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Articles/Essays

THE ROLE OF INSIDE COUNSEL IN THE 1990s: A VIEW FROM OUTSIDE

*Marc I. Steinberg**

AN ESSAY FOR KEN PYE

I am honored and pleased to contribute to this Issue of the *SMU Law Review* dedicated to A. Kenneth Pye. I did not know Ken Pye for a long period of time, but I feel fortunate that our paths crossed. Arriving at SMU during our athletic fallout, he invigorated this university. Ken Pye's integrity, energy, insight, straight talk, and commitment to high standards were valued and appreciated.

Unfortunately, we all have far too little time on this earth. In this short time, many of us strive to make a meaningful contribution. Ken Pye certainly succeeded. The conversation we had that I cherish the most was our briefest and our last. It was graduation day in May 1994. In spite of being terribly ill, he carried on with the ceremonial duties that were the order of the day. My role that day was to help host the recipient of an honorary degree. After the luncheon for the honorary degree recipients, Ken personally thanked me for my efforts that day. Fortunately, my reply was "Ken, I thank you for everything you've done for SMU." These were the last words we spoke, and I remember them fondly.

The subject of this article—the role of inside counsel in the 1990s—is one that I think Ken Pye would have liked. Ken considered it important for the business community and the legal profession to have close ties with SMU. Given the increasing importance of inside counsel's impact on corporate governance, efficiency, and law compliance, this subject is indeed timely.

I. CHANGING NATURE OF INSIDE COUNSEL'S POSITION

One may inquire, of course, whether it is curious for a law professor who has never served as inside counsel to opine on this subject. As a law professor and legal consultant, I certainly do not have the experience and

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insights equal to those who are inside counsel. Nonetheless, with those caveats, I will provide my thoughts.

The role of inside counsel has changed dramatically in the last two decades. As Irving Shapiro, former general counsel of DuPont, remarked:

In the past, businessmen wore blinders. After hours, they would run to their club, play golf with other businessmen, have a martini—and that was about it. . . . In a world where [g]overnment simply took taxes from you and did not interfere with your operations, maybe that idea was sensible. In today's world, it is not.¹

Reflecting upon the status of inside counsel in the 1950s, H.J. Aibel, chief legal officer of ITT, commented that “then the generally accepted wisdom [was] that jobs in corporate law departments were for second raters, or lawyers who had failed to make partner at some of the better firms.”² How things have changed. Today, the issues that lawyers practicing in-house face certainly are as multifaceted and challenging as those posed in law firms. Indeed, inside counsel plays an active role in shaping corporate events, in assessing corporate policies, and in establishing the tone and standard for corporate conduct.³

Interestingly, as I visit with my former students as well as other practitioners, it is striking how many of them seek opportunities to go “in-house.” The reasons focus on the fixation on billable hours in private practice, the stress associated with client development, and the competitive environment of law firm practice. Having this view, an increasing number of attorneys perceive their private practice as detrimental to their quality of life. They also recognize other distinct advantages relating to such matters as health benefits, retirement plans, and stock programs.⁴

On the other hand, inside counsel faces the situation of being “wedded” to his or her client. Generally, when outside counsel has a “difficult” client, one that fails to timely pay its bills, or one that engages in unethical conduct, the attorney may “walk” from that client.⁵ The attorney certainly may miss the revenues that otherwise would be generated but normally has the economic leeway to resign from the engagement. However, when inside counsel's client is unduly “difficult” or behaves

1. Marshall Loeb, *The Corporate Chiefs' New Class*, TIME, Apr. 14, 1980, at 87 (quoting Irving Shapiro).

2. H. J. Aibel, *Corporate Counsel and Business Ethics: A Personal Review*, 59 MO. L. REV. 427, 427 (1994).

3. MARC I. STEINBERG, CORPORATE INTERNAL AFFAIRS: A CORPORATE AND SECURITIES LAW PERSPECTIVE 251 (1983); Harold M. Williams, The Role of Inside Counsel in Corporate Accountability, Speech Before the 17th Annual Corporate Council Institute (Oct. 4, 1979), in [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,318, at 82,369 (1979).

4. See Robert E. Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 481-90 (1989). See generally Richard Gruner, *Improving the Effectiveness of Corporate Counsel: An Information Processing Analysis*, 9 J. CORP. L. 217 (1984); John C. Taylor 3rd, *The Role of Corporate Counsel*, 32 RUTGERS L. REV. 237 (1979).

5. See generally MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 & cmts. (1995); James P. Hemmer, *Resignation of Corporate Counsel: Fulfillment or Abdication of Duty*, 39 HASTINGS L.J. 641 (1988).

improperly, counsel must either tolerate such conduct or find another job. Hence, being in-house counsel makes separation and divorce far more onerous. This situation may be especially troublesome for senior in-house lawyers who may find great difficulty in procuring another position with comparable remuneration.⁶

This "marital" relationship to one's client, of course, has key attributes. One particularly attractive one is that inside counsel is very much at the center of corporate compliance and the legal functions of the enterprise. Moreover, in many corporations, being involved in business strategy, inside counsel has the financial acumen to understand the benefits and risks of a prospective venture and to communicate effectively economic aspects of a contemplated "deal." Having this input makes inside counsel's contribution that much more important. In these functions, inside counsel seeks to be perceived within the enterprise as a "can do yes person" yet retain the leverage effectively to "say no" when appropriate.⁷

II. HIRING OUTSIDE COUNSEL

Before delving into the "legal" issues, a word should be said about the subject of corporations hiring outside counsel. Relevant factors include the quality, areas of specialization, and number of in-house lawyers at the particular enterprise; the complexity of the project at hand; the scope and duration of the project; the presence of conflicts of interest; and time pressures. The size, sophistication, and expertise of the in-house legal staff will play the key role in how frequently the services of outside attorneys will be used.⁸

When retaining outside counsel, should a corporation hire one law firm to act as general outside counsel or a number of different law firms as called for by the situations at hand? With respect to an enterprise of relatively small size or one that engages in limited activities, it often makes good sense to retain one outside general counsel. That way the law firm has greater incentive to understand the corporation's culture, can handle the corporation's legal affairs in a more cost effective manner, and may be persuaded to bill at more economical rates. The potential risk, however, is that, if the retained attorney or law firm derives a substantial amount of revenue from the enterprise, such outside counsel may lose objectivity and render advice to the liking of the chief executive of-

6. See Ralph C. Ferrara & Marc I. Steinberg, *The Role of Inside Counsel in the Corporate Accountability Process*, 4 CORP. L. REV. 3, 6 (1981).

7. See John J. Creedon, *Lawyer and Executive—The Role of the General Counsel*, 39 BUS. LAW. 25 (1983); *How Agile is Your Legal Department?*, CORP. LEGAL TIMES, Aug. 1995, at 1, 5 (quoting statements by McDonald's Corp. assistant general counsel Ira S. Feldman that "[a]ll of the lawyers at McDonald's become intimately involved on the business side" and that "lawyer[s] . . . wear[] two hats: a business hat as well as [a] legal hat"). See generally Symposium, *Business Lawyering and Value Creation for Clients*, 74 OR. L. REV. 1 (1995).

8. See Howard J. Aibel, *Successful Teaming of Inside and Outside Counsel to Serve the Corporate Client*, 38 BUS. LAW. 1587, 1589-90 (1983); Sally A. Ramirez, *Spending on Outside Counsel Fees Is Down*, NAT'L L.J., Oct. 17, 1994, at C14.

ficer or other high-level executive rather than for the benefit of the client, which is the corporate entity. This occurrence has arisen with some frequency.⁹ Independence, integrity, and competence are essential attributes that may be lost when outside counsel becomes obsessed with placating a high-level executive rather than diligently representing his or her client's interests.¹⁰

To an increasing degree, the larger corporations elect to retain a number of outside law firms rather than one outside general counsel. In so doing, many of these companies actively interview a number of firms prior to selection, engage in a competitive bid process, and seek favorable billing practices.¹¹ The upside to this approach is that theoretically the enterprise can hire the best counsel at the best price for a given assignment. A concern, however, is that in reality the outside attorney for the "moment" may not have the same intensity of "zeal" to foster the client's interest as would general outside counsel of long-standing duration.¹²

Moreover, when several different law firms are employed, there is a much greater risk of attorney conflicts of interest arising. For example, attorney disqualification arises when the law firm that currently is representing the corporation had been previously retained by a person whose interests are materially adverse to such corporation in a matter that is substantially related. Without reasonably informed consent by the former client to the subsequent representation, the law firm normally will be disqualified, thereby denying the corporation the counsel of its choice.¹³

Depending on the factual scenario, however, these conflict rules also can be used as a sword by the corporation to disqualify former counsel from representing an adversary.¹⁴ Two Fifth Circuit decisions, the *Ameri-*

9. See, e.g., *In re Carter*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,847 (SEC 1981); see also Mike France, *New Corporate Strategy Leaves Firms Trembling*, NAT'L L.J., Oct. 31, 1994, at A1 (stating that "a growing number of American corporations . . . are consolidating their legal work—firing most of their outside attorneys and negotiating volume discounts with the lucky survivors").

10. See Marc I. Steinberg, *Attorney Conflicts of Interest in Corporate Acquisitions*, 39 HASTINGS L.J. 579, 600 (1988) ("The loss of a major client often causes a financial setback for members of a firm, and the loss of a few such clients may spell catastrophe.").

11. See generally Aibel, *supra* note 8, at 1601-03; France, *supra* note 9, at A1.

12. Aibel, *supra* note 8, at 1595-96; see also Luther C. McKinney, *Relationship with Outside Counsel*, 34 BUS. LAW. 921 (1979).

13. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1995); see, e.g., *Smith v. Whatcott*, 757 F.2d 1098 (10th Cir. 1985); *Trone v. Smith*, 621 F.2d 994 (9th Cir. 1980); *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953). See generally CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 7.1 (1986); Robert H. Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807 (1977); Samuel R. Miller et al., *Conflicts of Interest in Corporate Litigation*, 48 BUS. LAW. 141 (1992); Samuel R. Miller & Irwin H. Warren, *Conflicts of Interest and Ethical Issues for the Inside and Outside Counsel*, 40 BUS. LAW. 631 (1985); Rick R. Rothman, *Conflicts of Interest: Subsequent Adverse Representation*, 2 GEO. J. LEGAL ETHICS 119 (1988); Marc I. Steinberg & Timothy U. Sharpe, *Attorney Conflicts of Interest: The Need for a Coherent Framework*, 66 NOTRE DAME L. REV. 1 (1990); Task Force on Conflicts of Interest, *Conflicts of Interest Issues*, 50 BUS. LAW. 1381 (1995).

14. See *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1319-20 (1981); see also sources cited *supra* note 13.

*can Airlines*¹⁵ and *Dresser*¹⁶ cases, impact on this analysis. These decisions signify that disqualification motions brought in the Fifth Circuit are governed by federal standards. Hence, even though a course of conduct is allowed under the Texas Disciplinary Rules of Professional Conduct, it still may be impermissible under federal law. Applicable standards, according to the court, include the Texas Disciplinary Rules, the American Bar Association's (ABA) Model Rules of Professional Conduct, the ABA's Model Code of Professional Responsibility, and the American Law Institute's Draft Restatement of the Law Governing Lawyers.¹⁷ Applying all of these standards at once can lead at times to differing results, thereby making preventive counseling in this setting a challenging task.¹⁸

III. COUNSEL'S ROLE INSIDE THE BOARDROOM

With respect to counsel's role inside the boardroom, it is essential, of course, for counsel to comprehend the business dynamics of the enterprise and possess the acumen to understand the economics of the transaction or other matter being considered.¹⁹ Counsel's role also encompasses the implementation of internal procedures to reduce the threat of subsequent litigation. In this regard, the business judgment rule serves as an impressive shield to deflect otherwise successful challenges to board action.²⁰

Stated succinctly, the business judgment rule has four components. First, the board of directors must focus on the issue and make a deliberative decision (which may be a determination to engage in the contemplated action or to abstain from such action).²¹ Second, the board's decision must be reasonably informed. In this regard, the board should be provided with adequate information, including (where appropriate) pertinent reports (either internally generated or from outside sources), appraisals, and other material documents central to the transaction or other matter at issue. Once having such information before it, the board should take the time necessary to reach an informed decision.²² Third,

15. *In re American Airlines, Inc.*, 972 F.2d 605 (5th Cir. 1992), *cert. denied*, 507 U.S. 912 (1993).

16. *In re Dresser Indus., Inc.*, 972 F.2d 540 (5th Cir. 1992).

17. *Id.* at 543-45; *American Airlines*, 972 F.2d at 610-11.

18. See generally Jeffrey Garon, Comment, *Successive Conflicts of Interest and the Motion to Disqualify: The Impact of the Texas Rules of Professional Conduct*, 47 SMU L. REV. 399 (1994).

19. See sources cited *supra* note 7.

20. See, e.g., *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984); AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01 & cmt. (1994); DENNIS J. BLOCK ET AL., THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS (4th ed. 1993 & Supp. 1995).

21. See, e.g., *Aronson*, 473 A.2d at 812 (stating that the business judgment rule is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company"); cf. *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125 (Del. 1963) (because the board of directors never focused on the issue, the business judgment rule analysis was not applied).

22. See *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

directors making the board's determination must be disinterested, signifying that they are not engaged in self-dealing, do not have a disproportionate financial stake in the transaction, and are not under the control or domination of a director who has such a disabling conflict of interest.²³ With the increase in the number of outside directors serving on corporate boards who have no other affiliation with such enterprises, this problem has been significantly lessened.²⁴ Last, the decision must have a rational basis or, stated differently, must be made without gross negligence.²⁵

In this context, process is key. If the board abides by the procedural framework set forth above, courts will be reluctant to second-guess a deliberative decision reached in good faith by a reasonably informed board.²⁶ Hence, inside counsel's role here is to guide the board through this process, leaving a trail that will insulate the decision from successful attack.

Of course, in conflict of interest transactions, such as interested director transactions with a controlling shareholder, parent-subsidiary mergers, and leveraged buy-outs engineered by incumbent management, even more attention to process may be necessitated. In such situations, establishment of a committee comprised of the disinterested directors may be called for as well as appointment of special counsel for the committee.²⁷ As decisions such as *Weinberger v. UOP, Inc.*²⁸ evidence, deficiency in process accompanied by the specter of overreaching by the control group heightens the scrutiny that courts will apply. To allay this prospect, participation by reasonably informed outside directors who have sufficient leverage to negotiate with the control group in an effective manner will dissuade a court from upsetting the subject transaction.²⁹ Playing a key role in this setting, inside counsel orchestrates the process in such a manner as to hopefully further the best interests of the corporation, shareholders, and other affected constituencies.³⁰

23. See *Aronson*, 473 A.2d at 805; *Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971); *Shlensky v. South Parkway Bldg. Corp.*, 166 N.E.2d 793 (Ill. 1960).

24. See *Aronson*, 473 A.2d at 805; see also *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

25. See *Smith*, 488 A.2d at 858; *Gimbel v. Signal Cos., Inc.*, 316 A.2d 599 (Del. Ch.), *aff'd*, 316 A.2d 619 (Del. 1974) (per curiam).

26. See ALI PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 20, § 4.01 & § 4.01(a) cmt.; see also Ira M. Millstein, *The Professional Board*, 50 BUS. LAW. 1427, 1443 (1995) (observing that "courts are willing to defer to the deliberative, independent decisions of boards under the business judgment rule").

27. See, e.g., *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929 (Del. 1985); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 709 n.7 (Del. 1983).

28. 457 A.2d at 701.

29. See MARC I. STEINBERG, *SECURITIES REGULATION: LIABILITIES AND REMEDIES* § 15.04 (1995).

30. With respect to the interests of other constituencies, see, e.g., Symposium, *Corporate Malaise—Stakeholder Statutes: Cause or Cure?*, 21 STETSON L. REV. 1 (1991).

IV. LAW COMPLIANCE

Law compliance today is ever present on the corporate landscape. Inside counsel is a pivotal figure in the practice of preventive law. Although we are in an era of deregulation, we also are in a period of increased criminalization. What was acted upon as a civil enforcement matter a decade ago is more likely to be brought as a criminal action today.³¹ The federal criminal sentencing guidelines reflect this attitude³² and recognize that the subject corporation's establishment of an effective and operational law compliance program constitutes a mitigating factor in determining the appropriate sentence.³³

Law compliance, however, is not a revolutionary concept. Indeed, the American Bar Association's Corporate Directors' Guidebook identifies law compliance as a "significant aspect of the board's responsibility."³⁴ In corporations with multifaceted operations, such law compliance programs may cover such diverse areas as antitrust, environmental policies, employment and hiring practices, and securities.³⁵ Inside counsel's role in helping to administer and oversee an enterprise's law compliance program is critical.

When rendering advice with respect to law compliance, counsel may consider the following:

1. Although no system is "bullet-proof," the corporation should keep in mind that, if a violation were to occur, it would have the burden of showing that its law compliance program (Program) is reasonably effective.

2. The subject corporation's board of directors should adopt the Program, and the Program should be administered under the board's supervision as an integral part of its monitoring function. On a periodic basis, the board should review the Program for possible revision.

3. The Program's scope should reflect the nature of the enterprise's business and the legal issues such enterprise realistically may face. Given the economic practicalities involved and with the proviso that the law must be obeyed, an objective cost/benefit analysis normally is appropri-

31. See generally Dan K. Webb et al., *Understanding and Avoiding Corporate and Executive Criminal Liability*, 49 BUS. LAW. 617 (1994).

32. See Amendments to the Sentencing Guidelines for United States Courts, 56 Fed. Reg. 22,762, 22,787-88 (1991); Sentencing Guidelines for United States Courts, 55 Fed. Reg. 46,600, 46,603-04 (1990). See generally CORPORATE SENTENCING GUIDELINES: COMPLIANCE AND MITIGATION (Jed S. Rakoff et al. eds., 1993).

33. 55 Fed. Reg. 46,600, 46,604 (1990). The guidelines set forth "seven general types of steps" for such a compliance program, including effective training, monitoring, and enforcement, as well as the designation of high-level personnel with overall responsibility for compliance. *Id.* at 46,605. See generally Dan K. Webb & Steven F. Molo, *Some Practical Considerations in Developing Effective Compliance Programs: A Framework for Meeting the Requirements of the Sentencing Guidelines*, 71 WASH. U. L.Q. 375 (1993).

34. AMERICAN BAR ASSOCIATION, CORPORATE DIRECTOR'S GUIDEBOOK 31 (2d ed. 1994).

35. *Id.*; see Steven P. Reynolds, *International Antitrust Compliance for a Company with Multinational Operations*, 8 INT'L Q. 76 (1996); Marc I. Steinberg & John Fletcher, *Compliance Programs for Insider Trading*, 47 SMU L. REV. 1783 (1994).

ate. Certainly, an enterprise engaged in several different businesses with operations abroad should be expected to develop a more extensive program than one with purely local operations specializing in a particular product market.

4. The Program (such as a Code of Conduct) should be disseminated to and understood by all affected company personnel.

5. To integrate the Program into the corporation's culture and to help ensure continued personnel compliance, educational seminars should be conducted on a periodic basis. Moreover, consideration should be given to the question whether affected personnel should be required to certify annually that they have complied with the applicable Code(s) of Conduct.

6. The Program should be effectively administered. In this regard, the enterprise should not adopt any non-essential aspect of a prospective Program that it cannot feasibly implement. For example, a corporation's failure to obtain annual compliance certificates from a significant number of affected personnel may prove more harmful when such a component is contained in the corporation's Program.

7. The Program should be subject to adequate enforcement, such as spot checks, board of director (or delegated committee) review, "whistle blower" protection, and the taking of meaningful disciplinary action against those who fail to comply.³⁶

The adoption and implementation of a worthy law compliance program benefits the affected corporation, its shareholders, and the community at large. A sufficiently comprehensive and effectively implemented Program should reduce the risk of significant liability exposure and should be deemed a mitigating factor if a violation were to occur.³⁷

In this setting, inside counsel regularly provides advice to employees and management concerning compliance, investigates alleged policy violations, and consults with management as to what steps to take when violations are uncovered. Normally, such advice by counsel is implemented. However, in the rare company where such advice is not followed and the situation at hand involves a violation of law likely to result in substantial injury to such enterprise, counsel must take affirmative action. Looking to senior management to guide an appropriate response is certainly the preferable option. In certain situations, it may be prudent to procure a separate legal opinion. If those efforts fail, counsel should inform the corporation's board of directors of the subject violation and the corrective measures to be taken. If the board declines to implement these measures, counsel must resign from his or her employment (and, in a number of jurisdictions, may reveal confidential information to the extent necessary to investors and regulatory agencies). Resignation in such circumstances certainly is a drastic step, resulting in loss of employment, but

36. See Aibel, *supra* note 2, at 435-39; Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559 (1990).

37. See sources cited *supra* notes 31-36.

nonetheless may be required under applicable ethical standards.³⁸

The Securities and Exchange Commission's (SEC) fairly recent Feuerstein Report³⁹ and its well known Carter-Johnson proceeding⁴⁰ illustrate this dilemma. As the Commission pointed out, inside counsel may be charged with both ethical and supervisory responsibilities under the federal securities laws. In such circumstances, in-house counsel simply cannot advise senior management and then decline to ascertain whether such advice is being implemented. Rather, counsel must remain alert to developments and, if corrective measures are not taken, must climb the corporate ladder. If the ultimate decision maker embodying the corporate client—the board of directors—fails to take appropriate action, counsel's recourse is resignation.⁴¹

In sum, inside counsel must be careful not to become a participant in the client's illegality.⁴² Generally, provided that the client listens in good faith to the advice given, counsel should not be obligated to resign when a legitimate question exists regarding the legality of corporate conduct. In such circumstances, inside counsel's "energies should be channeled into advising and prompting corporate management and the board of directors to engage in conduct that is both legal and ethical."⁴³

V. THREE KEY LITIGATION ISSUES

Inside counsel faces a seeming multitude of litigation issues. Three key issues for the 1990s are explored here. The first issue emerges when the subject corporation is involved in a government investigation, such as one instituted by the SEC, and the Commission requests that the corporation produce documents that are protected by the attorney-client privilege (as well as the work-product doctrine). Although wishing to be cooperative, inside counsel should recognize that such production will likely result in a

38. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.6(b), 1.13(b) (1995); TEX. DISCIPLINARY R. PROF. CONDUCT 1.05(c), 1.12(b)-(c) (1995). See generally Joseph J. Fleischman et al., *The Organizational Sentencing Guidelines and the Employment At-Will Rule as Applied to In-House Counsel*, 48 BUS. LAW. 611 (1993); Samuel H. Gruenbaum, *Clients' Frauds and Their Lawyers' Obligations: A Response to Professor Kramer*, 68 GEO. L.J. 191 (1979); Simon M. Lorne, *The Corporate and Securities Adviser, the Public Interest, and Professional Ethics*, 76 MICH. L. REV. 425 (1978).

39. *In re Gutfreund*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,067 (SEC 1992); see also William F. Kennedy, *Professional Responsibility and the Inside Lawyer*, 34 BUS. LAW. 867 (1979).

40. See *In re Carter*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,847 (SEC 1981).

41. *Id.* at 84,169-70; see also *In re Gutfreund*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,067, at 83,608-09.

42. See, e.g., SEC v. National Student Mktg. Corp., 457 F. Supp. 682 (D.D.C. 1978); Simon M. Lorne & W. Hardy Callcott, *Administrative Actions Against Lawyers Before the SEC*, 50 BUS. LAW. 1293 (1995).

43. Ferrara & Steinberg, *supra* note 6, at 22; see MARC I. STEINBERG & RALPH C. FERRARA, *SECURITIES PRACTICE: FEDERAL AND STATE ENFORCEMENT* §§ 4:27-28 (1985 & Supp. 1995); see also Millstein, *supra* note 26, at 1431 ("Lawyers . . . understand that in most circumstances they render advice, and that taking or leaving that advice is the client's role. The limit is when the lawyer's professional responsibilities require him or her to act when the advice is ignored.").

waiver of the privilege.⁴⁴ Transmittal of the documents by the SEC to other law enforcement bodies, such as the Department of Energy and the Department of Justice, is a distinct possibility.⁴⁵ Moreover, once the SEC terminates its activity, plaintiffs' attorneys and others may seek production of the applicable documents pursuant to the Freedom of Information Act.⁴⁶ In light of these ramifications, inside counsel should respond cautiously when faced with a government request to produce privileged documents.

A second troubling issue arises when inside counsel learns that a corporate employee allegedly has violated the law. In this context, counsel may give the employee "quasi-Miranda" warnings to the effect that

(a) [counsel's] role is to represent the organization, (b) an actual or potential conflict of interest may exist between the organization and the individual, (c) [counsel] cannot represent the individual, (d) their conversation may not be confidential and any information the individual provides may be used against [such individual], and (e) he [or she] may wish to retain independent counsel.⁴⁷

A number of inside counsel argue against conveying these warnings to a suspected erring employee, reasoning that so doing is not in the corporation's interest.⁴⁸ On the other hand, failure to provide these warnings may subject counsel to increased liability exposure, particularly where the employee has a reasonable belief that counsel was personally representing the employee. In that event, an attorney-client relationship may be implicated, thereby signifying that such communications between counsel and the employee may be deemed confidential.⁴⁹ Moreover, dual representation of the corporate client and the employee may well constitute an impermissible conflict.⁵⁰

A third key issue may occur when the corporate client is in litigation and a former executive is privy to the facts surrounding the litigation. Can the adversary's counsel contact the corporate client's former execu-

44. See, e.g., *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991); *In re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981). But see *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc). See generally Janet L. Hall, Note, "Limited Waiver" of Protection Afforded by the Attorney-Client Privilege and the Work-Product Doctrine, 1993 U. ILL. L. REV. 981.

45. See, e.g., *Permian*, 665 F.2d at 1214. See generally Claire E. Furry, Note, *Permian Corporation v. United States and the Attorney-Client Privilege for Corporations: Unjustified Severity on the Issue of Waiver*, 77 Nw. U. L. REV. 223 (1982).

46. 5 U.S.C. § 552 (1994); 17 C.F.R. § 200.80 (1995). See generally STEINBERG & FERRARA, *supra* note 43, § 7.03; Robert R. Belair, *SEC FOIA Practice*, 23 REV. SEC. & COMMODITIES REG. 11 (1990); Edward A. Tomlinson, *Use of the Freedom of Information Act for Discovery Purposes*, 43 MD. L. REV. 119 (1984).

47. See Marc I. Steinberg, *Attorney Liability for Client Fraud*, 1991 COLUM. BUS. L. REV. 1, 20 (quoting Barry S. Martin, *When Corporate Counsel Get Caught in the Middle*, CAL. LAW., Dec. 1989, at 75).

48. See, e.g., Aibel, *supra* note 2, at 438-39.

49. See, e.g., *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955 (1978).

50. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1995); sources cited *supra* notes 13-18.

tive and speak with that former executive without corporate counsel being present? The answer may well be "yes." A number of cases as well as ABA Ethics Opinion 91-359 state that opposing counsel can speak to former employees, even former top executives of an enterprise, with respect to the facts and merits of the litigation without counsel for the corporation being there.⁵¹ The ABA Opinion cautions that counsel who is interviewing the former employee must insure that a breach of the attorney-client privilege does not occur.⁵² In other words, facts can be divulged but not communications that are within the attorney-client privilege. Note, however, that unlike the conflict of interest rules where there is a presumption of shared confidences,⁵³ in this setting there is no such presumption. The corporation seeking to show that confidences have been divulged has the burden of showing that is the case.⁵⁴ Not surprisingly, this is an area giving rise to contentious litigation.⁵⁵

VI. COUNSEL AS DIRECTOR

Potential conflicts of interest and enhanced liability concerns abound when counsel serves as a director of the corporate client. For outside counsel, irrespective of this dilemma, the economic necessities may dictate serving as a director. In some situations, senior executive officers may feel strongly that outside general counsel should be an integral member of the "team," thereby insisting that such counsel serve on the board. To maintain the corporation as a client generating substantial legal fees, outside counsel may acquiesce in this arrangement.⁵⁶

51. See *Dubois v. Gradco Sys., Inc.*, 136 F.R.D. 341 (D. Conn. 1991); *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y. 1990); *Niesig v. Team I*, 558 N.E.2d 1030 (N.Y. 1990); *Wright v. Group Health Hosp.*, 691 P.2d 564 (Wash. 1984); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-359 (1991) [hereinafter ABA Ethics Opinion] (interpreting Rule 4.2 of the *Model Rules of Professional Conduct*, to conclude that "[t]he prohibition of Rule 4.2 with respect to contacts by a lawyer with employees of an opposing corporate party does not extend to former employees of that party"). But see *Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Servs., Ltd.*, 745 F. Supp. 1037 (D.N.J. 1990); *Porter v. Arco Metals Co.*, 642 F. Supp. 1116 (D. Mont. 1986); Samuel R. Miller & Angelo J. Calfo, *Ex Parte Contact with Employees and Former Employees of a Corporate Adversary: Is It Ethical?*, 42 BUS. LAW. 1053 (1987); Louis A. Stahl, *Ex Parte Interviews with Enterprise Employees: A Post-Upjohn Analysis*, 44 WASH. & LEE L. REV. 1181 (1987).

52. ABA Ethics Opinion, *supra* note 51, at 6 (stating that "[t]he lawyer should also punctiliously comply with the requirements of Rule 4.3, which addresses a lawyer's dealings with unrepresented persons").

53. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.9 (1995); sources cited *supra* notes 13-18.

54. See, e.g., *Dubois*, 136 F.R.D. at 341; *Niesig*, 558 N.E.2d at 1030.

55. See *Stabilus v. Haynsworth*, No. 91-6184, 1992 WL 68563 at *2 (E.D. Pa. Mar. 31, 1992) (stating that "[t]his issue has been struggled with by many courts and has resulted in inconsistent decisions"); sources cited *supra* note 51.

56. See *Lorne*, *supra* note 38, at 490 (stating that "although several major law firms continue to have partners serving on the boards of their clients, no legitimate basis exists for allowing the practice to continue"); see also *Lawyer-Directors are Key Targets for Plaintiffs' Lawyers*, ABA Group Told, 21 Sec. Reg. & L. Rep. (BNA) 1272 (1989) (quoting a plaintiffs' attorney who stated that attorneys who serve as directors "have to be certifiably nuts").

No such compulsion should exist with respect to inside counsel. Serving as director is fraught with risk for inside counsel. First, application of the attorney-client privilege may be determined on an ad hoc basis depending on whether the attorney/director was acting as legal counsel or as a director. By assuming this dual function, therefore, the corporation's assertion of the attorney-client privilege may be subject to stricter scrutiny.⁵⁷ Second, by acting as director, counsel has a conflict between being a "team player" while at the same time rendering dispassionate legal advice that will be received with respect and without hostility by the inside directors.⁵⁸ Third, the counsel/director may be denied legal malpractice insurance coverage by the carrier on the basis that the alleged improper conduct did not involve the practice of law. If the subject corporation has insufficient director and officer insurance coverage, as well as inadequate indemnification resources, this problem is exacerbated.⁵⁹ Last, when counsel steps out of his or her attorney's shoes and acts as director, counsel's personal liability exposure is magnified. In such circumstances, courts are more likely to apply an enhanced standard to analyze the propriety of the alleged wrongdoing.⁶⁰ Moreover, claims relating to aiding and abetting, conspiracy, and control person liability will be initiated with greater vigor.⁶¹ Given these significant risks, inside counsel should not serve as a director of the corporate client but should (where appropriate) attend board of director (and key board committee) meetings as counsel. In this way, the corporation receives the benefits of counsel's legal advice and input without incurring the risks that otherwise would exist.⁶²

VII. CONCLUSION

Inside counsel today plays a vital role in rendering legal advice to the corporate client and in shaping corporate policy. He or she is in a far better position than outside counsel to take advantage of this advisory role. In light of the deregulatory era that prevails today, the opportunity exists to demonstrate that zealous government regulation is unnecessary, burdensome, and costly. Nonetheless, this is also a period of judgment. If private enterprise fails in this endeavor, accompanied by the onslaught of scandal and public distrust, major federal (and state) legislation that will indeed intrude upon corporate internal affairs will be on the horizon.

57. See MARC I. STEINBERG, *CORPORATE AND SECURITIES MALPRACTICE* 251 (1992).

58. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. (1995); Mendes Hershman, *Special Problems of Inside Counsel for Financial Institutions*, 33 BUS. LAW. 1435, 1439-40 (1978); Lorne, *supra* note 38, at 490-95; Martin Riger, *The Lawyer-Director—“A Vexing Problem”*, 33 BUS. LAW. 2381 (1978).

59. See STEINBERG, *supra* note 57, at 251.

60. See, e.g., *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968); Hershman, *supra* note 58, at 1440 (asserting that “as a director, the General Counsel is likely to be held to a higher standard of care than other directors because of his [or her] unique access to information and expertise”).

61. See, e.g., *In re Rospach Sec. Litig.*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,939 (W.D. Mich. 1992).

62. See STEINBERG, *supra* note 57, at 252.

Hopefully, the corporate community will seize this opportunity and thereby enhance the free enterprise system.

