BRENDAN BROWN LECTURE SERIES

SYMPOSIUM ON THE CULTURE OF PROFESSIONALISM IN LAW FIRMS

LAWYER AS WISE COUNSELOR

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INTRODUCTION

When I was a neophyte lawyer many years ago, I was asked to analyze a commercial lease between our corporate client, the lessee and occupant of the property, and a local landowner who was the landlord. Occupancy of the space had ceased to be useful and the client wanted out. The issue I addressed was whether a particular clause could be read as permitting the lessee to escape. In today's vocabulary, the analysis would be described as "aggressive." The memorandum was then reviewed by a senior partner, who was in charge of the relationship with the client. He rejected the conclusion, saying: "I don't think that's the right way to read the lease. The client made the deal, and it ought to stick with its bargain." The client was advised accordingly.

If I had been a judge in a hypothetical litigation over the lease clause, I think I would have agreed with the senior partner. That is, if the dispute had gone to judgment, the client probably

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would have lost. However, the aggressive interpretation was plausible, although perhaps barely so. If that interpretation had been given to the client, the client at the least could have bargained downward its obligation under the lease. On the unfavorable interpretation, the client could still have bargained, but from a much less favorable starting position. The advice given to the client precluded a dispute that would have erupted if the client had claimed the right to terminate.

ZEALOUS REPRESENTATION, AGGRESSIVE ADVICE

The term "aggressive" has been used recently to describe the standard employed by some accountants in reviewing corporate financial portrayals. It signifies that the professional analyst or adviser is giving the client maximum immediate benefit in relation to the interests of someone else, for example, the stockholders or prospective investors in a corporation. Aggressive accounting advice interprets the financials as favorably as possible under accepted accounting standards. The term can equally apply to legal advice. Aggressive legal advice gives the client the benefit of factual doubts and legal ambiguities, and allows the client something approaching an "advice of counsel" justification. There is no question that many lawyers give aggressive advice sometimes, and some lawyers do so much of the time, if not always.

The concept of aggressive advice harkens to a debate within the legal profession concerning the concept of "zealous advocacy." The debated issue was whether the concept of zealous advocacy can properly apply to giving legal advice, as distinct from providing advocacy before a tribunal.[2] The concept of zealous representation in legal counseling justifies and thus equates to aggressive advice.

Whether zealous representation is appropriate in legal counseling has been debated from time to time by lawyers and by legal academics. It was involved years ago regarding legal opinions by tax lawyers concerning claims of deduction or exemption by taxpayers. That issue has resurfaced recently regarding tax lawyer and tax account opinions concerning tax shelters. It was implicitly involved in an opinion by the ABA

2. *See* Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 COLO. L. REV. 1, 52-58 (2002) (discussing the attack on the ideal of zealous advocacy and citing to critics on both sides).

Ethics Committee that reached the astonishing conclusion that a tax return should be assimilated to a pleading in litigation, so that the standard governing a tax lawyer is the same as that of a litigation lawyer under Rule 11.[3] More pervasively, the issue arises in all counseling situations where the matter addressed can be visualized in terms of a litigated dispute. The problem can arise, for example, in interpreting the scope of the business judgment rule governing corporate directors, the terms of a "non-compete" provision in an employment agreement, the extent of a license of intellectual property, or, as in my case when a young lawyer, the terms of a commercial lease.

Giving aggressive advice involves interpreting the legal problem to maximize the client's immediate legal position. The essential idea is conveyed in the formula employed in litigation for a motion for directed verdict. Like the basis of a motion for directed verdict, aggressive advice indulges every favorable inference that could reasonably be drawn from the evidence.[4] Aggressive advice as a practical matter usually goes beyond that, however. In a litigation context, the motion for directed verdict has to survive the scrutiny and counter argument of an opposing party and pass muster with a judge. In the counseling situation, other interested parties have no opportunity to present evidence that might qualify or contradict the premises on which advice is predicated; and there is no judge to referee the determination. However, to use another formula from the litigation context, aggressive advice does not violate Rule 11.[5] In terms of Rule 11,

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3. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 85-352 (1985) (permitting lawyers to advise reporting a position on a tax return where there exists "some realistic possibility of success if the matter is litigated"); FED. R. CIV. P. 11 (providing that a lawyer's representations to the court must certify, "to the best of the person's knowledge," that the contentions contained in the document are "warranted by existing law" or by a nonfrivolous argument for its extension or modification).

4. *See* FED. R. CIV. P. 50(a); Reeves v. Sanderson Plumbing Prod., Inc. 530 U.S. 133 (2000)(providing that judgment as a matter of law is proper when a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue viewing it in the light most favorable to the non-moving party); Browning v. President Riverboat Casino-Mo., Inc., 139 F.3d 631 (8th Cir. 1998) (holding that the court must give the party the benefit of all reasonable inferences that may reasonably be drawn from the proven facts).

5. The reference here, of course, is to Rule 11 of the Federal Rules of Civil Procedure, governing the standard for legitimate contentions in litigation. Rule 11(b) provides, in pertinent part: "By presenting to the court . . . a pleasing, motion, or other written paper, an attorney . . . is certifying . . ., (2) the claims, defenses, and

if the advice provided has a "reasonable basis" in fact, and rests on an "extension . . . of existing law," the lawyer-counselor has acted within the bounds of professional propriety.[6]

Aggressive legal counseling was given famous recognition in the explanation by Oliver Wendell Holmes of the object of a "bad man" in seeking legal advice. As Holmes said in *The Path of the Law*:

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences . . . not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.[7]

In an earlier era, the maximal aggressive approach was considered to be characteristic of "New York practice." (That approach of course was not the style of all New York lawyers, nor was the style limited to the New York bar.) Practice in that style often yields benefit to the client. Confronted with an aggressive posture, the opposing party may well simply acquiesce. At the same time, projecting the result of the aggressive style is not risk-free. An opposing party's acquiescence might simply reflect the wit and wisdom of the late Senator Everett Dirksen, who said of such situations: "don't get mad, get even."

The aggressive style is often provocative. In the context of negotiation, it can make it more contentious. Sometimes it also results in litigation animated by anger and frustration over the aggressive tactic itself. Consequences of that sort are a variety of "unnecessary litigation;" that is, litigation provoked by the very style of the legal counseling afforded to one (or both) of the parties. In any event, aggressive legal advice makes many transactions unnecessarily contentious and is the predicate for the admonition followed by many business people: "don't get the lawyers into it." Or, at least: "don't let them get their lawyers into it."[8]

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other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." FED. R. CIV. P. 11(b).

6. FED. R. CIV. P. 11(b).

7. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

8. For critique of the style, see, for example, Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319, 323 (1987) (discussing the "New York ethic" of how attorneys who pursue their clients' interests zealously are not accountable for

WISE COUNSEL

In contrast, the style adopted by the senior partner in my apprenticeship experience exemplified the role of the "wise counselor."

As wise counselor, the lawyer assumes hypothetically the role of judge and counsels the client according to the outcome that the lawyer determines a court would reach. The formula has often been employed in the opinion letters. It goes like this: "If the matter were presented to a court of competent jurisdiction, upon full consideration of all the evidence, it is our opinion that the court probably would hold. . ." Beyond this, a wise counselor could view a situation in still broader perspective, much as an arbitrator who is not strictly bound by the law or a judge engaged in settlement mediation. From this perspective, the issue could be framed as, "What is fair and just all things considered." The senior partner in my case undoubtedly looked at the lease in that way.

The role of the wise counselor is implicit in a famous remark attributed to Elihu Root B who, it might be noted, was a New York lawyer. Root is reported to have said:

> About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.[9]

The role is also exemplified in advice given by other New York lawyers, Arthur Dean and John Raben, in a situation later identified as the "Dixon-Yates" matter. The advice was given in confidence, but the letter transmitting it later surfaced in litigation. The issue being addressed was the advisability of continued participation in a sensitive transaction by a financial consultant whose situation could be regarded as involving conflict of interest. Mr. Dean's advice to the financial consultant was simple but direct: "Resign promptly and in writing." Unfortunately, as it turned out, the advice was ignored.[10]

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their clients' behavior); William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1087 (1988) (discussing how the "libertarian approach" of zealous advocacy often has this effect).

9. MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 37 (1994) (quoting Elihu Root).

10. U.S. v. Miss. Valley Generating Co., 364 U.S. 520, 543 (1961).

Giving wise counsel is much to be commended and is much commended.[11] Some observers believe that it is a style no longer practiced, at least not practiced as much as it ought to be. The purpose of this address is to pursue the issue more fully.

WISE COUNSEL AS ADVANTAGEOUS COUNSEL

Legal counsel is provided in circumstances of some uncertainty. When the facts and the law are clear and incontestable, legal advice, if sought at all, will usually be rendered *pro forma*. Serious legal advice is given in less definite circumstances. For one thing, a lawyer never knows whether the client has provided all potentially relevant information. A lawyer also is aware that there can be other evidence which the client does not know about; that other parties will have different impressions of the facts; that the relevant circumstances themselves undergo change, and remembrances of the circumstances undergo even more radical change; and that people can misremember, confabulate and outright lie and fabricate. These uncertainties simply are taken into account in giving advice.

There are situations in which "wise counsel" is the most advantageous counsel the client can get. Most immediately, it is often advantageous for the client to leave a margin for error to offset the uncertainties involved. In any event, it is not always advantageous for a client to pursue its legal rights and interests to the limit. For example, legal advice is often provided to the client in continuing relationships that the client wishes to preserve, perhaps to nurture.

We can readily see this by considering transactions that eventually proceed into litigation. If it were always advantageous to pursue a client's rights to the limits, all litigation would proceed to trial. In fact, however, over ninety percent of civil litigation is resolved by settlement. A similar fraction of criminal cases are resolved by "plea bargains" or simply a prosecutor's decision not to proceed. The parties enter these settlements not out of the goodness of their hearts, but because the prospects of success, discounted by the cost and the risk of loss, do not justify the effort. Prosecutors decline to prosecute charges against

11. *See* Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 FORDHAM L. REV. 809, 816 (1998) (discussing an ideal image of the lawyers as a "statesman").

perpetrators they truly believe are guilty but against whom the proof is not strong, or because the victim does not wish to pursue the matter, or for other justifiable reasons. Claimants in civil matters behave in similar fashion. On the other side, defendants and defense counsel settle many claims prior to their being filed. Court filings typically operate as a mechanism for formalizing compromise.

Wise counsel is also good counsel in the transactions that do not reach a stage of disputation. Many people confronting legal problems do not seek legal advice, and therefore do not become clients. In a sense, they provide wise counsel to themselves, whether because they do not like confrontation and disputation or because they are skeptical or cynical about the prospect of obtaining justice. Most people who have legitimate legal grievances do not pursue their legal rights.[12] Many people who consult a lawyer and obtain advice, aggressive or otherwise, indicating they have a valid legal situation nevertheless decide not to assert their rights, or assert them only with restraint. The advice that clients often receive, and properly so, is that their legal situation is not as strong as they suppose it is.[13] That advice many not be "wise counsel" in the sense we are addressing, but simply hard-boiled assessment that there is no case worth pursuing. That kind of advice is usually well founded, if for no other reason than that lawyers have a selfish interest in advising a course of action that will require more of their services.

Wise counsel ordinarily is especially good counsel where the client has a continuing relationship with the opposite number. A divorce proceeding between spouses with young children is perhaps the most obvious example. Unless a parent in a divorcing couple abandons the children, and sometimes even then, the parents after divorce will have to deal with each other on a continuing basis. Moderation in negotiation will facilitate those dealings. Neighbors having a dispute over a fence or a driveway ordinarily will have to live with each other somehow.

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12. *See* William L.F. Felstiner, Marc Galanter, & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming. . .*, 15 LAW & SOC'Y REV. 631, 633-36 (1980) (categorizing disputes into three stages (naming, blaming, and claiming) and stating that reaching the third stage, claiming, is atypical).

13. *See* AUSTIN SARAT & WILLIAM L. F FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS (Oxford Univ. Press 1995) (discussing this phenomenon in the "socio-legal" arena of divorce cases).

All kinds of business relationships involve "repeat players" [14] on both sides: manufacturer and dealer, franchiser and franchisee, employee and employer, professional and client, etc.

Continuing relationships can be considered in substance as small face-to-face communities. The community consists at minimum of the two immediate parties. Usually, however, there are others more or less involved as well. In a divorce, for example, there often are friends and relatives who have continuing connections to both parties, perhaps also with the children involved. Neighbors having a dispute have other neighbors who are observers and witnesses, gossip mongers and talebearers. Business and professional people have other customers, clients, and employees, and they have interactions with still others who are situated in the commercial vicinity.

THE LAWFULNESS OF AGGRESSIVE COUNSELING

In considering wise counseling, it is useful to identify the legal framework in which legal counsel is provided.

In the first place, it is clear that a lawyer may include ethical, moral and other "nonlegal" considerations in giving advice. Authority to do so is conferred by Rule 2.1.[15] Lawyers often talk to clients in terms of "doing the right thing," as distinct from going to the limit of the law. Clients are often interested in a lawyer's view as to what "the right thing" might be in specific circumstances. However, authority is one thing, obligation another. And authority to interject nonlegal or extralegal considerations is not license to do so surreptitiously.

Of course, the difference between legal and nonlegal considerations is generally not distinct. The law is infused with moral considerations. Indeed, moral, ethical and "civic" considerations are the predicate of most legal rules. Moreover, a lawyer's interpretation of the law is inevitably shaped to some extent by the lawyer's personal morality, just as is a judge's interpretation of the law. Beyond this, the law affords lawyers

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14. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-103 (1974) (explaining that "repeat players," as used in this context, denotes clients that use the court system frequently and spend considerable wealth financing complex litigation).

15. Rule 2.1 provides: "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice." MODEL RULES OF PROF'L CONDUCT R. 2.1 (2001).

very wide latitude in their role as counselor.

There are three principal legal protections sheltering legal counsel. First is the broad latitude accorded to "exercise of professional judgment" in rendering advice and assistance. Second is the rule that a lawyer generally is not answerable for the conduct of a client pursued after consulting a lawyer. Third is the rule that the communications between the lawyer and client are generally sheltered by the client's attorney-client privilege. Together these rules confer what amounts to a qualified professional immunity.

Concerning exercise of professional judgment, a lawyer generally is not liable for mistakes short of those resulting from provable disregard of relevant facts or law.[16] The limits of this concept will be tested in litigation challenging professional advice from accountants and law firms concerning tax shelters. For example, the chief executive of a leading "telcom" company has commenced litigation against advisers who, for hefty fees, advised him that certain stock options would be essentially tax-free.[17] Claims of this kind may succeed, at least to the extent of provoking settlements. The rich fees involved are circumstantial evidence that the opinions were pushed to the limit and perhaps beyond. Nevertheless, it is a matter of conjecture whether the advisors will be held liable for consequences of adventuresome advice. After all, the clients were experienced business people who knew that the transactions might well be too good to be true. The limits of lawyer responsibility may well be prosecuted not in terms of due care, but of recklessness or misrepresentation, so that a lawyer's responsibility for negligent calculation of risk will remain in legal limbo.

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16. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 cmt. g (2000) (providing that proof of a lawyer's conscious disregard of facts is relevant evidence which, together with other evidence bearing on the question, may satisfy the element of actual knowledge in tort claim); FDIC v. O'Melveny & Myers, 969 F.2d 744 (9th Cir. 1992) (stating that securities counsel must make a due diligence investigation to detect and correct false or misleading materials that may subject the securities client to liability); on provable disregard of law, see *Gursey Schneider & Co. v. Wasser, Rosenson & Carter*, 109 Cal. Rptr. 2d 678, (Cal. Ct. App. 2nd Dist. 2001) (upholding accounting firm's indemnity action against a client's law firm where the firm failed to investigate facts relevant to client's community property settlement).

17. *See* Cassell Bryan-Low, *Unhappy Returns: Accounting Firms Face Backlash Over the Tax Shelters They Sold*, WALL ST. J., Feb. 7, 2003, at B1.

Concerning the lawyer's immunity from liability for the client's conduct, the lawyer ordinarily is not chargeable for liabilities imposed on a client who has acted after advice from the lawyer. For example, suppose that a client is advised about terminating a relationship with another, and the termination is later held to be legally wrongful. The client is liable but the lawyer is ordinarily not. This proposition would apply, for example, where an employer client discharges an employee, or a client spouse leaves the marriage, or, as in our case of the lease, a lessee vacates the premises and denies obligation for rent for the rest of the term.

In all these situations, the lawyer generally could be liable only on two bases.[18] If the course of conduct is criminal or intentionally tortuous, the lawyer may be subject to liability on the basis of "aiding and abetting" (the criminal liability concept) or as a "joint tort feasor" (the civil liability concept). However, establishing a lawyer's liability on this basis is very difficult. It must be shown not only that the lawyer had culpable knowledge but also that assistance was provided which went beyond what lawyers in ordinary practice would have rendered.[19]

The second basis of a lawyer's liability is for malpractice as against the client or as against a limited class of legally protected third parties.[20] Thus, if advice or assistance was provided in a degree of aggression that went beyond recognized standards of practice, and injury was to the client or a member of the limited class of third parties to whom a lawyer owes a duty of care, the lawyer can be held liable to the injured party.[21] However, short of

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18. For an analysis that is now somewhat dated, see Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669, 676-81 (1981) (referring to the laws of tort and agency as bases for a lawyer's liability).

19. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 30 (2002) (tort liability); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 8 (2002) (criminal liability).

20. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (2002) (lawyers' duties to clients); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 6 (2002) (remedies to a client for lawyers' wrongdoing).

21. *See, e.g.*, FDIC v. O'Melveny & Myers, 969 F.2d 744 (9th Cir. 1992) (finding that lawyer was liable to securities client for failing to make due diligence investigation as to false and misleading materials); Greycas, Inc. v. Proud, 826 F.2d 1560, 1562 (7th cir. 1987) (holding attorney liable for falsely representing to finance company that he had conducted a search to discover prior liens on property and finance company detrimentally relied on the representation in making a loan to the client).

these limits the lawyer is not liable for unlawful conduct of a client. This is an important immunity, although a limited one. Perhaps it should be noted that the bases of liability in such circumstances are defined by reference to ordinary standards of practice, i.e., practice of other lawyers.

Concerning the shield of the client's attorney-client privilege, the privilege is designed to protect the client but generally operates also to protect the lawyer as well as the client. The privilege prohibits inquiry into client-lawyer communications in the course of a client's quest for legal advice. By the same token, the privilege shields the lawyer's response in providing the advice.[22] A client may and sometimes does waive the privilege, thereby revealing the advice and thus possibly exposing the lawyer to charges of complicity. This can be done, for example, in a defense asserted by a client that he acted "on the advice" of counsel.[23] Waiver of the privilege by the client is not uncommon in the case of a corporate client that has undergone a change of management, for example, in the course of bankruptcy.[24] However, in most cases it is to the advantage of the client not to waive the privilege. Client and lawyer are thus empowered to refuse to disclose the communications between them and the advice rendered in response. In the absence of information from some other source, no one can find out the extent of the lawyer's involvement.[25]

In summary, the legal framework for the legal counselor is:

(1) A duty of restraint only at the point where advice would be outside the bounds of reasonable professional judgment. Advice which could be proven to be beyond that boundary would have to be recklessly or intentionally inaccurate.

(2) A broad immunity from accessorial liability, criminal or

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22. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2002) (providing that privilege may be invoked with respect to confidential communications between privileged persons for the purpose of obtaining or providing legal assistance).

23. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 29 (2002) (providing that a lawyer's advice may mitigate client's responsibility).

24. *See* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 350 (1985) (holding that a bankruptcy trustee of a corporation has the power to waive the corporation's attorney-client privilege with respect to pre-bankruptcy communications).

25. *See* Swidler & Berlin v. United States, 524 U.S. 399, 407-08 (1998) (upholding application of the attorney-client privilege after death of client).

civil, for consequences of a client's course of action pursued in light of the lawyer's advice.

(3) A strong protective shield, afforded through the client's attorney-client privilege, against official inquiry into the content or basis of the lawyer's advice.

Accordingly, the incentives and constraints conducing to "wise counsel" clearly are not to be found in the law of lawyering. The law of lawyering shelters the lawyer for the "bad man" as it shelters the bad man himself. Moreover, as I read the law, if it is clear that the client wants all the latitude that the law affords, a lawyer is not permitted to superimpose his own ethical standards on the advice given to the client. This restraint can be called that of loyalty or avoidance of conflict of interest or compliance with the requirement of competence.[26] In a limiting case, the restraint is that of not committing fraud on the client by pretending legal advice that the lawyer recognizes as inaccurate or incomplete.[27]

EXTRA-LEGAL CONSTRAINTS ON AGGRESSIVE LAWYERING

Accordingly, it must be faced that effective constraints on aggressive lawyering, such as they may be, are to be found outside the law. Holmes dictum about the "bad man" reminds us that the client may feel extra-legal restraints. This is what Holmes was referring to in speaking of the client's "reasons for conduct . . . in the vaguer sanctions of conscience."[28]

As noted above, clients often seek a lawyer's advice concerning those "reasons of conscience." Moreover, many clients are more or less aware of the ethical predispositions of the lawyers they consult. Some lawyers have reputations of being hard-boiled, others of having what might be called strong social consciences. To this extent, a client will get the kind of advice the client is seeking. The fact that lawyers have different ethical predispositions is a function of factors more systematic than

26. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (prohibiting representation that results in a conflict of interest); MODEL RULES OF PROF'L CONDUCT R. 1.1 (mandating that lawyers provide competent representation to clients).

27. *Compare* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYER'S ETHICS, 156-57 (1998) (noting a "contextual view" that decisions regarding a client's representation must often be made quickly due to deadlines or stakes, thereby excusing incomplete analysis and "presumptive responses").

28. *See* Holmes, *supra* note 7, at 459.

individual or idiosyncratic differences in ethical sentiments of members of the bar. Rather, these differences are correlated with the various roles that lawyers perform in the community.

At this point, it would be useful to describe the position in the community of the senior lawyer whose guidance determined the opinion given by my firm in the matter to which I initially referred. The lawyer was a very senior lawyer, in his late sixties or early seventies, which itself makes a difference. He had no further personal or professional marks to make. He was an elder of his church, being or having been for many years on the governing board of his congregation. He was a major contributor to one of the state's private universities and a member of its board of trustees. He was on the board of directors of several local major businesses. He had been on several special commissions of local and state government and served in various capacities in the state bar association. Senior, sober, sensible, sagacious, responsible. Perhaps most important, over the course of nearly a half-century, he had been a participant or close observer in most of the important local transactions in the community in which he lived and was member of a firm that would be expected to be similarly situated in the years to come. In short, he exemplified the classic wise legal counselor in the finest tradition of our profession.

CONCLUSION

On this analysis, the function of wise legal counselor is not simply a matter of ethical obligation or inclination, let alone a matter of legal obligation. Nor is it a matter of individual or idiosyncratic disposition on the part of a specific lawyer. Of course, the individual lawyer's personal engagement with ethical considerations is an essential element. One does not become "wise counselor" overnight or just occasionally. And an individual lawyer's ethical predisposition is an important factor in his professional development and the professional role that he comes to play in the community. It is lawyers of more skeptical or even cynical mind no doubt who become litigation lawyers, particularly lawyers in criminal litigation. In contrast, it is lawyers of more idealistic disposition who perhaps become judges, or so we would like to think.

In any event, the ethical predisposition of an individual lawyer has to converge with the lawyer's pathway in the

profession. There are many mansions, to use the phrase, in our profession, and different lawyers reside in different places. A major issue for our profession is whether there continue to be places of professional residence, so to speak, in which the role of wise counselor can be performed. In the impersonal and relentlessly changing environment of modern law, economics, and politics, those places of residence may be fewer and more unstable than they were a half-century ago. We would have to take that into account in speculating whether the role of wise counselor still has a place in the contemporary scene.