

# **“Lawyer for Lawyers”: The Emerging Role of Law Firm Legal Counsel**

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## **I. INTRODUCTION**

Large law firms, and many smaller ones, now engage a lawyer as legal counsel to the firm. Usually it is a lawyer in the firm assigned to the task, but some firms also have an outside legal consultant. These appointments respond to the increasingly “legal” environment in which law firms function, in such matters as conflict of interest, malpractice risks, the obligation of candor to courts and other government agencies, duties of disclosure in litigation and transactions, and responsibilities among lawyers and other firm personnel. Having legal counsel is not necessarily effective to keep a law firm out of legal trouble, however. The effectiveness of a law firm’s legal counsel depends on essentially the same factors as determine the effectiveness of legal counsel to any client: competence of counsel, seriousness of attention on the part of the client, and good communication. Some arrangements for legal counsel to law firms have been less than optimal in one or more of these respects.

## **II. THE CHANGING LEGAL ENVIRONMENT**

The need for a “lawyer for lawyers” arises from the much different legal environment in contemporary practice of law than in an earlier era. The change in legal environment parallels that attending all other kinds of activity in modern settings, including businesses of all kinds, nonprofits such as hospitals and universities, wealthy individuals (concerned with taxation and other threats to wealth), and ordinary individuals (concerned with such matters as loss of driver’s license, divorce, and creditor problems). In the old days, most people lived on farms or in small towns and cities and were governed primarily by local custom. Local custom was given effect by common opinion, a person’s standing in the community, and the sanction of bad-mouthing or ostracism. Today, everyone

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and everything, lawyers and law firms included, are increasingly governed by legal rules and subject to legal procedures.

Lawyers and law firms are governed, first of all, by the law at large, particularly regulations addressing white-collar enterprises: the duty to pay taxes; withholding or reporting taxes on compensation paid to others; employment discrimination; participation in fraud or misrepresentation; and money-laundering, which will probably soon include regulations requiring report of "suspicious" financial transactions. The regulations are not only more numerous, they are distinctly "legal." As legal rules, they have definite terms, many of them technical and prophylactic. It is no longer possible for anyone to stay within the law simply by using "common sense." Legal regulations, as practitioners must explain to clients, go beyond common sense and indeed often do not rise to that level.

Violation of the law at large, particularly criminal law and laws addressing civil fraud, can get a lawyer in trouble not only with the usual authorities but also in terms of a lawyer's professional standing. Rule 8.4 of the American Bar Association Model Rules of Professional Conduct, for example, provides that: "It is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . ."<sup>1</sup> Thus, the rules of professional conduct incorporate provisions of the general law.

The rules of professional conduct themselves have been "legalized" in the past forty years.<sup>2</sup> The old ABA Canons of Ethics, originally promulgated in 1908, in both tenor and legal effect were admonitory rather than legally obligatory.<sup>3</sup> In contrast, the Disciplinary Rules of the ABA Model Code of Professional Responsibility of 1970 are a legal code. The Model Code was designed for adoption by governmental authority, particularly the state court systems, and was so adopted. The ABA Model Rules of Professional Conduct, promulgated in 1983, were to the same effect only more so.

The 1983 Rules dropped the Ethical Considerations that had been in the 1970 Code, and they reshaped the legal rules in light of developing decisional law being pronounced in the courts. Omission of the Ethical Considerations in the 1983 Rules was not because ethical considerations

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1. MODEL RULES OF PROF'L CONDUCT R. 8.4 (2003).

2. See Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1241 (1991) (noting that "the traditional norms have undergone important changes. One important development is that those norms have become 'legalized.'").

3. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6.2 (1986).

in law practice were nonexistent or irrelevant. Rather, it had proved confusing to juxtapose admonitory norms, such as the Ethical Considerations, along side legal rules in a pronouncement issued by high legal authority.<sup>4</sup> Norms pronounced by a law-giving source, such as a state high court, are necessarily official and are therefore, in some sense, "legal." Legalization of the rules governing the profession proceeded apace in the work of the ABA Ethics 2000 Commission and further amendments adopted by the ABA in 2003. In general, these revisions interjected additional specifications in the legal prescription of lawyers' professional obligations.

Another dimension of "legalization" is that some provisions in the general law effectively incorporate rules of professional conduct. Thus, in the law of criminal fraud, there is at least one decision that refers to conflict of interest as defined in the rules of professional ethics as an element of misrepresentation. *United States v. Bronston* involved a charge of fraud against a lawyer who concealed a conflict of interest from a client.<sup>5</sup> The federal Racketeer Influenced and Corrupt Organizations Act (RICO)<sup>6</sup> can be applied in similar fashion.<sup>7</sup> Transaction lawyers, particularly those doing federal securities work, are well aware that the Sarbanes-Oxley Act<sup>8</sup> works in a similar way. As implemented by regulations of the Securities and Exchange Commission, that Act imposes federal sanctions in support of the ethical responsibilities of corporate lawyers prescribed in Model Rule 1.13(b).<sup>9</sup>

The practice of law has thus become a pervasively regulated vocation.

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4. In particular, the hopelessly vague concept of "appearance of impropriety," although not among the Code's Disciplinary Rules but rather a Canon, was absorbed into legal requirements through judicial decisions. See WOLFRAM, *supra* note 3, at § 7.1.4 (citing various cases in which the "appearance-of-impropriety" standard was used).

5. 658 F.2d 920 (2d Cir. 1981).

6. 18 U.S.C. §§ 1961-68 (2004).

7. See, e.g., *United States v. Teitler*, 802 F.2d 606 (2d Cir. 1986) (discussing lawyers convicted of RICO violation in connection with scheme to defraud insurance companies on injury claims).

8. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

9. See Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236 (2003) (discussing the ongoing interaction between the organized bar and the SEC).

### III. THE ENFORCEMENT APPARATUS

Perhaps even more important, the professional obligations imposed on lawyers can be invoked by multiple enforcement authorities. Professional misconduct that is also a crime can be prosecuted by state authorities and in some instances by the federal government. Criminal exposure can arise from various forms of fraud in matters undertaken for clients. A lawyer can be at risk of being charged with obstruction of justice when giving advice to a client who is being investigated by the authorities.<sup>10</sup> A lawyer named Lynne Stewart was recently convicted on the basis that, in the course of representing an accused terrorist, she allegedly gave aid to other terrorists.<sup>11</sup>

Then there is the risk of civil liability. In former times, the norms of the legal fraternity made it very hard for an aggrieved client to prosecute a claim for legal malpractice. No longer. Indeed, there are lawyers who specialize in legal malpractice litigation on behalf of claimants, and some who advertise themselves as such. Moreover, the scope of potential claimants in legal malpractice has been widened beyond people who would traditionally be classified as clients. The law today is that third parties who reasonably have relied on a lawyer's opinion generally can sue for damages if the opinion was rendered without exercise of reasonable care.<sup>12</sup>

Being the target of a motion for disqualification in litigation is another risk. The basis of such a remedy is typically an actual or alleged conflict of interest. But there is also risk of being disqualified in transaction practice, where the remedy of the aggrieved party will be an injunction rather than a motion against opposing litigation counsel.<sup>13</sup>

There is risk of being denied fee compensation, or having to return fees already collected, for violation of the rules governing conflict of in-

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10. Martha Stewart, it may be noted, was convicted of obstruction of justice for giving misleading information to federal investigators. Constance L. Hays & Leslie Eaton, *Stewart Found Guilty of Lying in Sale of Stock*, N.Y. TIMES, Mar. 6, 2004, at A1. It is not beyond imagination that lawyers with whom she conferred about responding in the investigation could themselves also have been charged.

11. *Lawyer is Guilty of Aiding Terror*, N.Y. TIMES, Feb. 11, 2005, at A1.

12. See *Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987) (holding that an attorney may be liable for a breach of his duty of due care if a lender detrimentally relies on the attorney's representation); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 56 (2000) (stating that lawyers may be subject to liability from non-clients).

13. See *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1284 (Pa. 1992) (stating that courts can issue an injunction to prevent an attorney from breaching his duty to a client).

terest<sup>14</sup> or those prohibiting unauthorized practice of law.<sup>15</sup> There is a risk of being investigated and prosecuted by the disciplinary authority. And, in many forms of litigation and transaction practice, there is a possibility of being pursued by more than one disciplinary authority.

As summarized in the Restatement of the Law Governing Lawyers: "Upon admission to the bar of any jurisdiction, a person . . . is subject to applicable law governing such matters as professional discipline, procedure and evidence, civil remedies, and criminal sanctions."<sup>16</sup>

Equally important as a practical matter, and often more important, serious violations of law can have serious effects on the reputation of a lawyer or a law firm. After all, lawyers need a continuing flow of new engagements, and garnering new engagements today, as in the past, depends mostly on reputation. For all these reasons, lawyers today often need a lawyer.

#### IV. FORMAL DESIGNATION

One of the new legal technicalities regarding a lawyer for a lawyer is proper designation of the role itself. In my opinion, a law firm intending to rely on legal advice should designate the adviser as a lawyer or, better still, as "general counsel." A law firm should not designate the adviser an ethics counselor, or ethics committee, nor "partner and counsel," or some other equivocal designation.

There are at least three reasons for this revolving around the concept of general counsel. First, the term "general counsel" now has a fairly definite meaning, derived from usage for the head of the law department of a corporation or other entity. It includes both a lawyer in independent practice and lawyers who are not in independent practice but who stand, as an employee of or by some other relationship to the client, as regularly providing professional legal advice to the enterprise. In this country (as in most common law countries), this role carries with it the powers and rights to participate in communications covered by the attorney-client

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14. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000).

15. *See, e.g.*, *Birbrower, Montalbano, Condon & Frank, P.C. v. Super. Ct.*, 949 P.2d 1 (Cal. 1998).

16. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 (2000). That section incorporates several sections containing more detail.

privilege,<sup>17</sup> to speak for a client in court,<sup>18</sup> and, when speaking out of court, to make immunized statements relating to litigation matters.<sup>19</sup>

Second, a multiple identity invites a finding that the lawyer was something else than a lawyer in the strict sense. For example, a lawyer might also be a business adviser or a political consultant. These vocations can be pursued by people who are not lawyers. If a lawyer has a dual designation, it can be argued that his other legal personality was the one involved in a specific transaction, and that in turn can nullify an identity as a lawyer. Thus, a participant in a strategy session can later be classified as a business adviser and not a lawyer, so that the discussions in the session are not covered by the attorney-client privilege.<sup>20</sup>

Third, an ambiguous designation can lead the lawyers in the client law firm to treat the adviser as something less than as a lawyer. This possibility is stronger where, as is often the case, the lawyer for the firm was previously an ordinary partner. As an ordinary partner, a lawyer, even one supposedly expert in legal ethics, has no greater authority than any other member of the firm.

## V. A LEGAL ADVISER'S "CLOUT"

A legal adviser's effectiveness in guiding and protecting a client derives from a complex set of competencies. Technical knowledge of the relevant field of law is, of course, essential. For counsel to a law firm, that field is the law governing lawyers, including, but certainly not limited to, the disciplinary code. Practical judgment and wisdom are required in matters arising in representation. For counsel to a law firm, the range of matters is as broad as the firm's practice.

Force of personality is also required, particularly in dealing with a strong-willed client. Long ago Elihu Root is said to have observed that "[a]bout half of the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop."<sup>21</sup> In my observation that proposition holds doubly when the client is another lawyer or group of lawyers. In some law firms the general counsel is a senior law-

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17. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

18. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4, cmt. a (2000).

19. *Id.* § 57 (2000); compare *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (finding Gentile violated a court rule that prohibited lawyers from making extrajudicial statements to the press that have a "substantial likelihood of materially prejudicing" an adjudicative proceeding).

20. See, e.g., *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 792-94 (8th Cir. 1997) (stating that no "ombudsman privilege," defined as "an employee outside of the corporate chain of command whose job is to investigate and mediate workplace disputes," applies).

21. PHILLIP C. JESSUP, ELIHU ROOT 133 (1938).

yer who has full force of personality. In some law firms the general counsel is supported by the managing partner, who thereby brings to bear the force of that office in support of the general counsel.

However, in some situations the general counsel has to mediate between lawyers or departments in the firm with strong independent influence of their own. Those situations are difficult for the lawyer who is general counsel and, as a result, difficult also for the law firm.

## VI. "STRUCTURAL" ETHICAL DIFFICULTIES

The most difficult problems in legal ethics and the law governing lawyers, in my observation, are not technical legal issues of professional responsibility. A doubtful technical legal issue of professional responsibility can usually be resolved the same way similar issues are resolved for other clients, that is, by backing off. Louis Brandeis, as a lawyer, made the point succinctly:

[Y]our lawyers . . . can tell you where a fairly safe course lies. If you are walking along a precipice no human being can tell you how near you can go to that precipice without falling over, because you may stumble on a loose stone, you may slip . . . but anybody can tell you where you can walk perfectly safe . . . .<sup>22</sup>

Instead, the difficult issues in professional responsibility arise from divergent interests between a lawyer and the firm or divergent interests among lawyers or lawyer groups within the firm. The problems are generally similar to those in dealing with a corporate or other organizational client. As Rule 1.13(a) of the ABA Model Rules of Professional Conduct recognizes, "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."<sup>23</sup> As every corporate lawyer knows, an organization and its constituents do not always have the same interests.<sup>24</sup> Every general counsel for a law firm also knows or soon comes to this realization.

A very common divergence of interest is presented when one lawyer or group in a firm wants to undertake a matter that arguably would involve a conflict of interest with another matter being handled by other lawyers in the firm. Undertaking the new matter is an opportunity for

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22. GEOFFREY C. HAZARD, JR., & SUSAN P. KONIAK, *THE LAW AND ETHICS OF LAWYERING* 60 (3rd ed. 1999).

23. MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2004).

24. A classic is *FDIC v. O'Melveny & Meyers*, which dealt with an attorney's obligation to reveal fraud by corporate insiders. 969 F.2d 744 (9th Cir. 1992).

one side of the firm, although attended by risk, while for the other side the new matter presents only risk.<sup>25</sup> Resolution of the issue might involve the firm's "new business" committee but it can also involve the firm's legal counsel. This common dilemma gave rise to the sardonic colloquialism that a firm's "new business committee" is the "no business committee" because it delivers bad news. But responsibilities of law firm legal counsel also involve delivering that kind of news.

Another divergence of interest is less visible, but for that reason, it can involve hidden risk. This divergence arises where many billable hours are to be committed to a matter before any fee money is received. The law firm is obviously at risk that some misfortune or misstep will turn such a case into unintentional "pro bono" work—that is, the billable hours never get paid. But the lawyer immediately handling the matter is exposed to risk of a more personal nature in suffering waste of effort, sometimes very great effort, and losing credit for the billing hours in his financial relationship in the firm.

Another set of risks arise from compartmentalization of information within the firm. An extreme form of this is where a lawyer handling a matter maintains secrecy of damaging facts. Another is where a combination of facts is damaging, but no one person in the firm understands the combination. A variation is where the client of the firm is concealing facts whose significance is not understood by the lawyer handling the matter but could be understood by someone else in the firm.

Still another risk arises from specialization in the practice of law. A law firm is an organization whose members are specialists to some degree. Specialization of function is a prime basis of law firm efficiency, compensating for the bureaucratization and other conveniences of a collective organization. But specialization, especially in the extreme forms in modern practice, means that counsel to the firm usually will not understand the issues in the underlying matter as well as the lawyer who has the problem of professional responsibility. A lawyer ordinarily is supposed to become a temporary expert in the underlying problem in which the client is embroiled. When the client is itself constituted of such experts (as the firm's lawyers will be), the theory of achieving instant expertise is stretched to the limit, and perhaps beyond.

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25. A classic case is of course *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, where the Chicago office of a law firm undertook a matter involving severe positional conflict and then direct conflict of interest with a matter being handled by the firm's Washington office. 580 F.2d 1311 (7th Cir. 1978).



Practicing lawyers are familiar with the awkwardness in dealing with clients who think they know the law. A law firm general counsel deals with clients like that all the time.

Of course, these and other problems in practice are encountered in a law firm's representation of the firm's "outside" clients. But the difficulties may be greater for a lawyer's lawyer. Lawyers as a class are very sensitive to legal problems, including those arising from their own activities. General counsel for a law firm therefore has legally intelligent and sophisticated clients. However, the clientele also has been trained to act autonomously in dealing with legal problems. Accordingly, lawyers have an inclination to keep their own counsel in dealing with their legal problems. There is an apt folk saying about a cobbler's children having poor shoes. In extreme form, the attitude of a lawyer in the client firm can amount to denial of psychopathic dimension. Only too late may counsel for a law firm learn what has been happening.

## VII. CONCLUSION

The responsibility of legal counsel to a law firm is essentially the same as that of counsel to a corporation: The client is a jural entity and the individuals with whom one interacts are only the constituents of the client. But the constituents are highly literate professionals, like doctors for example, or university personnel, or officers and employees of a high-tech corporation. The difference is that the personnel in a law firm client are legally trained.

Being an effective legal counselor to such a client requires technical knowledge of the law governing lawyers and diplomatic skill of a high order. This combination is not easily found. For a law firm to engage one of its own members to handle its legal problems would seem like a waste of valuable revenue-producing talent. For a law firm to rely on someone less capable, however, would be to disregard the very advice it gives to the firm's clients:

Get a good lawyer, seek advice early, and pay attention.