crawl on floors. She had at one time enjoyed dancing during her free time (clearly not with her husband). No more dancing for Ms. Tenant. No more kickball on family outings. Ms. Tenant could no longer enjoy walks with her daughter. Now, she was using a cane.

Ten days after the accident, Ms. Tenant visited a doctor whose specialty was physical medicine. The doctor sent her for MRIs and gave her a cane and some exercises to perform. Her doctor took us on a tour of Ms. Tenant’s injuries, referring to the MRIs and a human anatomy model that she brought with her. She said that plaintiff had suffered a diminished quality of life, and that this was due to the accident—if, as the doctor said she did, one assumes that what Ms. Tenant told her when she sought treatment was true.

Then it was time to hear the city’s side.

I was fairly certain the city would have a thorough plan of attack. I was prepared to hear that the plaintiff is a liar; she resided in an apartment that she had no right to reside in; she owned property elsewhere. And was the plaintiff even hurt? She had all of these pictures with her. The bathroom was hurt; there were pictures of plaster on the toilet, plaster in the tub, and plaster on the floor. Ms. Tenant’s daughter said she took pictures of her mother on the bathroom floor covered in plaster, but they were not offered into evidence. The number one reason for taking pictures was to recover damages, but the plaintiff was not claiming property damage. Why did the city’s lawyer not ask, where are the snapshots of the plaintiff? I was prepared for the city to counter plaintiff’s claims of blacking out. I was waiting for the EMT and the emergency room doctor to testify that she had not blacked out. After all, no X-rays or MRIs of her brain were ordered the night of the accident. There was no record of a blackout, and the hospital sent Ms. Tenant home two hours after she got to the hospital. I was waiting for the city’s lawyer to ask the daughter why neither she nor the aunt accompanied this severely injured woman to the hospital. Why did the city’s lawyer not ask Ms. Tenant how she got home?

There was none of this. Instead of attacking her credibility with better witnesses and good cross-examination, Ms. L. kept focusing on whether the repairs were the responsibility of the tenant association or
not. We did not care. We had all seen who was in charge of the tenant association, and there was no possibility that under his leadership any repairs could be undertaken. Again, without focusing on tearing down Ms. Tenant’s story, the city called another witness, an HPD employee who was supposed to bring in records of inspections to the roof and repairs as well as written documentation as to who was responsible. There were no such records, and there was no policy or contract that relieved the city’s obligation to maintain safe conditions. Ms. Tenant said that she notified the president of the tenant association of her leaky roof. The city presented no evidence to the contrary. As a jury, we were given no reason to believe that the tenant association was not an agent of the city.

Common sense suggests that the heart of the city’s case lay in damages. Was the plaintiff even injured? Her doctor specifically said she was. And although the doctor gave off an air of credibility, it seems as if she may be primarily a doctor whose patients are plaintiffs in personal injury actions. The city’s lawyer could have highlighted her patient population, but instead was disrespectful. Ms. L. repeatedly referred to the doctor’s specialty as physiology as opposed to physical medicine. It was unclear whether she was trying to make us think the doctor was an exercise physiologist or whether the city’s lawyer was just uninformed.

The city’s experts were disappointing. The orthopedist who saw the plaintiff came off as a—forgive the term—“crazy, old guy”: he was willy-nilly pulling random diagnostic instruments from a weathered medical bag and answering questions not put before him. He had not practiced medicine in years and instead saw patients once a week as a paid expert for the city. For sure, he did not seem trustworthy. He answered questions to the extent that he thought the city would be pleased. So when the city’s lawyer, in an effort to show that Ms. Tenant’s smoking habit may have contributed to her slow recovery, asked the city’s expert if smoking would have any effect, he responded that the effect would be positive. Smoking would relax her.

Moreover, the city called another expert, another doctor engaged solely in the practice of representing the city. His interpretation of the MRIs contradicted that of the crazy, old guy’s several times.

On several occasions, the city’s lawyer asked the doctors if the accident caused the injuries. Plaintiff’s attorney objected every time, and the judge sustained his objection every time. Why was the plaintiff’s medical expert allowed to say that the accident caused the injuries but the city’s doctors were forbidden from disputing that? Was this a sanction for the city’s failure to file papers in time?
So we come to Wednesday evening of the second week of trial. We stayed late to finish the doctor’s testimony because the judge did not sit on Thursdays, and she was anxious that we all get to deliberate by Friday. She had already lost one juror due to the ridiculous length of the case. She was not about to lose another.

Thursday night, we got a telephone call. “Don’t come in, the parties have settled.”

No thank you. No good-bye party. No apologies for wasting our time.

III. THE SIGNIFICANCE OF LAWYER-JURORS’ PERSPECTIVE

As jurors, our experience was disappointing—not at all the rewarding experience the court led us to expect. But at least we came away with a story, and potential material for an article about government lawyering in civil litigation. The experience provides an opportunity to reflect on why we were particularly disappointed by the city lawyer’s performance and from there, to infer what we and our fellow jurors, as members of the public, expected of the city lawyer. The exercise may provide an opportunity to consider how the public might answer recurring questions about the role of city government lawyers, or whether the public might raise different questions altogether. Or the project may be perceived to be as tedious and unproductive as the trial through which we sat. In thinking about whether it is worth thinking about the jurors’ perceptions of government civil litigators, we begin with a few words about the conventional professional discussion, then consider what jurors might add to the discussion.

A. Conventional Questions About the Civil Government Lawyer’s Role

The conventional question is where to situate lawyers who represent the government in civil matters: Are they more like prosecutors or lawyers for private parties? Prosecutors have a special duty to promote the fairness of the outcome of a proceeding.8 While lawyers for private parties need not trouble themselves over whether the client deserves to win a lawsuit, prosecutors should not prosecute those whom they believe to be innocent,9 and they have responsibilities to avoid, and rectify, wrongful convictions.10 Prosecutors also have a special responsibility to promote the fairness of the criminal justice

8. See supra note 2.
10. See MODEL RULES OF PROF’L CONDUCT R. 3.8(g)-(h) (2009).
process. This includes obligations, unlike those of private litigants’ lawyers, to avoid misleading the fact finder by urging it to draw unfair or untrue inferences or by discrediting truthful testimony, and to call the court’s attention to procedural error and to opposing counsel’s inadequacy. Further, prosecutors are expected to exercise their power with a sense of proportionality—for example, to seek outcomes that are deserved, not necessarily the most harsh.

There is disagreement within the legal profession about whether government lawyers in civil litigation have exceptional obligations comparable to those of prosecutors. The American Bar Association’s (“ABA”) previous ethics code equated criminal prosecutors and government civil litigators, but the Model Rules of Professional Conduct, adopted in 1983, do not preserve the idea that government lawyers in civil and administrative proceedings have a special role. Further, at least for disciplinary purposes, the ABA’s ethics committee has taken the view that in civil cases, government litigators’ duties are like those of private litigants’ lawyers. In contrast, courts sometimes

11. See supra note 3.
12. See, e.g., United States v. Reyes, 577 F.3d 1069, 1077 (9th Cir. 2009) (observing that “a federal prosecutor has a special duty not to impede the truth” and it is therefore “improper for the government to present to the jury statements or inferences it knows to be false or has very strong reason to doubt”); United States v. Lusterino, 450 F.2d 572, 574-75 (2d Cir. 1971) (prosecutor may not knowingly “participate[] in allowing a false picture to be painted” for the jury).
13. See generally Vanessa Merton, What Do You Do When You Meet a “Walking Violation of the Sixth Amendment” if You’re Trying to Put that Lawyer’s Client in Jail?, 69 FORDHAM L. REV. 997 (2000) (discussing whether prosecutors are required to intervene if they feel a defendant is being poorly represented by his counsel).
15. ABA Model Code of Professional Responsibility (“Model Code”), Ethical Consideration 7-14, provided:
A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A 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 settlements or results.
MODEL CODE OF PROF’L RESPONSIBILITY EC 7-14 (1980).
17. In ABA Formal Op. 94-387 (1994), the committee considered whether a government lawyer who brought a claim barred by the statute of limitation could negotiate a settlement, thereby exploiting defense counsel’s evident unawareness that he could get the claim dismissed based on this affirmative defense. The committee recognized that a lawyer for a private client could exploit the opposing party’s ignorance or inexperience in this manner, and continued: The Committee sees no reason to reach a different conclusion respecting the lawyer’s ethical obligations simply because she represents a governmental agency as opposed to a
espouse the view that in civil litigation and agency proceedings, no less than in criminal prosecutions, government lawyers have ethical and professional duties different from those of lawyers for private parties. A noteworthy expression of this view is Judge Abner Mikva’s 1992 opinion for the D.C. Circuit, which emphasized that lawyers for the Federal Energy Regulatory Commission had an ethical duty like that of prosecutors to seek justice. More recently, in a case in which the state brought a civil action against lead paint manufacturers, the Rhode Island Supreme Court distinguished the state attorney general’s role from that of the usual advocate: It stated that, like prosecutors, lawyers for the government in civil lawsuits have an “enduring duty to ‘seek justice,’”

private party. While some courts have held that ethical codes impose different requirements of advocacy on government litigators, we find no basis in the Model Rules for doing so, at least in the context of a noncriminal matter.


18. See, e.g., In re Lindsey, 158 F.3d 1263, 1272-73, 1278 (D.C. Cir. 1998) (rejecting an executive official’s assertion of attorney-client privilege in the grand jury based in part on the view that “government attorneys stand in a far different position from members of the private bar,” and observing that unlike ordinary lawyers, government lawyers have a constitutional responsibility to faithfully execute the laws, which means that a government lawyer cannot be loyal exclusively to his or her government agency, but must “uphold the public trust reposed in him or her”); Douglas v. Donovan, 704 F.2d 1276, 1279 (D.C. Cir. 1983) (“As officers of this court, counsel have an obligation to ensure that the tribunal is aware of significant events that may bear directly on the outcome of litigation. . . . This is especially true for government attorneys, who have special responsibilities to both this court and the public at large.”); Gray Panthers v. Schweiker, 716 F.2d 23, 33 (D.C. Cir. 1983) (“[C]ounsel for the government, no less than their colleagues in the private sector, are bound by the same obligations to the court. There is, indeed, much to suggest that government counsel have a higher duty to uphold because their client is not only the agency they represent but also the public at large.”); Former Employees of BMC Software, Inc. v. U.S. Sec’y of Labor, No. 08-102, 30 ITRD 2167, 2008 WL 4386874, at *2 n.4 (Ct. Int’l Trade Sept. 26, 2008) (“government lawyers play a unique role in the administration of justice, and therefore have some special duties”); Jones v. Heckler, 583 F. Supp. 1250, 1256-57 n.7 (N.D. Ill. 1984) (“[C]ounsel for the United States has a special responsibility to the justice system. . . . Given the wholly untenable position of the government . . . , the professionally responsible answer to this lawsuit would have been a confession of error by government counsel.”); EEOC v. New Enter. Stone & Lime Co., Inc., 74 F.R.D. 628, 632-33 (W.D. Pa. 1977) (“True, Justice Sutherland’s remarks [in Berger v. United States, 295 U.S. 78 (1934)] were made in the context of the role of the United States Attorney in a criminal case; they should nevertheless apply with equal force today to the actions of federal attorneys representing the myriad governmental regulatory and administrative agencies which have materialized since 1934.”); City of Los Angeles v. Decker, 558 P.2d 545, 551 (Cal. 1977) (“Occupyng a position analogous to a public prosecutor, [a civil government lawyer] is ‘possessed of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice.’ ” (citation omitted)).

arising out of their duty to represent the public interest and their responsibility to represent the people of the state.  

Academic commentators line up on both sides. Some argue that the government’s civil litigators play a unique role that implies responsibilities different from those of lawyers for private clients. They maintain that the rationale for treating prosecutors differently from ordinary advocates also applies for the most part to civil government litigators. Whether the client is the federal, state, or local government, or a public agency, the argument goes, the client is significantly different from a private entity or an individual. The public entity itself has unique legal duties and objectives because its role is to serve the public. In order to carry out the objectives of the public-entity client—including its obligation to seek fair civil outcomes and to promote fair civil processes—the lawyer for the public entity must proceed differently from a private litigator. It has also been suggested that government lawyers should play a professionally distinct role in civil litigation because of their status as public officials. However, other

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20. Rhode Island v. Lead Indus. Ass’n, Inc., 951 A.2d 428, 471-72 (R.I. 2008). These observations were a prelude to the court’s consideration of whether the state Attorney General could retain private lawyers on a contingency fee basis to bring a public nuisance action against lead paint manufacturers. Id. at 477. The court concluded that:

[D]ue to the special duty of attorneys general to “seek justice” and their wide discretion with respect to same, such contractual relationships must be accompanied by exacting limitations. . . . [T]he Attorney General is not precluded from engaging private counsel pursuant to a contingent fee agreement in order to assist in certain civil litigation, so long as the Office of Attorney General retains absolute and total control over all critical decision-making in any case in which such agreements have been entered into. . . . In our view, it is imperative that the case-management authority of the Attorney General, where a contingent fee agreement is involved, be “final, sole and unreviewable.” Id. at 475-76.

21. See, e.g., Steven K. Berenson, Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?, 41 B.C. L. REV. 789, 813-29 (2000); Bruce A. Green, Must Government Lawyers “Seek Justice” in Civil Litigation?, 9 WIDENER J. PUB. L. 235, 236, 239-40, 256-63 (2000); see also Jack B. Weinstein, Some Ethical and Political Problems of a Government Attorney, 18 ME. L. REV. 155, 157-58, 165, 168-72 (1966) (discussing the ethical pressures faced by the government attorney due to “the heightened responsibility he has as a lawyer for reform of the administration of justice and law” and “the multiplicity of services he renders, the many departments he represents, and the fact that he represents the people as well as government”).

22. Green, supra note 21, at 265-66 (“The traditional understanding reflected in decisions such as Berger rests on three premises: (1) the government lawyer represents the sovereignty and not a private client; (2) the sovereignty’s legal obligations and objectives include ‘seeking justice’; and (3) as the government’s representative, the prosecutor must carry out that objective. . . . [T]hese premises are generally, if not invariably, applicable to government lawyers conducting civil litigation.” (citation omitted)).


24. Green, supra note 21, at 275-76 (“As a public official, the government lawyer has an independent legal duty to faithfully carry out the law. This duty may be distinct from (and possibly,
commentators share the ABA’s skepticism, and raise such questions as how government lawyers are supposed to determine what is in the public interest, whether government lawyers are qualified to make this determination, and whether their doing so in a civil lawsuit undermines or usurps the role of the officials who stand in the shoes of the public-entity client, who are entrusted with the responsibility to make decisions in the case, and who are more democratically accountable.

Sometimes, the question is posed, “Whom does the civil government lawyer represent?” The expectation is that the answer will determine the lawyer’s role. But the question can push the debate in either direction. Often, the point is that the government lawyer is not a free agent but represents an entity (for example, a government branch or agency) that is not meaningfully different from a private entity that determines its objectives and directs its lawyer accordingly.

Alternatively, the point is that the client is ultimately the “public,” or at least that the agency is a fiduciary for the public, and that the lawyer therefore has license to promote the public interest, or the lawyer’s conception of the public interest, independently of how the public interest is perceived by agency representatives.

Looking at Ms. Tenant’s lawsuit, one engaged in this debate might ask whether the city’s lawyer should defend the city the same as, or differently from, a lawyer defending a private landlord. If a tenant lives in a privately owned building and brings a lawsuit like the one brought by Ms. Tenant, the private landlord will ordinarily want to avoid or minimize liability, period. Any given landlord may be exceptional—he may have different, broader, additional, or more enlightened objectives.

at times, paramount to) the ordinary duty of a lawyer to render zealous representation. . . . Arguably, at the very least, the government lawyer’s constitutional duty to faithfully carry out the law restricts the government litigator from seeking outcomes or employing methods that, in the lawyer’s independent professional judgment, are contrary to the law. Beyond that, the idea that the professional obligation of the government lawyer transcends loyalty to the government agency implies that the lawyer has a constitutional obligation to act based on an independent determination of what it means to carry out the law, unconfined by the traditional lawyer’s role.”)


26. Professor Steven K. Berenson has sought to identify and refute these arguments. See Berenson, supra note 21, at 802-30.

27. See Green, supra note 21, at 249 (“When the government . . . is a civil plaintiff in an ordinary dispute (e.g. a breach of contract case) or is a civil defendant, the government is arguably no different from a private litigant.”).

If not, the job of the private landlord’s private lawyer is to win or, failing that, to settle a tenant’s personal injury lawsuit on favorable terms. The lawyer may do whatever the law allows to achieve that objective. She might also do some things that the law on the books does not allow because she can get away with minor transgressions, such as asking questions without a good faith basis or offering evidence she knows to be inadmissible. She probably would not identify strongly with the landlord. She would advocate without regard to her view, if any, about what the just result would be. Her conduct would not cast much light on the landlord, who would not be expected to control his lawyer’s courtroom conduct. If the lawyer was respectful on one hand, or obnoxious on the other, a jury would not assume the same of the landlord.

Particularly if the government trial lawyer’s client is a civil agency with a public official who wants to direct the representation, the conclusion may be that the lawyer represents the public agency in roughly the same way as a private lawyer represents a private entity. She advises the public official and takes direction from the public official about whether to proceed in the litigation or settle, and advocates for the public agency’s lawful objectives as communicated by the official—objectives which, in litigation, may be limited to seeking the best economic outcome. She would not view her role as ethically distinct from that of a private entity’s lawyer. She would just be an advocate.

It appeared that this is how the city’s lawyer regarded her role in defending Ms. Tenant’s lawsuit. In her voir dire, the city lawyer asked one of us, “Would you agree that the city has no greater responsibility than a private landlord, and not hold the city to a higher standard?” The premise of the question was that this was just a garden-variety tort case—do not expect more from the city than from anyone else. But another implication may have been, do not expect anything more from the city’s lawyer than from a private lawyer. Ms. L.’s trial conduct was consistent with the conception of her role as indistinguishable from that of a private landlord’s lawyer—and particularly, the conduct of a lawyer for a landlord who was seeking to limit litigation expenses in defending what was perceived to be a small and questionable claim. There appeared to be little pretrial discovery or preparation—there was no indication, for example, that the city conducted any depositions. Its lawyer certainly had not pre-marked and photocopied the city’s exhibits or taken other steps that might have streamlined the trial. The city’s expert witnesses were evidently cut rate; and much of the cross-examination consisted of innuendo. Any theory to defend the claim was
fair game, whether or not it was supportable by the evidence, much less true.

In contrast, if the city’s lawyer analogized her role to that of a prosecutor, she might have sought to prevail in defending the city only if she had conducted investigation and ascertained that Ms. Tenant’s claim was legally undeserving. She might have limited her arguments to those that seemed meritorious, in order to ensure the fairness of the process by which the jury would decide the case. Further, she might have considered in general whether the city had broader interests at stake beyond winning, and pursued those interests.

B. The Lawyer-Juror Perspective

We have offered to reflect on the role of civil government litigators based on our experience as jurors. We were, to say the least, disappointed, and we are confident that our disappointment was shared by our fellow jurors. In other words, we all had some implicit expectations of the city’s lawyer that were not met. The objective of this writing is to infer what those expectations were in order to explore whether jurors (even lawyer-jurors), as representatives of the public, may have useful views on the role of civil government trial lawyers.

But before we get there, one might ask, why bother? This was one trial, and we saw only portions of the city lawyer’s work in connection with it; we were not privy to her work preparing for the trial, to discussions at sidebar, to negotiations with plaintiff’s counsel—we saw just the tip of the iceberg. We were two legally-trained and, thus, atypical jurors.29 The city’s lawyer may likewise be unrepresentative of civil lawyers, or the trial may be unrepresentative of personal injury cases defended by the city; personal injury cases may be unrepresentative of government litigation; and so on. And even if we could say anything meaningful about how the public might view government lawyers, why take the public’s expectations seriously? Judges, prosecutors, and others legal professionals are, in many respects, expected to resist public expectations in favor of professional expectations, and the same might equally be true of the government’s civil trial lawyers. Thus, there are many reasons for skepticism about our project.

One answer is that, regardless of the non-representativeness of two jurors’ expectations, our reactions as jurors may lead us to identify a

29. Further, as the footnotes to this writing reflect, one of the authors, in an academic role, has given prior thought to the question of how civil government trial lawyers should conduct their work. See Green, supra note 21; Green, supra note 3; Green & Yaroshefsky, supra note 9.
different set of expectations from the conventional ones. Even if not, it is likely that, whatever juror expectations may ultimately be, they come to their expectations differently than commentators who debate the role of government lawyers. During long sidebars and other long periods of enforced rumination, we jurors thought about the lawyers’ stage craft, in part because we were told not to deliberate about the evidence, but to keep an open mind until the evidence was all presented. As we thought about what the lawyers were doing, we certainly did not cogitate on whether the city’s lawyer was more like a private landlord’s lawyer or a prosecutor. Neither a private landlord’s lawyer nor a prosecutor was in the courtroom to serve as the basis of implicit comparisons.

Nor would the question, “whom does the city’s lawyer represent,” have struck the jurors as a very interesting one. She obviously represented the city. That’s who she said she represented; that’s who the lawsuit was against; that’s who we assumed would pay any judgment. And the lawyer obviously made decisions for the city in the trial. There was no one else to do so. Perhaps other city lawyers, or someone else, made decisions leading up to the trial, and perhaps others would have to authorize a settlement, but inside the courtroom, the city’s lawyer was calling the shots. And, needless to say, jurors would not be limited or influenced in their thinking by prevalent theories of representation—for example, by models of advocacy such as strong views of zealous representation versus more public-regarding models. Whatever (unfulfilled) expectations we had as jurors came from somewhere else.

To be sure, we jurors did not represent all jurors, and our jury did not represent the entire public. But that may just mean that our project should be replicated—that the profession needs to hear the reactions of more jurors from more trials. And even if we represented just a few, it may be worth knowing what a few disappointed members of the public expected. While not necessarily legitimate, jurors’ expectations are not necessarily illegitimate either. That is worth debating. And even if some members of the public have illegitimate expectations of government lawyers, some professional response may be in order. If public expectations need not be met, perhaps better public education is in order, so that jurors do not walk away disappointed, and the public in general does not walk around believing that public lawyers are doing a bad job.

This is not to suggest that jurors’ perspectives are more valuable than others, just that they may be different and may therefore add something to the mix. Surely, academic commentators who explore the work of government lawyers are more sophisticated and benefit from being able to build upon existing literature and data. Judges’ expectations are entitled to special consideration, because the judiciary
has authority to regulate the legal profession and judges see many more cases and many more aspects of government lawyers’ work than do individual jurors. Government lawyers have the broadest perspective, although not necessarily the most objective or detached one. They see their own work from the inside, and understand the pressures and incentives, and interaction with other players. Even judges have a comparatively limited experience by comparison. In contrast, jurors react to a single anecdotal experience of limited aspects of a single government lawyer’s work.

What do jurors bring to the table? At least three things. First, we bring our own implicit expectations of how the city should act and how its lawyers should act. Our responses to the city lawyer’s trial conduct provides an occasion to make those expectations explicit, and perhaps an occasion that is more genuine, or at least more contextual, than a public opinion poll in which questions are abstract. Second, we have a stake, as residents and taxpayers of the city, in how the city ultimately represents the public in a fiduciary sense. That makes our expectations more than a matter of curiosity. Third, we bring the same common sense and experience that make us valuable as jurors deliberating on the evidence.

We do not mean to suggest that many or most government lawyers conduct their work like the lawyer we observed. Although we began with the story of our trial, our project is not a descriptive one. In fact, our overwhelming experience remains that government lawyers are generally skilled and dedicated, and that they deserve to be honored for their public service. Further, we have no reason to doubt the ordinary excellence of the one lawyer whose work we observed. For all we know, Ms. L. filled in at the last minute for a sick colleague and did her best under difficult conditions. We have no comment on how government lawyers generally behave. Our point is simply that seeing a government lawyer at work can trigger reflections, comments, and intuitions that reveal one set of public expectations about government lawyers’ role. While expectations thereby intuited are not invariably legitimate, they may provide a different perspective—and one that presumptively is entitled to be taken seriously if not necessarily accepted. Ultimately, readers can decide for themselves whether our perspective adds anything to the conversation.

IV. “REPRESENTING” THE CITY, FROM THE JURY’S PERSPECTIVE

The city’s lawyer told the jury that she represented the city. The concept of “representation” is ambiguous, or at least multifaceted. Lawyers represent clients as their agents. Lawyers represent clients in
litigation as their advocates. Does representing the city in civil litigation mean more?

Certainly, we saw the city’s lawyer as an advocate for the city. She “represented” the city in that sense. But we saw a stronger identity between the city lawyer and the city as client. She was a city official. She decided for the city; she spoke for the city; she was employed by the city in a highly responsible position. No city official sat by her side whispering to her what to do. For unexplained reasons, the plaintiff’s lawyer parked his client on the uncomfortable benches in the back of the courtroom rather than in the more comfortable chair beside him (making us wonder whether her injuries could be as bad as all that). But there was still an identifiable client on the plaintiff’s side. As far as we could tell, the city’s lawyer had no one but a junior assistant to confer with. Heaven forbid the agency representatives who testified at the trial should have responsibility for making decisions.

The city’s lawyer represented the city in that little piece of the public square known as the courtroom, just as the Mayor and other high ranking city officials represent it in the broader public sphere. The jury did not view the plaintiff’s lawyer as the plaintiff’s public face. The plaintiff’s lawyer, sitting at counsel table, was separated from his client not only physically but by class, education, expertise, and role. They were distinct. But the city’s lawyer was the city’s public face.

As the public face of the city, the city’s lawyer appeared to carry a different burden from that of the plaintiff’s lawyer. Think of how your mother worried about whether you brushed your hair and dressed respectfully when you went out in public, even though she did not care about how other people’s kids looked. Why did she want you to tuck your shirt in your pants, not look like a slob? Because when you went out in public, you “represented” her and the rest of your family, albeit not in an agency or advocacy sense. Your slovenliness would reflect poorly on all of them. So it was the same with the city lawyer. For better or worse, her conduct reflected on the city administration. Similarly, to us, “representing” the city had a different meaning than representing a private individual. The city lawyer is more than just an advocate and agent. She is a part of the city who represents the whole.

Further, as the city’s public face in the courtroom, the city’s lawyer was not just a “hired gun” who may or may not believe what she was saying and, likewise, whose client may or may not know, care, or

30. See MODEL RULE OF PROF’L CONDUCT R. 1.2(b) (2009) (“A lawyer’s representation of a client . . . does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”).
believe what she is saying, and whose function was exclusively the narrow one of trying to win the case for the client. When a government lawyer, who is a government official, speaks on behalf of the government in a courtroom, which is a public forum, the public does not view her statement as mere advocacy, but as a statement of official government position. In general, her conduct of the proceedings is conduct of the city, not just advocacy on behalf of the city. Members of the public chosen as prospective jurors are watching their city government in action. We expected no sincerity from the plaintiff’s lawyer; had he displayed any warmth toward his semi-exiled client, we would not have taken it seriously. But we expected sincerity, not mere displays of advocacy, on the part of the city’s lawyer.

We expected more from the city administration and its lawyer than we expected from the plaintiff’s lawyer. Jurors are not uninterested when the city is a party. The city government worked for us. It is our city. We take pride in it. We pay taxes to the administration to run it. We had high expectations—that the city administration runs the city effectively, efficiently, and fairly. If a private landlord’s lawyer did a poor job, we would not care about the landlord or the lawyer or think that the lawyer’s performance had much to say about the landlord, assuming we did care about him. But we cared about how the city’s lawyer represented the city. We expected her to take her job seriously; to

31. Consequently, the government may fairly be criticized for assertions it makes in its legal papers. For example, in The New York Times, a recent editorial addressed legal arguments made by government lawyers in defending the constitutionality of the Defense of Marriage Act, which authorizes states to disregard same-sex marriages performed in other jurisdictions and denies federal benefits to same-sex couples. Editorial, A Bad Call on Gay Rights, N.Y. TIMES, June 16, 2009, at A20. Viewing the arguments as not mere advocacy but as statements on behalf of the administration, the editorial took the administration to task for analogizing gay marriages to incestuous ones. Id.

32. Wholly apart from our legal training, we had seen enough lawyers on television, as had all the other jurors, to have a sense that trial lawyers do not necessarily believe what they are saying. In any event, this is scarcely a recent public revelation. As Boswell recounted his conversation with Dr. Johnson:

Boswell: “But, sir, does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion, when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life, in the intercourse with friends?” Johnson: “Why no, sir. Every body [sic] knows you are paid for affecting warmth for your client; and it is, therefore, properly no dissimulation: the moment you come from the bar you resume your usual behaviour. Sir, a man will no more carry the artifice of the bar into the common intercourse of society than a man who is paid for tumbling upon his hands will continue to tumble upon his hands when he should walk on his feet.”

JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON, LL.D. 168 (1830).
serve with dignity; to do a good job—in short, to represent our city well.

V. WHAT DOES IT MEAN TO REPRESENT THE GOVERNMENT WELL?

The jury had a number of expectations of the city’s lawyer. The most basic expectation was that the lawyer will perform her job competently and diligently. But not only because we wanted our city to be well represented.

As jurors, we wanted to do our own job well, and we counted on the city’s lawyer to help us to do so. No one expected anything from the plaintiff’s lawyer. If he was one-sided, or mildly deceptive, we understood that as his job. We were only mildly annoyed. But we looked to the city’s lawyer to bring out the truth, the whole truth, not to offer bogus, unprovable suppositions through innuendo-laden cross-examination. Our failed expectation was implicit in our disappointment in her. The city’s lawyer did not present any independent evidence, but essentially just put the plaintiff to her proof. Her opening offered no plausible theory of the defense other than wait-and-see. She never offered an alternative version of events—that the ceiling never really fell; that if it did, it never landed on the plaintiff’s head; that if it did, it did not really injure her; that if it did, it was not the city’s fault, it was her own. The cross-examination suggested all these possibilities but developed none of them. We did not want to decide the case on burden of proof. We wanted to know what happened, and we wanted the city’s lawyer to help us figure that out.

Second, we thought that the city’s job, when its tenant claims that the ceiling of a city-owned apartment fell on her head, is not just to challenge the plaintiff to prove her claim. We had not yet been instructed on the law—but until then, we thought that if the city’s failure to maintain its building resulted in injury to a tenant, the city should compensate her. The testimony of a city agency representative and the conduct of the defense seemed designed to cast doubt on that legal proposition, but we were not at all persuaded. A private landlord might

33. Ms. L.’s voir dire did not consider that the jury took pride in the city, but the opposite. Evidently assuming that we might be victims of the city as a bad actor, she asked whether we had a bad experience with the city and held a grudge that we would take out against it when we decided the lawsuit. The question we would rather have heard was: “Would you unfairly favor the city because you are a taxpaying resident of it?”

34. In part, the city lawyer’s cross-examination implied that the city would have no duty in this situation. Her theory seemed to be that it was the problem of the tenant association. We found this bewildering. The tenant association was said to play the role of managing agent. Whose agent? The city’s. The tenant association did not own the apartment; it surely could not pay a judgment.
contest liability even in the face of a meritorious claim if that was consistent with his individual sense of social responsibility. He might make the cost of prosecuting the claim high, to extract an unjustly low settlement. But if the law calls on the city to give just compensation to tort victims, its job is to do so. 35 This means that the city’s lawyer and her colleagues had a responsibility to arrange for fair compensation if they concluded that the city acted negligently and injured the plaintiff. 36

Conversely, we thought that if the city had not acted wrongfully or had not injured the plaintiff, the city’s lawyer should put on an effective defense. 37 She should play to win, not defend half-heartedly. She should show and tell the jury why the city was not liable. She should not settle, not even for nuisance value. To do so would unjustly reward people for no good reason, encourage more bogus lawsuits, and pay out our tax dollars where there was no legal necessity for the expenditure.

These understandings were implicit in our frustration at the city’s weak defense to a weak claim. There were so many reasons for skepticism about the plaintiff’s claim. But the city’s lawyer had no discernable theory of defense. Is that because the city’s lawyers recognized that the claim was just, even if the plaintiff’s lawyer was mediocre and lacked adequate resources to do a good job? Or was that because the city had not cared to do its homework? We could not tell.

Why did the city’s lawyer not present the city’s side of the story? Maybe this was just bad lawyering. We can imagine at least two possible reasons. First, the New York City Law Department’s Tort Division divides up responsibility for defending a lawsuit among different city lawyers: one may write the papers, one may conduct discovery, and the trial lawyer may come in at the end. The trial lawyer in this case may simply have grabbed the file on the morning of jury selection and not fully understood the case. But we doubt that is the whole story, or much of it, because the trial proceeded so slowly that she had plenty of time to catch up. Rather, it appeared to us that whoever had responsibility at the

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35. See ABA Formal Op. 94-387, supra note 17 (“It may be that the government client itself has duties to members of the public and to the justice system generally . . . .”)

36. See id. (“[T]he government lawyer retains the right and may have a duty . . . to advise her client respecting obligations the client may have towards the court and opposing parties, and may discuss whether its goals are ‘fair’ or ‘just.’”).

37. See id. (“The government lawyer has no less a duty zealously to represent her client within the bounds of the law than does a lawyer representing a private litigant.”).
discovery phase had not discovered anything either through independent, informal investigation or through depositions.

Another possible explanation is that the city treats tort claims the way an insurance company might—purely from an economic perspective without regard to the justness of individual claims. The Law Department has a portfolio of personal injury cases. It would be economically rational to seek to minimize the city’s liability, including its litigation expenses, in the aggregate. If so, it might be rational not to sink money into defending small cases. The city might settle the just claims for less than their actual value, because plaintiffs’ counsel will want to minimize their own litigation costs and avoid the risk of losing. The city might settle unjust claims for more than the nothing they are worth, to avoid litigation costs. It will do justice wholesale, not retail. And it will play catch up in the exceptional little case that does not settle but goes to trial. Ms. Tenant’s case may have been such a case.

But sitting in the jury box, we were offended by the Law Department’s apparent indifference to the case prior to trial, whether out of incompetence or strategy. If the city has a two-fold obligation of fairly compensating just claims and rejecting unjust ones, even if the case is small potatoes, then the city’s lawyers have to do their homework. They have to investigate and educate themselves about the facts of the case. They have to decide in advance what happened.

Assuming the Law Department had not done its homework, we were offended. We did not want to sit through a trial that was just a discovery process—a prelude to a settlement that could have been achieved without a trial if the city had conducted ordinary investigation and discovery. That is an abuse of our time. We eventually were told that the city settled the case for $75,000. If you add in the court’s time and jurors’ time, the process probably cost far more than if the city had assessed its case before trial and made a decision—either the lawsuit was meritorious, and should be settled at a fair price, or it was not, and should be seen through to verdict. In a sense, the city shifted its litigation costs to the jury.

If the Law Department had done its homework, which seems unlikely, then why did the city settle just before summations? Perhaps the plaintiff was seeking an unfairly high amount. Perhaps the city’s lawyer thought the claim was unjust, but was worried that the jury would reach the wrong conclusion. If so, surely that was not because she found fault with the jury she spent two days selecting, doubting our capacity to decide the case fairly. We were well-educated and attentive. She may have doubted the outcome because her case had not gone in well, but that was her fault, not ours.
Two final points: First, the city’s lawyers should promote the administration of justice. That is an essential government function, and the city’s lawyer represents the city. One aspect of that obligation is that the city’s lawyer should promote the obligation of citizens to serve on juries. We were frustrated by Ms. L.’s approach to voir dire—basically encouraging prospective jurors to say that they could not be fair. We were also disappointed in her conduct of the trial, which we thought reflected disrespect for our time. Those chosen for the jury were among the few prospective jurors who were ready and willing to serve. Contrary to the movie we were shown on the first day of jury service, we did not come away feeling that we had a valuable experience. We had no closure; we were never thanked; we did not see why the trial was necessary in the first place. Nothing about the process would have led the eight of us to want to serve again or to encourage others to do so.

Second, the city’s lawyer should help the city clean up its messes. Lawsuits often reveal problems—ranging from potholes that need to be filled to personnel who need to be retrained or fired. This one revealed failures in a city program: the housing department’s TIL program. There was no serious dispute that the plaintiff’s building was in disrepair. It seemed plain that the building was not inspected and repaired over a significant stretch of time, that the city failed to keep records, or both. The agency official in charge of the building came across as a buffoon. We were frustrated that the city’s lawyer never acknowledged these problems, but cross-examined the housing department’s representative as if he and his agency were doing an exemplary job. Of course we have no way to know whether the city’s lawyer called the problem to the agency’s attention, but her solicitude toward the witness suggested otherwise.

As jurors, we wanted the Law Department to call the city’s attention to the problem in its housing department. The agency might not otherwise find out, since the problems were unlikely to have been revealed but for the litigation. Implicitly, we believed that being a representative of the city in a broad sense calls for a responsibility beyond the advocacy role. Again, this was a matter of common sense and experience, not theory. If a cashier in a grocery store saw a puddle on the floor or a leak in the roof, she might not be responsible to clean it up or repair it, but the grocery store owner and its customers would expect her to report it. Surely, the Law Department and its individual lawyers have some comparable responsibility to put the relevant city

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38. See MODEL CODE OF PROF’L RESPONSIBILITY EC 7-14 (1980) (“A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice . . . .”).
officials on notice of the city’s messes—in this case, to point out the housing department’s evident mismanagement.

VI. CONCLUSION

From our seats in the jury box, government lawyers in civil litigation do have a distinct role and special responsibilities. In the end, our expectations may not differ from those of commentators who analogize civil government lawyers to prosecutors. But our expectations are not derived from theory, but from common sense and experience as members of the public, city residents, and taxpayers. From our perspective, the government lawyer is the government’s public face as well as its advocate and agent. She should do in court what we expect the government to do generally. This includes offering fair settlements of just claims and vigorously defending against unjust ones, not just making economically rational decisions in the aggregate. This includes promoting respect for the judicial process by respecting the jurors, their role as jurors, and their time. This includes calling attention to dysfunctions in other city agencies that are exposed by the litigation. Or, to put it differently, government lawyers should tuck in their shirts, do their homework, and help clean up the city’s messes.