2005

Hard Bargaining on Behalf of the Government Tortfeasor: A Study in Governmental Lawyer Ethics

Steven K. Berenson

Follow this and additional works at: https://scholarlycommons.law.case.edu/caselrev

Part of the Law Commons

Recommended Citation

Available at: https://scholarlycommons.law.case.edu/caselrev/vol56/iss2/4

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
During the first half of the 1990s, I worked as an assistant in the Office of the Attorney General for the state of Massachusetts. My initial assignment was to what became designated as the Administrative Law Division within the office’s Government Bureau. In addition to representing state agencies in administrative appeals, lawyers within the division represented state governmental entities in litigation challenging the validity of state statutes and regulations, as well as in lawsuits challenging the legality of various government policies, practices, and programs. Although the work was interesting and challenging, it involved little actual trial practice. State agencies provided their own legal representation in administrative hearings and in many trial court proceedings. Thus, most of our representation of administrative agencies was in administrative appeals, which were conducted based on the record compiled at the administrative hearing, or in actual appeals of trial court decisions. The other cases we handled at the trial court level usually involved pure questions of law, and were decided on summary judgment.

1 Associate Professor at Thomas Jefferson School of Law. The author wishes to thank W. Bradley Wendel and Fred Zacharias for comments on an earlier draft, and Deanna Sampson for continuing support.
2 Id. (following the “Government Bureau” hyperlink).
3 See MASS. GEN. LAWS ANN. ch. 30A, § 14(5) (West 2004).
4 See MASS. R. CIV. P. 56 (2002).
Newer attorneys who wanted trial experience had the option to take on a case from the office's Trial Division. The Trial Division defended cases against state governmental entities involving issues other than governmental policies, practices, and programs. These were primarily tort, contract, employment, real estate, and environmental damage claims. As the name would imply, cases in the Trial Division actually went to trial with much greater frequency than those in the Administrative Law Division. Another salient difference between the cases assigned to the two divisions is the fact that by virtue of the government's monopoly on certain types of activities (such as lawmaking), most of the cases assigned to the Administrative Law Division could only be brought against governmental entities, for example, a suit challenging the constitutionality of an administrative regulation. By contrast, many of the cases assigned to the Trial Division could equally have been brought against a private defendant had a private party engaged in the challenged conduct—for example, a slip and fall case occurring on privately owned, rather than publicly owned property. There might be procedural distinctions between the private and public slip and fall cases as a result of the requirements imposed by the Massachusetts Tort Claims Act, but the substance of the underlying claims would be virtually identical.

I volunteered to take on a Trial Division case and was assigned a wrongful death claim involving a man in his early twenties, who died at a state-run mental health facility. While the underlying facts in any legitimate wrongful death action are disturbing, they were particularly so in this case. At the time of his death, the decedent was involved in his second inpatient mental health hospitalization, following a series of unsuccessful suicide attempts and a lengthy period of treatment for a variety of mental health issues including depression and bi-polar disorder. The decedent's doctors were treating him with a number of

---

5 It has often been contended that one of the reasons why some newer attorneys choose government over private law practice is the opportunity to get trial practice experience. See, e.g., Jonathan R. Macey & Geoffrey P. Miller, Reflections on Professional Responsibility in a Regulatory State, 63 GEO. WASH. L. REV. 1105, 1115-17 (1995); Michael Selmi, Public v. Private Enforcement of Civil Rights: The Case of Housing and Employment, 45 UCLA L. REV. 1401, 1445 (1998); Nicholas S. Zeppos, Department of Justice Litigation: Externalizing Costs and Searching for Subsidies, 61 LAW & CONTEMP. PROBS. 171, 173-75 (1998).

6 See Massachusetts Attorney General: Office Overview, supra note 1.

7 See id. (following the "Government Bureau" hyperlink).

8 MASS. GEN. LAWS ANN. ch. 258, §§ 1-13 (West 2004).

9 I do not currently possess any documents relating to the case, and my memory as to its specific details is quite limited nearly a decade and a half later. However, the precise details are not essential to the following analysis. The details that are provided represent my best recollection of the actual facts of the case.
therapeutic approaches and a changing and complex "cocktail" of six or seven different prescription drugs.

In the day or so before his death, the decedent began to display symptoms of medical distress. These included an elevated temperature, sweating, a racing heartbeat (tachycardia), dryness of the mouth, increased anxiety, and disorientation. These symptoms worsened until emergency medical technicians were summoned to take the decedent from the mental health facility to a hospital. This action, however, was not sufficient to prevent the decedent’s death a short time later.

Following an autopsy, the state’s medical examiner established the cause of death to be Neuroleptic Malignant Syndrome (NMS). According to the National Institutes of Health’s National Institute of Neurological Disorders and Stroke, NMS is

a life-threatening neurological disorder most often caused by an adverse reaction to neuroleptic or antipsychotic drugs. Symptoms include high fever, sweating, unstable blood pressure, stupor, muscular rigidity, and autonomic dysfunction. In most cases, the disorder develops within the first two weeks of treatment with the drug; however, the disorder may develop any time during the therapy period.10

Through research conducted after I was assigned the case, I learned that NMS is quite rare and difficult to diagnose.11 Thus, any failure to diagnose and treat the disease may not have resulted from substandard care on the part of the decedent’s doctors.12 Such a defense argument seemed objectively weak, however, given the decedent’s symptoms. Perhaps even more troubling from a legal defense perspective was the response of the mental health facility’s nursing staff and doctors on call at the onset of the decedent’s symptoms.13 Although the medical records demonstrated that the nurses and doctors involved were aware of and had monitored and attempted to treat the decedent’s symptoms, it was clear with hindsight that an earlier transfer of the decedent to a hospital might have been advisable and

12 See Pelerono et al., supra note 11, at 1170-71.
may have saved the decedent's life. Although the question of whether the decedent's treatment in the last hours of his life fell below the applicable standard of care would certainly be one for the jury; if the question went to a jury, a plaintiffs' verdict seemed highly likely.

Litigation proceeded into discovery. As part of that process, I took depositions of the decedent's parents, the plaintiffs in the lawsuit and the decedent's only family. The parents were immigrants from Italy, and (well into their sixties) were older than one might expect of the parents of a man in his early twenties. Plaintiffs' counsel asserted that the plaintiffs' English skills were not sufficient to conduct the deposition without a translator (though I suspect that counsel's insistence on this approach was more of a tactic to limit the effectiveness of the deposition than an expression of the plaintiffs' genuine need).

Not that the plaintiffs really needed anything beyond my own lack of experience and discomfort with the foundations for the depositions (not to mention the defense as a whole) to limit the effectiveness of that discovery tool. The plaintiffs knew almost nothing about the medical treatment their son had received; therefore, their testimony would have little relevance to the liability issues. But of course their testimony would be highly relevant to the question of damages. Thus, my objectives for the depositions were threefold: First, I wanted to establish that the decedent's long history of mental health problems and suicide attempts at least made it questionable whether the decedent would have survived much further into adulthood, even in the absence of any medical negligence that might have taken place. Second, I wanted to document the decedent's limited education (he had not graduated high school) and complete lack of work experience so as to argue against any claim for lost earning capacity, which is often the largest component of economic damages in a claim relating to the death of a young person. Finally, I sought evidence that would undermine any loss of consortium damages for the parents. With regard to the last objective, information contained in the medical records indicated a troubled relationship between parents and child, including arguable verbal abuse of the decedent by the parents throughout his upbringing, and likely physical abuse as well, in the form of excessive use of corporal punishment.

Simply put, at the time I lacked the experience, skills, and imagination necessary to handle such delicate issues effectively in a deposi-

14 See generally Pelerono et al., supra note 11, at 1171-72 (citing Arthur Lazarus, Should Neuroleptic Malignant Syndrome Be Treated in a Private Psychiatric Hospital or a General Hospital?, 12 GEN. HOSP. PSYCHIATRY 245 (1990)).
tion. The result was a few hours of tears (by the plaintiffs), misunderstood translations (by all parties), and little in the way of useful information (for the defense). The experience left me feeling worse than I had before about the state’s position.

The case went forward. At a routine scheduling conference with the judge, the parties agreed to attend mediation. At the mediation session, after the lawyers delivered both written and oral summaries of their cases, the mediator agreed with the appraisal of both attorneys, namely, that this was a strong case for the plaintiffs, and a weak one for the defendant. However, at this point in the discussion, the most important fact from the perspective of settlement must be introduced: under the MTCA, damages for negligence are capped at $100,000. Although the jury in a MTCA case is not instructed as to the damage cap during the trial, any jury award in excess of the cap is reduced to $100,000. Thus, given the nature of the claim, what might have been at least a seven figure case if brought against a private party would be limited to the relatively small amount allowed under the statute.

In light of the damage cap, the “expected value” I came up with was $87,500. Although not based on a terribly elaborate analysis, the way I came up with that figure was as follows: First, juries are unpredictable. Therefore, I surmised that even the weakest case that gets to the jury, such as my own, yields a 5-10 percent chance of a verdict for the weaker side. Thus, the expected value of the case dipped to $95,000-$90,000. Next, subtracting at least a few thousand dollars in litigation expenses (the plaintiffs would at a minimum need to present the testimony of a medical expert), left me with the $87,500 figure.

In perhaps another example of my new-lawyer naiveté, I relatively quickly disclosed to the mediator my willingness to settle for up to the $87,500 figure. Shortly thereafter, the mediation session turned

15 Here I learned another lesson in “zealous advocacy.” I went to the scheduling conference with my date book (this was the early 1990s after all) and some suggestions for how to wrap up discovery in the case. Plaintiffs’ counsel, on the other hand, brought her opening argument and proceeded to deliver it as soon as we appeared before the judge. It was all uphill from there for the defense, so to speak.
16 MASS. GEN. LAWS ANN. ch. 258, § 2 (West 2004).
18 Ninety to ninety-five percent of $100,000.
19 I did so with little doubt that the mediator would abide by the norm of confidentiality, and not disclose my “bottom line” figure to opposing counsel without my consent. See, e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS art. V (1994), available at http://www.abanet.org/dispute/modelstandardsofconduct.doc. I also felt confident that the well-qualified mediator would use the information appropriately to advance the parties’ mutual
into a debate over the appropriateness of the $87,500 figure. Plaintiffs' counsel argued vigorously that because the case would clearly have been worth far more than $100,000 if brought against a private party, the state should simply pay the full amount allowed under the damage cap, regardless of the "expected value" calculation articulated in the previous paragraph. I stuck with my figure, which had been approved up the chain of command within the Attorney General's Office prior to the mediation. This was the "hard bargaining" referred to in the title of this Article. For me, if the case did not settle, it simply meant I would receive the trial experience I sought in the first place. However, from the plaintiffs' perspective, it certainly was not worth the risk, time, and aggravation that they would incur in taking the case to trial, for the possibility of at most a few thousand dollars more (given the necessary costs of trial). After a good deal more bluster, plaintiffs' counsel agreed to settle at $87,500.

In the intervening years, I have often thought about the appropriateness of my actions in the litigation of the above described case, which I shall refer to fictitiously for the remainder of this Article as Alighieri v. Commonwealth of Massachusetts. Additionally, I have published two articles focusing particularly on government attorney ethics. In Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?, I argued in favor of what I described as the "public-interest-serving-role" for government attorneys, or, more particularly, the notion that government attorneys have a greater duty to pursue the public interest than their counterparts in private practice. In The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers' General Duty to Serve the Public Interest, I demonstrated that courts, legislators, and bar authorities, have incorporated conceptions of the public-interest-serving-role for civil government attorneys into the positive law (i.e., cases, statutes, and bar rules) in a variety of contexts. However, neither of those previous articles directly addressed the situation presented by Alighieri.

interest in a fair settlement. However, I have since come to learn that few practicing attorneys would have such confidence in either proposition and that most practicing attorneys in fact keep mediators "at arm's length" in much the same way they would approach the opposing party in a bilateral negotiation to settle a case. See, e.g., John W. Cooley, Mediation Magic: It's Use and Abuse, 29 Loy. U. Chi. L.J. 1 (1997) (discussing "deceptions" routinely used by counsel and mediators alike as part of the mediation process).

21 Id. at 789-90. For an explanation of what I mean by the term "private practice" in this context, see Steven K. Berenson, The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers' General Duty To Serve the Public Interest, 42 Brandeis L.J. 13, 13 n.1 (2003) [hereinafter Berenson, The Duty Defined].
More particularly, in *Public Lawyers*, after laying out traditional understandings and formal statements of the public-interest-serving-role, and identifying and responding to various critiques of that role, I provided three examples of how the role should be applied in particular government-lawyering contexts. The first example addressed the paradigmatic case of criminal prosecution. The second example involved work on behalf of a federal government agency in setting up a program of aid to religious schools that raised serious questions as to the program’s constitutional and statutory validity. The final example related to the role of attorneys in negotiating the value to be paid for property in an eminent domain action.

In each of these three examples, the government client engaged in conduct that only a government entity, as opposed to a private party, could have engaged in. Of course, with regard to the first example, only the government has the authority to pursue criminal prosecutions. And with regard to the second example, only a government agency could be authorized by legislation, and given access to public funds to enact an education subsidy program. Similarly with regard to the third example, only the government, or an entity acting with a grant of government authority, can exercise the power of eminent domain.

Virtually all of the examples of positive law discussed in *The Duty Defined* also involved government clients or government entities engaged in conduct that no private client or entity would be able to engage in. In each of these examples, at least to a certain degree, it is the government actor’s exercise of sovereignty that justifies imposing special or “higher” duties than would be applied to the lawyer for a private party who cannot exercise such sovereignty. However, as suggested above, in many contexts, government entities appear to act without exercising the sovereign authority accorded to them. In such contexts, a government entity’s actions do not appear to be fundamentally different from similar actions of a private party. For example, if a government agency purchases automobiles for its employees, its
actions might not appear to be significantly different from those of a corporation making such a purchase. Or, if the driver of one of those government automobiles gets in a fender bender with a private citizen, the government might be faced with a tort suit in which its actions might also be viewed as equivalent to those of a private party defending a similar suit.

Indeed, the Alighieri case might well be characterized as one in which the government defendant’s actions do not appear to be significantly different from those that might be engaged in by a private party. After all, doctors and their support staff who work for private hospitals or other private health care entities are sued for medical malpractice and/or wrongful death with some frequency. In such circumstances, it might well be argued that because the government’s conduct did not differ significantly from conduct a private party might have engaged in, the ethical responsibilities imposed on the government’s lawyers should similarly not differ from those imposed on the lawyers for the private party, as would be the case if the government defendant had engaged in a sovereign government function, that is, one that a private party could not engage in.

Thus, one of the primary purposes of this Article is to try to determine whether the public-interest-serving-role, as identified in the above-mentioned articles, applies equally in contexts where the government lawyer represents a government entity engaged in conduct that does not appear to involve an exercise of the entity’s sovereignty. A second important purpose is to then determine, if there is such an exception to the applicability of the public-interest-serving-role, whether that exception applies in the circumstances of the case described herein.

Before addressing these fundamental questions, however, this Article explores whether my conduct in Alighieri violated relevant ethical standards that would apply to an attorney engaging in similar activity but working for a private party. According to the public-interest-serving-role, if the same conduct engaged in by a government attorney would be deemed unethical if engaged in by a private attorney, then by definition, the government attorney’s conduct would be unethical. To determine how the actions of a private attorney who engaged in the same behavior that I did in Alighieri would be viewed from an ethical perspective, it is necessary to explore two familiar categories of legal ethics principles, namely, the duty not to pursue or

29 See infra Part II.
defend a claim on grounds that are frivolous, and the collection of rules and norms that govern attorney settlement negotiations.

After concluding that my actions in Alighieri would not have been unethical if engaged in by an attorney for a private party, this Article then considers whether, under established doctrine, the answer should be different given that a government attorney did in fact engage in the actions on behalf of a government entity. More particularly, in The Duty Defined, I argued that existing doctrine supports the notion that a higher threshold of "nonfrivolity" applies to government attorney decisions to bring or defend a claim than applies to private practitioners. I also argued that courts exhibit a lower tolerance for certain "hardball litigation tactics" when engaged in by government attorneys than they would for similar conduct engaged in by private attorneys. Thus, this Article next reviews my conduct in Alighieri through the lens of the heightened pleading threshold applicable to government attorneys and the more constrained version of zealous representation available to government attorneys. At least with regard to the former issue, the Article concludes that a serious question is raised as to whether the defense in this case was appropriate in light of the applicable standard for government attorneys.

Assuming for the sake of discussion that my conduct in Alighieri did not run afoul of the doctrines mentioned in the previous paragraph, this Article next applies the general approach to the public-interest-serving-role identified in Public Lawyers to the facts of the instant case. To do so, it is necessary to discuss in some detail the purposes behind damage caps such as the one included in the MTCA. After engaging in this analysis, this Article also concludes that a serious question is raised as to the appropriateness of my settlement posture in light of the purposes behind the MTCA damage cap.

Given the conclusion that my conduct in Alighieri raised serious issues as to its appropriateness under the public-interest-serving-role, this Article next returns to the fundamental question of whether an exception to the public-interest-serving-role should apply to situations in which the government attorney represents a government entity act-

---

30 See infra Part II.A.
31 See infra Part II.B.
32 See infra Part III.
33 See Berenson, The Duty Defined, supra note 21, at 23-28.
34 Id. at 29-31 (citing other secondary sources).
35 See infra Part III.A.
36 See infra Part III.B.
37 See infra Part IV.
38 See infra Part IV.
ing in a capacity that does not appear to exercise the entity’s sovereign authority. To answer this question, the link between sovereignty and the public-interest-serving-role is explored. Additionally, an analogy is drawn to substantive law doctrines in which the U.S. Supreme Court has treated government actors differently in situations where the actors allegedly have not exercised their sovereign authority, from how the Court would have treated the actors had they exercised such authority. More specifically, this Article explores the “market participant” exception to application of the dormant commerce clause, the possible First Amendment exception that applies to the government in its role as speaker as opposed to regulator of speech, and the similar exception to First Amendment constraints that applies to the government in its capacity as an employer. Although parallels between these doctrines and Alighieri exist, this Article concludes that these doctrines are either seriously flawed or are limited to the point that even if accepted in their current forms, they do not go so far as to conclude that the government actors in those situations completely “shed” their sovereignty and therefore should be treated exactly the same as similarly situated private entities. Thus, the notion that government attorneys can ever escape completely from the strictures of the public-interest-serving-role is rejected.

Moreover, even if it were that case that in certain circumstances government attorneys should be exempt from the public-interest-serving-role because neither they nor their clients’ conduct differed significantly from that which a private attorney and/or his or her private party client might engage in, it would be questionable whether the case discussed here would fall within such an exception. Thus, this Article next goes on to examine whether Alighieri would qualify for any exemption to the public-interest-serving-role for government attorneys.

After concluding that it would not, this Article ultimately concludes by reiterating its appraisal of the conduct in question pursuant to the public-interest-serving-role.

II. PRIVATE ATTORNEY ETHICS

Before turning to whether my conduct in Alighieri violated the ethical standards applicable to government attorneys, it is worth ask-
ing whether similar conduct would be unethical if engaged in by an attorney for a private party. Because the public-interest-serving-role imposes additional duties on government attorneys beyond those applicable to private practitioners, it is necessarily the case that if conduct engaged in by a government lawyer would violate standards applicable to private attorneys, then such conduct would be unethical when engaged in by the government attorney as well. In general, attorneys for private parties are expected to work diligently to pursue their clients' lawful objectives. And it is clear that for a client's objectives to be lawful, the pursuit of the objectives must involve neither a violation of substantive law by attorney or client nor a violation of relevant legal ethics standards.

45 See MODEL RULES OF PROF'L CONDUCT R. 1.2, 1.3 (2002); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (2000). The long standing formulation was "[z]ealous [advocacy] [w]ithin the [b]ounds of the [[l]aw." MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1969). However, when the American Bar Association replaced its Model Code of Professional Responsibility with its Model Rules of Professional Conduct in 1983, the Canonical status of the duty of zealous advocacy was reduced to a couple of mentions in the Rules' Preamble. See MODEL RULES OF PROF'L RESPONSIBILITY pmbl. ¶ 2, 7 (1983). And, in the more recent Restatement (Third) of the Law Governing Lawyers, zealous advocacy barely warrants a mention in the comment to the section entitled "A Lawyer's Duties to a Client—In General," and does so by way of disclaimer. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. d (2000). The comment states that as a matter of law, any suggested duty of zealous advocacy amounts to nothing more than an attorney's combined other duties of competence and diligence. Id. Other commentators have devoted much attention to the meaning of the decreased focus on zealous advocacy in each subsequent codification of attorney professional responsibility. See, e.g., John Conlon, It's Time To Get Rid of the "Z" Word, 44 RES GESTAE 50 (2001) (discussing the historical development of the zealous advocacy standard and its applicability to the present); W. William Hodes, We Need More Zealousness, Not Less—But Within the Bounds of the Law, 44 RES GESTAE 46 (2001) (discussing the zealotry-zealousness distinction in support of a properly defined zealous advocacy standard); Janis Reinken, Zealous Representation: No-Win Benchmark for Lawyers, 65 TEX. B.J. 706 (2002) (discussing the subjectivity of the zealous advocacy ideal). However, this debate is largely beside the point for the present discussion. It is clear that the language in the above-cited provisions relating to the degree of effort required to be expended by a lawyer acting on behalf of a client represents a minimum standard that must be satisfied by the lawyer, rather than an upper limit. Indeed, to the extent such an upper limit exists, it is embodied in other, more specific prohibitions—the "bounds of the law" aspect of the above-cited formulations. See infra notes 46-47 and accompanying text. Here, there is no reasonable argument my efforts on behalf of the government defendant fell below the level of zeal required of a government attorney. Rather, as is discussed in more detail below, any reasonable argument relating to zealousness in the instant case would be that my conduct on behalf of the government defendant transgressed the upper, rather than the lower limit, of required effort on the part of a government attorney.

46 See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2000) ("A lawyer shall not counsel a client to engage, or assist a client, in the conduct that the lawyer knows to be criminal or fraudulent . . ."). see also David B. Wilkins, Legal Realism for Lawyers, 104 HARV. L. REV. 468, 471 & n.9 (1990) (quoting MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1, 7-4, 7-5 (1980)).

47 See MODEL RULES OF PROF'L CONDUCT 1.16(a)(1) (2002) ("[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the representation will result in violation of the rules of professional conduct or other law . . ."); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 ("[T]he bounds of the law . . . includes Disciplinary Rules and enforceable professional regulations."); see also Wilkins, supra note 46, at 471 & n.10 (quoting MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1
There is nothing even remotely unlawful about a defense attorney in a tort suit seeking to minimize the amount the plaintiff recovers from her or his client, if that is the client's objective. Indeed, the decision whether, or for how much, to settle a lawsuit falls within the client's exclusive authority in terms of the delegation of authority between lawyer and client within the scope of the professional relationship.\textsuperscript{48} However, my conduct in \textit{Alighieri} does raise questions with regard to at least two attorney ethical obligations. The first involves the attorney's duty not to defend a claim unless there is a non-frivolous basis for doing so.\textsuperscript{49} The second involves the collection of rules and norms that govern attorney conduct in negotiating settlements.\textsuperscript{50} Below, it is determined whether my conduct in \textit{Alighieri}, if engaged in by an attorney for a private party, would have violated either of those obligations.

\textbf{A. Frivolous Defense}

According to the best-known formulation of the nonfrivolity requirement as applied to private attorneys, "[a] lawyer shall not . . . defend a proceeding . . . or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."\textsuperscript{51} The evidence of medical negligence in \textit{Alighieri} was strong enough at least to raise a question as to whether defense of the claim would have been frivolous if engaged in by an attorney for a private hospital, physician, or medical insurer. Of course, the term "frivolous" is not self-defining in the context of litigation defense, and the Model Rules also fail to provide a definition of the term.\textsuperscript{52} The \textit{Restatement (Third) of the Law Governing Lawyers} (the "Restatement"), which contains similar language to that in Model Rule 3.1, goes further in defining a frivolous position in litigation as "one that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it."\textsuperscript{53}

\textsuperscript{48} See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2003); \textit{Restatement (Third) of the Law Governing Lawyers} § 22 (2000).


\textsuperscript{51} MODEL RULES OF PROF'L CONDUCT R. 3.1 (2003).

\textsuperscript{52} \textit{Id.}

However, even application of the Restatement's standard raises questions in the medical malpractice context. That is because the ultimate question of whether there was medical negligence is generally one for the jury rather than the judge.\textsuperscript{54} Related principles that are relevant to the instant case are that generally the question of whether there was medical negligence requires expert testimony,\textsuperscript{55} and that by definition if there is a conflict between experts regarding the question of negligence, the case is properly submitted to the jury.\textsuperscript{56} Another way to put this is that a court may not take the question of medical negligence away from the jury by granting summary judgment, for example, as long as there is credible expert testimony on both sides of the question.\textsuperscript{57}

Applying the above-described principles to the facts of \textit{Alighieri} yields the conclusion that a private attorney would not have acted unethically in defending a medical malpractice claim under the same circumstances. Early on in my investigation of the case, I was directed to a Department of Mental Health psychiatrist, who was not involved in \textit{Alighieri}, but had reviewed the case pursuant to internal department procedures, following the decedent's death but prior to the filing of the lawsuit. This doctor was experienced, had strong paper credentials, and disagreed with the medical examiner's conclusion that the cause of death was NMS. Correspondingly, the doctor did not believe that the department's doctors and staff had acted negligently in failing to treat the decent for NMS.

Of course, one can debate how much credence a jury would have placed on this one expert's views. Although he was thoughtful, articulate, and would have presented himself well to the jury, the fact that he was a department insider might have raised a presumption of bias. On the other hand, there was absolutely no reason to believe that the doctor had been pressured to reach his conclusions nor was there any evidence to suggest that his employment would have been negatively impacted had he concluded for internal purposes that there had been medical negligence. Indeed, the fact that the doctor would not be compensated beyond his normal salary for his testimony could counter any perceived bias, at least when contrasted with the

\textsuperscript{55} \textit{Burke}, 867 A.2d at 219; \textit{Garnett v. Coyle}, 33 P.3d 114, 122 (Wyo. 2001).
\textsuperscript{57} \textit{Burke}, 867 A.2d at 218-19; \textit{Barresi}, 740 N.Y.S. at 446; see also \textit{Garnett}, 33 P.3d at 122 (finding summary judgment for defendant appropriate where plaintiff failed to present expert testimony of medical negligence); David Hittner, \textit{Summary Judgments in Texas}, 35 BAYLOR L. REV. 207, 221 (1983).
plaintiffs' expert, who most certainly would be paid for her or his testimony.\textsuperscript{58}

In any event, the conflicting expert testimony would have made it clear that no reasonable tribunal could have rejected the defense presented as frivolous. Furthermore, a jury decision to believe the defense expert rather than any plaintiffs' experts would not properly have been rejected as unreasonable.\textsuperscript{59} In such circumstances, the non-frivolity standard articulated above would certainly be satisfied by a private attorney presenting a defense based on the testimony of the above-described expert witness.

\section{B. Negotiation Ethics}

Another question that should be addressed is whether the negotiation approach taken in this case would have been unethical if engaged in by an attorney for a private party. Earlier, reference was made to the collection of rules and norms that govern attorney conduct in negotiation of settlements in litigation.\textsuperscript{60} Discussing the applicable standards in such broad terms is necessary in the area of negotiation because, in fact, there is a paucity of binding rules that govern attorney conduct in negotiation.\textsuperscript{61} Perhaps this is the case because there is such wide normative disagreement regarding what the appropriate ethical standards for negotiations ought to be.\textsuperscript{62} Or this state of affairs may exist because so much negotiation takes place outside the public view, thus rendering enforcement of binding rules of conduct in this area difficult.\textsuperscript{63}

In any event, the starting (and often ending) point for discussions of negotiation ethics is generally Model Rule 4.1,\textsuperscript{64} which prohibits lawyers from making false statements of material fact in the course of representing a client.\textsuperscript{65} However, it should be obvious that no mis-


\textsuperscript{60} See supra note 50 and accompanying text.

\textsuperscript{61} See, e.g., Cooley, \textit{supra} note 19, at 94.

\textsuperscript{62} Id. at 95-97 \& nn.649-63 (summarizing various scholarly positions regarding negotiation ethics).

\textsuperscript{63} \textsc{Richard A Zitrin \& Carol M. Langford}, \textit{Legal Ethics in the Practice of Law} 446 (2d ed. 2001).

\textsuperscript{64} Cooley, \textit{supra} note 19, at 94.

\textsuperscript{65} \textsc{Model Rules of Prof'L Conduct R. 4.1 (2002); accord Restatement (Third) of the Law Governing Lawyers \textsection{} 98 (2000); see also Model Rule of Prof'L Conduct R. 8.4(c) (2003)} (precluding lawyers from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation"). However, this provision has not been interpreted to impose obligations on lawyers relating to negotiation beyond those imposed by Rule 4.1. Cooley, \textit{supra} note
statement of fact was made in Alighieri. To the contrary, as suggested above, my fear in retrospect is that I was too candid in revealing my "bottom line" for settling the case, not that I acted deceptively in disguising the defendant's willingness to settle. Moreover, even if I had lied about what the defendant was willing to settle for, the comments to Rule 4.1 specifically except statements as to a party's intentions regarding settlement from the category of statements of material fact covered by the rule.

Perhaps if my conduct in Alighieri had been engaged in by an attorney for a private party, it may have been unethical to go into the mediation session in the first place with a firm "bottom line" and an unwillingness to settle for any figure above that amount. However, rules of ethics governing attorneys representing parties in mediation are even less well established than those governing representation in bilateral settlement negotiations. While there may be an emerging standard of "good faith" that applies to attorney conduct in mediation, it must be kept in mind that Alighieri was litigated nearly a decade and a half ago when any such standard would have been in its infancy. Moreover, participation in the mediation session in Alighieri was purely voluntary—there was no requirement to attend mediation at the time. Furthermore, even to the extent that a good faith requirement might have applied, such a requirement has not been interpreted to condemn attorney insistence that settlement be at a particular figure unless such a figure is wholly unreasonable. While the reasoning process described above that went into developing the settlement figure in Alighieri may not have been the most sophisticated one possible, it certainly should not be characterized as unreasonable. Indeed, the fact that the plaintiffs ultimately accepted the settlement offer belies any argument that the offer was so unreasonable as to represent bad faith. Thus, had a private attorney engaged in conduct analogous to my own, he or she would not have violated applicable ethical standards.

19, at 98-99.

66 See supra note 19 and accompanying text.

67 See supra note 19 and accompanying text. Accord Restatement (Third) of the Law Governing Lawyers § 98 cmt. c (2000); Cooley, supra note 19, at 97.


69 Id. at 92; see also John Lande, Why a Good-Faith Requirement Is a Bad Idea for Mediation, 23 ALTERNATIVES TO THE HIGH COST OF LITIGATION 1, 9 (2005) (quoting ABA Section of Dispute Resolution).
III. GOVERNMENT ATTORNEY ETHICS—THE POSITIVE LAW

Since my conduct in Alighieri would not have been unethical if it had been engaged in by a private attorney, the question now is whether that same conduct would have been inappropriate given that it was engaged in by a government attorney. The next section of the Article addresses the question of whether it would be appropriate for a government lawyer to pursue the lowest possible recovery for the plaintiff suing a government entity if that were the objective of the government client.\(^{71}\) More narrowly for the moment, however, in The Duty Defined, I contended that in a number of areas, courts, legislatures, and bar authorities are developing different ethical standards applicable to government attorney activities than are applicable to private attorneys.\(^{72}\) Two of these areas relate to the two ethical issues addressed in the private representation context in Part II: frivolous defense and negotiation ethics. More particularly, a higher threshold for defending claims may apply to government attorneys than applies to private practitioners,\(^{73}\) and courts may have a lower tolerance for certain hardball litigation tactics when engaged in by government attorneys than when engaged in by private attorneys.\(^{74}\) Thus, the questions of frivolous defense and negotiation ethics must be revisited under the emerging standards that apply to government attorneys.

**A. Frivolous Defense**

Although courts do appear to apply a higher standard for bringing or defending a claim to government attorneys, a single, clearly articulated alternative to the nonfrivolity standard that applies to attorneys for private parties has yet to emerge. Two possible formulations that I have cited to previously come from Judge Jack Weinstein’s opinion in Zimmerman v. Schweiker.\(^{75}\) One, described as the “reasonable litigation-attorney” standard, asks: “Is there any substantial chance of success for my client? Am I merely going through the motions of a suit when my investigation of the law and facts convinces me that my

---

71 See infra Part IV.
72 See Berenson, The Duty Defined, supra note 21, at 13.
73 Id. at 23.
74 Id. at 29.
75 575 F. Supp. 1436 (E.D.N.Y. 1983). Zimmerman involved a request for attorneys’ fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 (1982 & Supp. III 1982), after the plaintiff successfully overturned a decision by the United States Secretary of Health and Human Services denying her application for Supplemental Security Income (SSI) benefits. Under the EAJA, a prevailing party in a case against the United States is entitled to attorneys’ fees if the government’s position in the litigation was not “substantially justified.” Id. at 1438.
client would and should lose?" The other, addressed even more directly to government defense attorneys asks: "Is opposing this claim just, is it fair, is there a reasonable basis for believing that the government can prevail on both the law and facts?"

Although those standards are not self-executing, each raises a serious question as to the appropriateness of the defense in *Alighieri*. In my heart, I believed both that my client and I *would* lose, and indeed *should* lose, were the case to be tried. Thus, under neither standard would it have been appropriate to require the plaintiffs to try the case. However, this I did not do. In agreeing to settle the case, I may have done all that the above two standards required. On the other hand, I was willing to go to trial should the plaintiffs refuse to agree to my firm settlement offer, and indeed it may only have been that credible "threat" that caused the plaintiffs to settle. Thus, a proper application of the above two standards might well have required settlement for the full amount of the damage cap. Perhaps a final conclusion with regard to this question must await the fuller discussion of the purpose behind the damage cap that will be undertaken later in this Article.

Moreover, because interesting issues related to the case remain to be addressed, I will assume for purposes of discussion that my conduct in *Alighieri* did not run afoul of the higher standard for defense of a claim that applies to government attorneys. However, a reasonable application of such a standard might indeed conclude that my conduct as a government attorney was unethical.

**B. Hardball Litigation Tactics**

In addition to a higher pleading threshold, courts have begun to exhibit a lower tolerance for certain hardball litigation tactics when engaged in by government attorneys than when similar tactics are engaged in by attorneys for private parties. Thus, the question might be asked whether the firm negotiating stance taken in *Alighieri* might run afoul of such a standard. However, given the above analysis of the negotiating stance taken in *Alighieri* from the perspective of private practice ethics, it may not even be accurate to describe the negotiating tactics applied here as "hardball," let alone impermissible.

---


77 Zimmerman, 575 F. Supp. at 1440.

78 See infra p. 370.


80 See *supra* Part II.
Certainly, none of the specific tactics that have been deemed to be inappropriate when engaged in by government attorneys resemble the hard bargaining I engaged in. Thus, without delving into the question in much detail, it can be concluded that my negotiating tactics did not violate emerging standards prescribing certain hardball litigation tactics on the part of government attorneys.

IV. THE PUBLIC-INTEREST-SERVING-ROLE FOR GOVERNMENT ATTORNEYS

Assuming, for purposes of discussion that my conduct in Alighieri did not violate positive law relating to the conduct of government attorneys, the next question is whether that conduct nonetheless may have violated a broader conception of appropriate conduct by government lawyers. Is it appropriate for a government lawyer defending a tort claim to seek the lowest possible recovery for the plaintiff? Note that with regard to the same question asked in relation to conduct by a private lawyer, the conclusion was that such conduct would be appropriate because: (1) seeking to minimize recovery is a lawful objective of the client and (2) such an objective is reserved exclusively to the client in terms of the scope of authority within the lawyer-client relationship. Referring to the second point first, perhaps the "800 pound gorilla in the room" that has yet to be addressed is: as a government attorney, who was my client? Indeed, many commentators who have addressed questions of government attorney ethics have viewed as the necessary starting point the determination of who the client of the government lawyer is.

However, I (along with others) have argued that answering the "who is the client" question is often neither necessary, nor even particularly helpful, in determining a government attorney's ethical obligations in a particular set of circumstances.

For example, in Alighieri, there are numerous possible answers to the "who is the client" question. In the litigation itself, pursuant to the

---

81 See Berenson, The Duty Defined, supra note 21, at 29.
82 See supra notes 45-48 and accompanying text.
requirements of the MTCA, the only properly named defendant was the Commonwealth of Massachusetts. But if the commonwealth is treated as "the client," the basic issue that plagues all entity representations arises—which individuals have the authority to give instructions to the lawyer on behalf of the entity client? When the entity is a state, perhaps the governor as the state's chief executive officer has that authority. However, it seems quite silly to think that I might have sought direction from the governor of Massachusetts, or anyone on his legal staff for that matter. Other authorities have contended that the branch of government implicated in the dispute is the client, in this case, the executive. However, this "answer" does not solve the fundamental entity representation problem. Nor is the problem solved by treating the client as the executive branch agency employing the hospital, doctors, and support staff that allegedly treated the decedent negligently, namely, the Massachusetts Department of Public Health.

Thus, another possible client or client spokesperson might be the relevant agency head, or perhaps the agency's general counsel. However, neither of these persons had any knowledge regarding the facts of Alighieri. Perhaps then the client should be the subordinate agency personnel (both inside and outside the general counsel's office), who actually had knowledge of the facts relevant to Alighieri, and who I actually dealt with in formulating a defense in the case. Of course, none of these individuals were named defendants, nor would they personally be liable to pay any part of the judgment or settlement. Indeed, under Massachusetts law at the time, all judgments and settlements of litigation claims were paid out of the state's general fund rather than the involved agency's budget, thereby even further limiting the stake of individual agency personnel in the outcome of the lawsuit. Moreover, no theory of bureaucratic accountability within a democratic state would accord the full authority that goes with client status to personnel so far down the agency "chain of command."

The situation is further complicated here by the fact that in Massachusetts, the attorney general is an independently elected, constitutionally recognized officer with individual authority over the conduct of litigation instituted on behalf of, or against, the commonwealth. Thus, the attorney general had an independent responsibility for the

---

85 See MASS. GEN. LAWS ANN. ch. 258, § 2 (West 2004).
87 See Berenson, Public Lawyers, supra note 20, at 822-24.
reasonableness of the settlement posture taken in *Alighieri*. Therefore, the attorney general also might properly be viewed as the client in this situation, or perhaps the head of the office’s Trial Division, or even other supervisory attorneys within the division. In fact, it was the latter persons whom I dealt with almost exclusively in formulating the actual settlement posture in the case.

Alternatively, arguments have been made that the public, or the public interest, should be treated as the client in the representation of government entities.\(^8\) Obviously, treating every citizen of Massachusetts as a client of the government lawyer would be unworkable and unwise,\(^9\) though I have argued that public opinion should not be discounted entirely in determining appropriate government lawyer conduct.\(^9\) The version of the public-interest-serving-role I have advocated for also rejects the idea that any abstract notion of "the public interest," particularly when that term serves as a euphemism for a particular government lawyer’s personal policy preferences, should be treated as the government attorney’s client.\(^9\) However, through proper analysis of the relevant legal source material, the next Section of this Article demonstrates that rather than pursuing such an amorphous and overarching concept of the public interest, government attorneys can, and indeed should, determine how the public interest is implicated in the context of the particular legal disputes they are called upon to help resolve.\(^9\)

In any event, the above discussion underscores the fact that choosing a single client from among the many possibilities mentioned above would be arbitrary and could serve to prevent the significant contribution that might be made by other potential clients on the list to determine the proper approach to take in litigating the case. Therefore, the version of the public-interest-serving-role advocated here suggests that the correct approach of the government attorney to litigating this case would be to seek guidance from a wide range of the sources identified above and to serve a mediating function in considering how to incorporate those views in the representation. Of course, such a task would be very difficult if the views of all of the potential clients were at odds in a given case. However, in the instant case, as will be true in many cases, most if not all of the potential clients

---

\(^{8}\) Cramton, *supra* note 83, at 298.

\(^{9}\) See Roberts v. City of Palmdale, 853 P.2d 496, 506 n.5 (Cal. 1993) (rejecting plaintiff’s claim that as a member of the public, she was a client of the City Attorney, and therefore entitled to waive any claim of privilege relating to communications between the City Attorney and the City Council).

\(^{91}\) See Berenson, *Public Lawyers*, *supra* note 20, at 818-19.

\(^{92}\) Id. at 846.

\(^{93}\) See *infra* Part V; see also Berenson, *Public Lawyers*, *supra* note 20, at 814-21.
shared common interests in the litigation of the matter. For example, all of these parties share an interest in both minimizing the impact of a judgment or settlement in the case on the public fisc and in assuring that the plaintiffs received fair treatment in the process of litigating their claim against the government.

One thing that should be clear from the foregoing discussion is that in Alighieri, I played a much greater role in formulating its settlement posture than a similarly situated private attorney would have in advocating the settlement figure proposed by his or her private client pursuant to the client's exclusive authority regarding settlement. This will often be the case to a greater or lesser degree in government legal practice. Therefore, in contrast to the situation with the private attorney, the ethical appropriateness of the government attorney's conduct must be evaluated in conjunction with an evaluation of the appropriateness of the substance of the commonwealth's settlement posture in light of the relevant legal authorities.

This returns us to the first issue raised at the beginning of this Part: how appropriate is the objective of minimizing plaintiff recovery in a tort case against a government defendant? To answer this question, focus is placed on the writings of Professor William H. Simon regarding appropriate ethical behavior for attorneys generally, which in turn were relied on heavily in developing the version of the public-interest-serving-role for government attorneys advocated in Public Lawyers, Private Values. Simon's basic maxim for lawyers' ethics is that lawyers "should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice." Given that one of the starting points for Simon's theory was the duty of government prosecutors to "seek justice" rather than merely to convict defendants, and that the prosecutor's duty to seek justice, in turn, is grounded in the same conception of government sovereignty that grounds the broader public-interest-serving-role for all government attorneys, it makes sense to look to Simon's theory in formulating a conception of the public-interest-serving-role for government attorneys.

94 See supra pp. 362-65.
95 See supra p. 362.
96 Berenson, Public Lawyers, supra note 20, at 817-18.
98 Id. at 10; William H. Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083, 1091 (1988).
99 See infra Part V.
100 Another reason to look to Simon's theory as a basis for developing a proper conception of government attorney ethics is its origin in opposition to traditional approaches to legal ethics
The breadth of the term "justice," in Simon's maxim, as well as in the justice-seeking role for public prosecutors, and similar conceptions of "the public interest" in the public-interest-serving-role for government attorneys generally, has caused some critics to contend that application of these standards in particular cases is likely to be hopelessly indeterminate. However, for purposes of his maxim, whose primary justifications lie in the "private" values of individual dignity and autonomy. Berenson, Public Lawyers, supra note 20, at 811-13. Simon's grounding of his ethical theory in the "public" values of justice and legal merit makes it a more appropriate candidate for grounding a view of attorney ethics that will apply in the public realm of government legal practice than the traditional approaches. See id. at 830-35 (discussing how private values are an inappropriate basis for evaluating public lawyers' conduct). However, since the writing of Public Lawyers, at least a couple of scholars have offered critiques or responses to the theories of Simon and like-minded scholars, who seek a return to the more client-centered approach advocated by traditional views of legal ethics, in contrast to the approach offered by Simon, which vests greater discretion with lawyers to determine appropriate actions in the course of legal representation. Ted Schneyer, The Promise and Problematics of Legal Ethics from the Lawyer's Point of View, 16 Yale J.L. & Human. 45, 73-77 (2004) (citing Norman W. Spaulding, Reinterpreting Professional Identity, 74 Colo. L. Rev. 1 (2003); W. Bradley Wendel, Civil Obedience, 104 Colum. L. Rev. 363 (2004)). A difference between these critiques and traditional justifications of client-centered lawyering is that the new critiques are largely based on public values, rather than the private values of individual dignity or autonomy. See Spaulding, supra (grounding advocacy of a client-centered approach in public values including public service and broad access to legal services); Wendel, supra, at 363 (grounding advocacy of a more client-centered approach in the public value of law as a necessary precursor to coordinated social action in societies characterized by normative disagreement as to fundamental moral values). As such, they might be considered possible alternatives to Simon's theory as a basis for developing a theory of government attorney ethics. However, to the extent that their views place greater responsibilities on clients to make important decisions, Spaulding and Wendel's theories are more likely than Simon's to fall prey to the previously-discussed client identification problems that plague government attorney representation. See supra notes 83-93 and accompanying text. Additionally, as of this date, Spaulding has not specifically addressed the applicability of his views to government attorneys. Wendel has, at least to a certain degree, in discussions of the ethics of the conduct of the Office of Legal Counsel (OLC) attorneys in conjunction with the now infamous "torture memos" relating to permissible interrogation techniques for use on prisoners suspected of having information regarding potential terrorist activity. See W. Bradley Wendel, Professionalism as Interpretation, 99 NW. U. L. Rev. 1167 (2005); W. Bradley Wendel, Legal Ethics and the Separation of Law and Morals (Cornell Legal Studies Research Paper No. 05-011, 2005), available at www.ssrn.com/abstract=687804 [hereinafter Wendel, Legal Ethics]. Wendel criticizes the OLC lawyers for treating laws regarding torture as barriers to be circumvented, rather than the outcome of legitimate processes designed to facilitate coordinated social action against a background of moral pluralism, and which were therefore entitled to respect. Wendel, Legal Ethics, supra. However, Wendell's critique does not rely in particular on the OLC lawyers' status as government attorneys, and indeed, it appears that Wendel would present the same criticism had the OLC lawyers been private attorneys representing private parties. See id. Wendel's analysis, therefore, does not appear to be compatible with the public-interest-serving-role for government attorneys. Thus, at least for this period, Simon's theory of legal ethics remains the best basis for a theory of government attorney ethics.
Simon’s conception of the term justice equates generally to a concept of legal merit, or the notion that even if application of relevant legal rules to particular sets of circumstances does not yield clearly right or wrong answers in all cases, it may nonetheless yield better or worse answers to a degree that rebuts the indeterminacy critique. Here, Simon’s views are consistent with both broadly accepted jurisprudential theories and the intuitions of most practicing attorneys. Therefore, Simon’s notion of legal merit stands up against his critics’ charges.

Turning more specifically to Simon’s conception of legal merit: determining the legal merit of a particular position in a controversy requires determination of the purposes behind the legal rules to be applied to the facts of the particular controversy. Thus, to apply Simon’s maxim and the version of the public-interest-serving-role that is based on it to the circumstances of Alighieri, it is necessary to inquire into the purposes behind the legal rules implicated in the case. As suggested earlier, the critical legal rule to consider in evaluating the ethical appropriateness of the hard bargaining in Alighieri is the $100,000 damage cap under the MTCA. But for the damage cap, it would have been impossible for me to come up with such a firm “bottom line” to insist upon in the course of settlement negotiations, or at least one that was so low in relation to what the value of the case would have been absent the cap. Thus, an evaluation of my conduct in terms of the public-interest-serving-role requires an examination of the purposes behind damage caps under government tort claims acts.

Damage caps under government tort claims acts must be analyzed against the backdrop of the sovereign immunity doctrine. With ancient origins, the sovereign immunity doctrine, often described loosely by the phrase “the king can do no wrong,” barred lawsuits against the sovereign at English common law. Despite America’s

103 Id.
104 Id. at 144-45. Indeed, Simon’s focus on the purposes behind laws has led a number of scholars to describe his approach as “purposivist.” E.g., Heidi Li Feldman, Apparently Substantial, Oddly Hollow: The Enigmatic Practice of Justice, 97 Mich. L. Rev. 1472, 1477 (1999); Spaulding, supra note 100, at 83; Paul R. Tremblay, Practiced Moral Activism, 8 St. Thomas L. Rev. 9, 24 (1995).
107 Frasier, supra note 106, at 644; McAlister, supra note 105, at 441; Van Valkenburgh,
origins in rebellion against the notion of monarchical authority, the
sovereign immunity doctrine was incorporated early on into Ameri-
can law at both the federal and state levels. Over time, however, the
unfairness of prohibiting all claims against the government for redress
for improper conduct became obvious, and courts and legislatures
began carving out exceptions to the background rule of immunity.
Tort claims acts of the type at issue here are a major example of one
such exception. Nonetheless, many of the state tort claims acts en-
acted have caps on damages similar to the one contained in the
MTCA.

The purposes behind the damage caps contained in most state tort
claims act are not hard to discern. On the one hand, damage caps
serve to preserve the public fisc and ensure that adequate funds
remain available for the numerous and multifarious purposes citizens
expect modern governments to serve. On the other hand, the
amount of damages available under state tort claims acts is viewed as
being adequate to provide fair compensation to those injured by the
negligent conduct of state actors. Such damage caps uniformly
have withstood constitutional challenges on grounds of state equal
protection, due process, and access to courts clauses because
the purposes described above represent legitimate government
objectives.

Returning to an analysis of the settlement posture employed in
Alighieri, the two purposes behind damage caps point to opposite
c oncussions. The “protect the public fisc” purpose behind damage
caps supports attorney conduct that would yield the lowest possible
recovery for a state tort claim plaintiff. However, to the extent that the
amount of the damage cap is intended to provide a fair measure of
recovery to claimants against the state, even when the actual amount
of damages sustained greatly exceeds the amount of the cap, it seems
that the full amount of the cap should be paid in all instances when
the expected amount of the recovery would be greater than the
amount of the cap, but for the cap. Moreover, the $100,000 cap of-

---

supra note 106, at 1081.

108 Frasier, supra note 106, at 644-45; McAlister, supra note 105, at 442; Hack, supra note
106, at 746-47; Van Valkenburgh, supra note 106, at 1081.

109 Frasier, supra note 106, at 645; Van Valkenburgh, supra note 106, at 1082.

110 See 1 CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENT § 6.12 (2002) [here-
inafter, CIVIL ACTIONS].

111 Hallett v. Town of Wrentham, 499 N.E.2d 1189, 1194 (Mass. 1986); accord CIVIL AC-
TIONS, supra note 110, § 6.13 (citing cases).

112 Hallett, 499 N.E.2d. at 1194; CIVIL ACTIONS, supra note 110, § 6.13 (citing cases).

113 CIVIL ACTIONS, supra note 110, § 6.13 (citing cases).

114 Id.

115 Id.
fered under the Massachusetts statute is not among the more generous caps.\textsuperscript{116} Given that in \textit{Alighieri} a judgment in the plaintiffs’ favor was highly likely and that the actual amount of damages to be determined by the jury would likely exceed the cap, it seems that the best accommodation of the competing policies would be to pay the full amount allowable.

V. SHOULD THE PUBLIC-INTEREST-SERVING-ROLE APPLY TO THE PRESENT CASE?

It was concluded above that under both the positive law enacted pursuant to the public-interest-serving-role for government attorneys and the broader theory underlying that role, the settlement posture in \textit{Alighieri} might well have been inappropriate. But before concluding the analysis entirely, it is worth asking whether the public-interest-serving-role should be applied in all instances when evaluating the ethics of government attorney conduct. One of the key bases for the public-interest-serving-role is the fact that the government entity represented by the government attorney exercises sovereign authority.\textsuperscript{117} As such, it has unique responsibilities to pursue the public interest.\textsuperscript{118}

The government attorney’s duty to pursue the public interest is, at least in part, derivative of the represented entity’s duty.\textsuperscript{119} Moreover, given that government attorneys are themselves government officials, they have an independent duty to pursue the public interest as well.\textsuperscript{120}

In any event, it is not clear that all government action involves an exercise of sovereignty. Thus, the question arises whether the public-interest-serving-role should apply to situations in which the government entity does not obviously exercise its sovereignty, such as when the government attorney represents a government entity in negotiating and drafting a contract or when he or she represents a government entity in a “routine” tort case. Moreover, even if some representations fall outside the purview of the public-interest-serving-role, it must be determined whether \textit{Alighieri} involved one such representation.

\textsuperscript{116} Damage caps under state tort claims acts appear to run from $100,000 at the low end, to $750,000 at the high end. See, e.g., \textsc{Civil Actions}, supra note 110, § 6.12 (collecting tort claims statutes from various states). The Federal Tort Claims Act does not include a damage cap. 28 U.S.C. §§ 2671-2680 (2000).

\textsuperscript{117} E.g., Bruce A. Green, \textit{Must Government Lawyers “Seek Justice” in Civil Litigation?}, 9 \textsc{Widener J. Pub. L.} 235, 277 (2000).

\textsuperscript{118} \textit{Id.} at 270-71.

\textsuperscript{119} \textit{Id.} at 269.

\textsuperscript{120} \textit{Id.} at 275; Berenson, \textit{Public Lawyers, supra} note 20, at 818-21.
A. Should There Be Exceptions to the Public-Interest-Serving-Role?

There are a number of areas of substantive law that, at least at first glance, appear to support the view that the government may in some instances "shed" its sovereignty and be treated similarly to nongovernment parties when it acts without exercising its sovereignty. These doctrines seem to support the view that there should be an exception to the public-interest-serving-role for government attorneys when such attorneys represent government entities acting outside of their sovereign capacity. Three such doctrines discussed here are (1) the "market participant" doctrine under the dormant commerce clause, (2) the "government as speaker" doctrine within First Amendment law, and (3) the "government as employer" cases following Pickering v. Board of Education. However, on further analysis, I argue that each of these doctrines either rests on a weak foundation or is of limited practical significance, and that even to the extent that such doctrines remain viable, none goes so far as to equate completely government entities with similarly situated nongovernmental entities. Therefore, none of these doctrines supports the idea of a blanket exception to the public-interest-serving-role, even when the represented government entity appears to act outside of its sovereign capacity.

The Commerce Clause grants Congress the authority to regulate interstate commerce. Under the "dormant commerce clause doctrine," the U.S. Supreme Court has held that by negative implication, the Commerce Clause additionally prohibits states from enacting "legislation that discriminates against or impermissibly burdens interstate commerce." However, in a series of cases beginning with Hughes v. Alexandria Scrap Corp., the Court carved out an exception to the prohibitions of the dormant commerce clause doctrine for situations where a state acts as a "market participant" rather than as a "market regulator." For example, in Hughes, the Court held that Maryland laws favoring in-state sellers of abandoned automobiles were permissible because the state was participating in the market

122 3 U.S. CONST. art. I, § 8, cl. 3.
123 Brannon P. Denning, Why the Privileges and Immunities Clause of Art. IV Cannot Replace the Dormant Commerce Clause Doctrine, 88 MINN. L. REV. 384, 385 n.2 (2003); see also Karl Manheim, New-Age Federalism and the Market Participant Doctrine, 22 ARIZ. ST. L.J. 559, 564-65 (1990) (discussing how courts have held the dormant commerce clause prohibits state regulation that either discourages or unduly burdens interstate commerce).
rather than regulating it. In *Reeves, Inc. v. Stake*, the Court upheld a regulation giving state residents preference over nonresidents in the purchase of cement from a state-owned plant on the same grounds. And, in *White v. Massachusetts Council of Construction Employees*, the Court also upheld under the market participant doctrine a municipal ordinance that required contractors and subcontractors with the city of Boston to hire a certain number of city residents. In each of these cases, the state engaged in commercial rather than sovereign activity, thus warranting an exception from the strictures that apply to it in the latter capacity.

As the Commerce Clause limits state governments' ability to affect interstate commerce, the First Amendment similarly imposes great restrictions on governments' ability to regulate speech. For example, the government generally may not suppress private speech based on the content of the speech. And when the government creates a public forum for speech, it may not discriminate in providing access to that forum based on the viewpoint expressed by the speaker. However, an emerging doctrine seems to recognize that when the government itself acts as a speaker, as opposed to a regulator of speech, such restrictions do not necessarily apply.

Perhaps the best-known case relating to this doctrine is *Rust v. Sullivan*. *Rust* involved a challenge to the constitutionality of regulations that: (a) prohibited projects funded pursuant to Title X of the Public Health Service Act (the "Act") from giving counseling and referrals to women regarding abortion or advocating abortion as a method of family planning and (b) required funded projects to use separate facilities, personnel, and accounting records from any abortion-related entities. The Act specified that none of the funds allocated pursuant to Title X "be used in programs where abortion is a method of family planning." The Court rejected arguments that the

---

126 *Hughes*, 426 U.S. at 809-10.
127 *Reeves, Inc.*, 447 U.S. at 446-47.
129 U.S. CONST. amend. I.
134 *Id.* at 179-80.
135 *Id.* at 178 (quoting 42 U.S.C. § 300a-6 (2005)).
regulations impermissibly discriminated on the basis of viewpoint—favoring an anti-abortion message over competing views. The Court held that the government may permissibly fund certain activities as opposed to others, even if such funding choices involve value judgments regarding issues of great public controversy. The Court went on to note that the government may additionally take steps to ensure that the allocated funds be used only for their intended purposes. Thus, the government’s decision to fund family planning programs relating to conception and childbirth, as opposed to abortion, and the steps it took to ensure that none of those funds were used in support of abortion or related services were both permissible exercises of governmental authority rather than impermissible viewpoint discrimination.

A third area in which the government appears to be able to avoid many of the restrictions that apply to its actions as sovereign occurs when the government acts as an employer. The case most closely associated with this doctrine is Pickering v. Board of Education. In Pickering, a public school teacher was fired for writing a letter to a newspaper editor criticizing the actions of the local board of education in relation to two bond issue proposals and the allocation of resources between the school system’s athletic and educational needs. The board contended that the letter contained numerous false statements, impugned the integrity of members of the board, and would foment controversy and discontent among teachers. Mr. Pickering countered that because the letter related to the actions of public officials and matters of public concern, the heightened standard of proof required to show defamation under the Court’s decision in New York Times Co. v. Sullivan, should be applied to review of the statements contained in his letter as well. The board, on the other hand, argued that an employer’s need for loyalty from its employees, as well as the school system’s educational needs, called for a higher standard of veracity and accuracy in evaluating public speech by teachers.

\[136\text{Id. at 192-93.} \\
137\text{Id.} \\
138\text{Id. at 193-94.} \\
139\text{391 U.S. 563 (1968).} \\
140\text{Id. at 564-65.} \\
141\text{Id. at 566-67.} \\
142\text{376 U.S. 254, 280 (1964) (requiring proof of knowledge that a statement was false or made with reckless disregard of whether it was false, to allow recovery).} \\
143\text{Pickering, 391 U.S. at 569.} \\
144\text{Id. at 568-69.}\]
In holding that Mr. Pickering's dismissal was improper, the Court refused to adopt the extremes of either side's legal arguments. Rather, the Court opted for a middle ground, balancing a government employer's interest in efficiency and orderly administration with a government employee's First Amendment interest in freedom of speech regarding matters of public concern. Over time, the Court's "balancing test" has been refined into a three-part inquiry where the government employer alleges that government employee speech will "disrupt" the workplace. What is important for present purposes is the fact that this doctrine grants the government much greater authority to regulate speech in its capacity as employer than it has in its capacity as regulator of speech, and that this distinction is based on the government exercising its sovereignty in the latter capacity but not in the former.

The three doctrines discussed above seem to support the notion that the government may, in some circumstances, "shed" its sovereignty and be governed by standards significantly less stringent than those that apply to the government when it acts in its sovereign capacity. Correspondingly, one view of these doctrines suggests that if the government acts outside of its sovereign capacity, government attorneys need not be held to the standards of the public-interest-serving-role but should adhere to the same ethical standards as private attorneys. A closer examination of the three doctrines, however, demonstrates that such a conclusion is not justified.

First, the market participant doctrine is of significantly less ongoing import than the above-cited cases might suggest. Even in situations where state or local regulation might be insulated from challenge under the dormant commerce clause by the market participant doctrine, such regulation might nonetheless run afoul of the Privileges and Immunities Clause of Article IV. For example, in United Build-

---

145 Id. at 574-75.
146 Id. at 569-70.
147 See Ailsa W. Chang, Resuscitating the Constitutional "Theory" of Academic Freedom: A Search for a Standard Beyond Pickering and Connick, 53 Stan. L. Rev. 915, 926 (2001) (explaining that a government employee may be fired for speech that will disrupt the government employer's workplace if: "(1) the employer's prediction of disruption is reasonable, (2) the potential disruptiveness is enough to outweigh the value of the speech, and (3) the employer took action against the employee based on this potential disruption and not in retaliation for the speech").
148 See id. at 927 (quoting Waters v. Churchill, 511 U.S. 661, 675 (1994)) (suggesting that the different goals of employees and governments yield differences in the kind of acceptable restrictions).
149 See supra notes 125-28 and accompanying text.
150 U.S. Const. art. IV; see Manheim, supra note 123, at 617 & n.426 (citing cases involving challenges to both clauses).
plaintiffs challenged a municipal ordinance requiring a certain percentage of jobs on construction projects performed on behalf of the city of Camden to be filled by city residents that was substantially similar to the ordinance held to be immune from dormant commerce clause challenge under the market participant doctrine in White. However, the Court declined to apply the dormant commerce clause’s market participant exception to plaintiffs’ Privileges and Immunities Clause claim. Thus, the mayor, on remand, was required to demonstrate “substantial reasons” for the hiring requirement’s discrimination against out-of-state residents and prove that the provision was closely related to those reasons. Of course, under this standard, many of the “local hire” provisions that are insulated from review pursuant to the dormant commerce clause are nonetheless likely to be struck down pursuant to the Privileges and Immunities Clause.

Additionally, a number of commentators have questioned the ongoing viability of the market participant doctrine following the decision of the Supreme Court in Garcia v. San Antonio Metropolitan Transit Authority. In Garcia, the Court overruled its earlier decision in National League of Cities v. Usery, in which it held that Congress exceeded its Commerce Clause power in applying the federal minimum wage law to state and local governments. The Usery decision rested, at least in part, on a distinction between the sovereign and proprietary functions of state government. Historically, the Court had viewed a state’s sovereign functions as immune from fed-

152 See supra note 128 and accompanying text (describing the ordinance in White); see also Mayor of Camden, 465 U.S. at 213 (explaining that the plaintiffs dropped their dormant commerce clause claim because of the result in White).
153 Mayor of Camden, 465 U.S. at 219-20. The Court drew this distinction based on what it described as the different purposes behind the two constitutional provisions. Id. at 220. The Court reasoned that the dormant commerce clause doctrine was developed to protect the Commerce Clause’s delegation to the U.S. Congress to regulate interstate commerce. Id. And, as suggested above, where state governments act as market participants, rather than regulators, the dormant commerce clause’s purpose of banning conflicting regulation is not implicated. Id. By contrast, the Privileges and Immunities Clause was designed to restrict actions by states that might threaten interstate harmony. Id. Because state actions might threaten such disharmony whether they take the form of regulation or market participation, it would not make sense to except market participation from the Clause’s coverage. Id.
154 Id. at 222-23.
155 See Manheim, supra note 123, at 618-23 (examining possible explanations for the relative effectiveness of the two clauses).
158 Id. at 852.
159 Manheim, supra note 123, at 574 (explaining that Usery signaled the reemergence of this distinction).
eral government regulation, whereas a state's proprietary functions could be regulated within the Constitution's federalism framework.\textsuperscript{160} The \textit{Usery} Court concluded that setting the terms and conditions of employment with its employees went to the heart of states' governmental functions, rather than merely involving states in their proprietary capacity.\textsuperscript{161} In \textit{Garcia}, however, the Court rejected the sovereign/proprietary function distinction as unworkable\textsuperscript{162} and abandoned it as a basis for limiting Congressional authority to regulate the wages and hours of state and municipal employees.\textsuperscript{163}

The logical similarities between the sovereign/proprietary function distinction rejected in \textit{Garcia}, and the regulator/market participant distinction recognized in \textit{Hughes} and its progeny\textsuperscript{164} should be readily apparent. Indeed, these similarities have caused a number of commentators to conclude that in addition to overruling \textit{Usury}, at least implicitly, \textit{Garcia} overruled the market participant doctrine.\textsuperscript{165} On the other hand, at least a couple of commentators have argued in favor of the market participant doctrine's continuing vitality.\textsuperscript{166} Perhaps most tellingly, the Supreme Court has not explicitly relied on the market participant doctrine to decide a case in the two decades since \textit{Garcia}.\textsuperscript{167} Whether the market participant exception clings to life or not, for the foregoing reasons it remains too weak a reed on which to ground the notion that there should be exceptions to the public-interest-serving-role for government attorneys in certain circumstances.

The government-as-speaker notion recognized by the Court in \textit{Rust} also fails to provide adequate support for recognizing exceptions to the public-interest-serving-role for government attorneys. First, \textit{Rust} has been "widely and severely criticized by Constitutional scholars" on a variety of grounds.\textsuperscript{168} Second, it is worth mentioning that nowhere in the \textit{Rust} opinion itself does the Court explicitly rely on the government-as-speaker concept to uphold the regulations at issue.\textsuperscript{169}

\begin{thebibliography}
\bibitem{160} \textit{Usery}, 426 U.S. at 851.
\bibitem{161} \textit{Usery}, 426 U.S. at 851.
\bibitem{162} \textit{Usery}, 426 U.S. at 851.
\bibitem{163} See id. at 545-55 (choosing instead to defer to the political process).
\bibitem{164} See supra notes 124-28 and accompanying text.
\bibitem{166} Id. at 733 n.53.
\bibitem{167} See \textit{id.} at 733 & n.51 (noting that the Supreme Court has been essentially quiet on the market participation doctrine since \textit{Garcia}).
\bibitem{169} See supra notes 133-38 and accompanying text (explaining the reasoning of the \textit{Rust} court).
\end{thebibliography}
Only in subsequent cases has the Court raised the point that the government’s attempt to communicate was a significant factor in the *Rust* decision.\(^{170}\)

The metaphor that a government is “speaking”\(^{171}\) would seem stronger in a context involving more direct speech, such as a government official giving a speech or a government published brochure advocating a certain position, than a context in which the government “speaks” by funding private parties to engage in certain activities and then enacting regulations restricting the scope of those activities as was the case in *Rust*. Indeed, it may be difficult to distinguish *Rust* from cases in which the government subsidizes artistic expression rather than speaking itself.\(^{172}\) And, while it is true that when the government acts as subsidizer of expression, it has broad authority in determining how to spend public funds, that authority is not wholly free from First Amendment restrictions.\(^{173}\)

Therefore, *Rust* at best provides a shaky foundation for a doctrine recognizing that when the government acts as speaker, the traditional First Amendment constraints that apply to it in its role as sovereign or as regulator of speech should be relaxed. Moreover, to the extent such a doctrine is emerging, much work remains to be done in establishing the contours and implications of such a doctrine.\(^{174}\) In defining such a doctrine, it would be a mistake to go so far as to treat all government speech exactly the same as private speech for First Amendment purposes. The very concept of government speech is in tension with both the text and the purposes behind the First Amendment; the risk of government speech distorting the private speech marketplaces the Amendment was designed to encourage is too great to ignore.\(^{175}\) Therefore, even a doctrine recognizing limited First Amendment re-

---


\(^{173}\) See, e.g., Regan v. Taxation with Representation, 461 U.S. 540, 548-49 (1983) (upholding internal revenue statutes that denied tax exemptions to certain charities engaged in lobbying but that allowed such exemptions to veterans groups that engaged in lobbying) (cited with approval in *Finley*, 524 U.S. at 587-88; *Rust* v. Sullivan, 500 U.S. 173, 193-94 (1991)).


\(^{175}\) See *id.* at 1508-11 (warning that protecting government speech may cause competition with the First Amendment rights of individuals); see also Linda L. Berger, Note, *Government-Owned Media: The Government as Speaker and Censor*, 35 CASE W. RES. L. REV. 707, 720-21 (1985).
restrictions on government speech would not go so far as to completely support the notion of the government "shedding" its sovereignty, nor the notion that there should be exceptions to the public-interest-serving-role for government attorneys in certain circumstances.

The holding in Pickering also fails to compel the conclusion that there should be exceptions to the public-interest-serving-role for government attorneys. It is true that under the Pickering doctrine, when the government acts as an employer, it faces significantly lower restrictions on its ability to sanction employees for speech acts than it does in its sovereign capacity as regulator of private speech. However, the very existence of the Pickering balancing test demonstrates a difference between the constraints on government and private employers in responding to employee speech. For even the lower constraints that Pickering imposes on government employers protects employee speech to a greater extent than the employment-at-will doctrine governing private employers. In any event, at most, Pickering supports the notion that while the government may shed some of its sovereignty when acting in its capacity as employer, it does not shed itself of either its sovereignty entirely or the restrictions that accompany such sovereignty. Correspondingly, while Pickering might support the notion of relaxing the requirements of the public-interest-serving-role for government attorneys in certain circumstances, it does not support a conclusion that those requirements should be eliminated entirely in certain circumstances.

It should be pointed out here that even in the paradigmatic instances mentioned above, when the government appears to act no different from a private party (i.e., contracting for the purchase of goods or defending against a garden variety tort suit), the law in fact does not treat the government exactly the same as it would a private party. For example, with regard to the purchase of goods or services by government entities, there are often a wide range of procurement statutes in place that significantly restrict the government's ability to contract in ways that would not apply to private parties. Similarly, in the tort context, the very existence of tort claims acts like the MTCA demonstrate the different requirements that apply in tort litigation with the

---

176 See supra notes 145-47 and accompanying text (discussing the Pickering test).
177 See generally Lisa B. Bingham, Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions, 55 OHIO ST. L.J. 341, 342-48 (1994) (discussing the reluctance of courts to protect employees' freedom of speech from employers); 2 EMP. L. DESKBOOK HUM. RESOURCES PROF. § 34.5 n.13 (2005). An exception may exist in "whistleblower" type situations when an employee is fired for speech that reveals conditions that threaten public health or safety. Id. § 34.5 n.14.
178 See, e.g., 41 U.S.C. §§ 251-266a (2000) (attempting to eliminate policies and practices that unnecessarily inhibit open competition with the government).
government as opposed to private parties. In short, there is simply inadequate support for the notion that there are contexts in which the government may so completely shed its sovereignty as to justify a complete departure from the public-interest-serving-role for the government attorneys who provide legal representation to those government entities.

B. Would an Exception to the Public-Interest-Serving-Role Apply Here?

Even if we were to reach the conclusion that there are certain circumstances in which the government so clearly acts outside of its sovereign capacity that it would be appropriate to excuse attorneys representing the government in such circumstances from the requirements of the public-interest-serving-role, it is far from clear that Alighieri would present an example of such circumstances. This case does not present such a circumstance because delivery of mental health services of the type at issue here was traditionally considered a governmental responsibility, thereby implicating state sovereignty. It is true that in recent decades, mental health services have been among the vast array of services previously performed by government entities that have been "privatized."179 Despite this fact, as pointed out earlier, the current regime for the delivery of mental health services includes delivery of services by both governmental and private entities, as well as a wide range of public and private "partnerships" of varying types.180 Therefore, it is simply not accurate to say that the government has shed itself entirely of its traditional sovereign function of caring for the mentally infirmed. Moreover, as a matter of general law, courts have been loathe to exempt governments from the restrictions that apply to them in their sovereign capacities, even when the government is engaged in functions that have been partially or even largely privatized.181 Therefore, even if we were willing to recognize certain circumstances when the government acts outside of


180 See Petrila, supra note 179, at 91 (describing the emerging balance of governmental and private roles in providing services to the mentally ill). See generally MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD (2002) (discussing the vast array of public/private partnerships across a range of services).

181 By contrast, courts have hesitated to apply the restrictions that apply to sovereign government entities to private parties, even when such parties perform "privatized" government functions or act pursuant to government contracts. See MINOW, supra note 180, at 31-32; Brooks, supra note 179, at 3.
its sovereign capacity, and therefore excuse lawyers representing the government in such a capacity from the strictures of the public-interest-serving-role, it is unlikely that representing the government in conjunction with the delivery of mental health services would be one such circumstance.

VI. CONCLUSION

Although my hard bargaining on behalf of the government tortfeasor in Alighieri would not have been unethical had it been engaged in by a lawyer on behalf of a private client, a different conclusion is warranted because the actions were undertaken by a government attorney. First, under the heightened threshold for defending a claim applicable to government attorneys, it was inappropriate to litigate Alighieri based on a willingness to go to trial, when the merits of the claim were such that the plaintiffs would almost certainly, and indeed should almost certainly, have prevailed had the case gone to trial. Second, given the purposes behind damage caps in state tort claims acts such as the MTCA, it was also inappropriate to use the existence of the cap to squeeze a few thousand dollars from the plaintiffs’ recovery based on the inherent uncertainties and costs of going to trial, particularly given that under the aforementioned heightened pleading threshold, such a trial should never have happened at all in the particular case. Thus, my hard bargaining in Alighieri ran afoul of government lawyers’ public-interest-serving-role.

Moreover, the circumstances of Alighieri fail to support either a general or a particular exception to the public-interest-serving-role when the represented governmental actor engages in conduct that is similar to that which a private party might engage in. It is simply erroneous to contend that the government somehow sheds its sovereignty when it engages in conduct that could equally be engaged in by a private party. No matter what type of activity it engages in, the government retains its obligations to pursue the public interest and to treat all of its constituents fairly; obligations that do not similarly attach to private actors. Additionally, individual government employees, both lawyers and their clients, retain independent obligations to serve these goals by virtue of their status. Finally, government entities retain resource advantages over private ones in terms of finances, reputation, and authority that continue to require special restrictions on governmental action implicating such advantages. For all of these reasons, no blanket exception to the public-interest-serving-role for government attorneys should be recognized regardless of the type of activity the represented government entity engages in. Also, because
treatment of the mentally infirmed was traditionally considered an obligation that followed from governmental sovereignty, the underlying case presents a particularly weak claim for such an exception.

Of course, nearly a decade and a half later, after the heat of litigation has cooled and the sharpened lens of hindsight has heightened my analytic powers, it is relatively easy (and cost free) to conclude that I should have acted differently in Alighieri. Nonetheless, I am left with the strong feeling that the proper course of conduct at the time would have been to advocate to my superiors in the Attorney General’s Office for payment of the full $100,000 allowable under the damage cap to the plaintiffs in settlement of the case. *Mea culpa.*