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Corporate Counsel and Business Ethics: A Personal Review

*H. J. Aibel***

It was over 35 years ago that I left the private practice of law to join a corporate law department. Corporate law departments existed prior to World War II, but primarily at railroad and other utility companies subject to extensive regulation or which had repetitive claims. It was only in the decades after the war that law departments grew in number, size, and importance. Probably the GE legal operation was the first of the "full service" departments. When I joined GE in 1957 there were 120 lawyers, most of whom were at decentralized management locations, but all professionally responsible to the GE general counsel; that was more lawyers than were at all but a handful of the large New York Wall Street firms. At the time that I was looking for my first job as a lawyer, it was rare that any law school placement office would provide assistance to those few companies which, according to an ABA study published in 1952, employed recent law graduates right out of school. It was not suggested to any of the better students, at least it was not at my law school, that they consider joining a corporate law department.

It was then the generally accepted wisdom that jobs in corporate law departments were for second raters, or lawyers who had failed to make partner at some of the better firms. It was asserted that the work done in corporate law departments, often actually the corporate secretary's department, was not truly professional, with the employed lawyers acting merely as conduits to outside counsel.

I personally felt that to join a corporate law department was to risk giving up the opportunity to be an independent force in the community, and possibly beyond, since there would be pressure, I thought, to conform to the corporate position on public issues. Thus in 1955, when I was in my fourth year of practice, I turned down an offer of employment from a major corporation on that ground, somewhat to the amazement of the general counsel. Shaking his head in disbelief, he said that he thought that even as a partner of a major firm, a lawyer might be constrained not to take public positions to which clients of the firm could take exception, and indeed I found out subsequently that he was right.

* Earl F. Nelson Lecture. University of Missouri-Columbia School of Law, Friday, November 5, 1993.

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Over the course of the years, professional responsibilities of corporate counsel have changed and developed to the point that they have become an integral part of the management structure. Success in becoming a member of the management "team" depends in most instances on the development of mutual trust and confidence between corporate counsel and the executives and managers who run the corporation. The lawyer thinks of those individuals as the clients, and those executives and managers think of the corporate counsel as their lawyer. The career development of a corporate lawyer depends to a major extent on success, not only in developing this relationship, but also on the ability of the employed lawyer to make professional contributions to the management's achievement of its business goals.

In fact, however, the corporate entity is the lawyer's client.¹ From time to time divergences between the goals of the individuals and the best interests of the corporation, as the lawyer sees the situation, can give rise to career threatening tensions, if not ethical and legal issues. This is particularly the case with regard to corporate programs to ensure compliance with legal, regulatory, and ethical requirements.

It is these problems of practicing in a corporate law department that I would like to discuss this afternoon. For me, these tensions and the ethical and legal challenges of carrying out compliance functions became clear early on in my career as a corporate lawyer.

It was a cold day in early February 1961 when William S. Ginn, who until shortly before had been a corporate vice president of General Electric Company with a very promising career, rose before Judge Ganey in a court room in the Federal Court House in Philadelphia. Bill Ginn and three others, two of them colleagues of his at GE, the other an executive of Westinghouse, had pleaded guilty the previous December to one or more of 20 indictments charging 21 electrical equipment manufacturers and a half dozen of their executives with price fixing in violation of the antitrust laws. These were the infamous electrical equipment cases, which later spawned private actions to recover treble damages by over 4,000 utilities. Robert Kennedy, who had only recently been confirmed as Attorney General, appeared in court to excoriate the indicted individuals and their companies for their illegal price gouging of the nation's electric utilities and the consumers they served. Fines were imposed by Judge Ganey on the corporate defendants, and the individuals were led away to serve time in jail, the first time in almost sixty years of Sherman Act enforcement that executives charged with antitrust violations had been sent to jail.

Just three years before, in January 1958, Judge Stanley Barnes, then of the 9th Circuit Court of Appeals, who had served as the first head of the

1. MODEL RULES OF PROFESSIONAL CONDUCT 1.13 (1992) (Organization as Client).

Antitrust Division in the Eisenhower administration, gave a talk at the annual dinner of the New York State Bar Associations's Antitrust Section. In the course of his remarks, he said the following:

I am reminded of several large industrial empires which within the last several years, have done a complete "about face" in their attitude toward antitrust law and particularly toward the government's efforts toward enforcement

I give as the number one example the General Electric Company. It completely changed its policy since the war, and undertook a strong compliance program, and a secondary educational program to insure the success of its primary endeavor. This decision was made at a high level of management. Prior to that time, General Electric had been named as a defendant in at least 15 antitrust cases. Since 1952, General Electric has had no suits brought against it by the government. Of course, no one knows how long this state of affairs will last. I hope that after mentioning the company by name, I will not read of indictments in tomorrow morning's papers.²

As I sat among the diners listening to Judge Barnes, I knew that grand juries had only recently been empaneled in Philadelphia to hear testimony regarding price fixing in the electrical equipment industry. The indictments did not come "tomorrow," but they came soon enough.

The policy directive to which Judge Barnes referred was "On Compliance by the Company and its Employees with the Antitrust Laws."³

This policy had been the subject of regular communication by members of GE's senior management in New York and the field operating managers. The Chief Executive had been quoted in the widely distributed minutes of a management meeting: "failure to observe this Directive Policy... would result in immediate replacement of the employee involved." Counseling compliance

2. *"Is there a Better Way?"*, in 1958 ANTITRUST SYMPOSIUM: HOW TO COMPLY WITH THE SHERMAN ACT, p. 115 et seq.

3. GE's policy 20.5 read in significant part:

"No employee shall enter into any understanding, agreement, plan or scheme, expressed or implied, formal or informal, with any competitor, in regard to prices, terms or conditions of sale, production, distribution, territories or customers; nor exchange or discuss with a competitor prices, terms or conditions of sale or any other competitive information; nor engage in any other conduct which in the opinion of the Company's counsel violates any of the anti-trust laws."

with the antitrust laws was *the* primary responsibility which GE lawyers had. All to no avail.

Faced with highly credible evidence that senior operating executives of the company had violated the policy, it was the determination of GE's senior management that noncompliance would have to be met with internal discipline. At that time I was on the headquarters staff of the General Counsel serving as trade regulation counsel. I was given the assignment of carrying out the compliance investigations. In carrying out my interrogations, I told each person that I would keep confidential information disclosed to me in the course of the interview, but that if I concluded that there had been noncompliance with the policy, I would have to report that conclusion to the senior management and that discipline could follow. I also told each target of my investigation that while I had information implicating him, I would accept his denial, but that should it be concluded at a later time that the denial had been false, there would be an immediate discharge for cause. Following each interview, and there were approximately forty, my conclusion as to compliance with the Company policy was set forth in a summary memorandum which was the basis for the imposition of discipline upon the employee when the conclusion was noncompliance.⁴

As one of those who had been involved in price fixing activities put it in the course of a compliance interview, there were a number of unwritten rules which went along with participation in price fixing meetings: "One was that you never talked to the lawyers about it, and two was that you never talked about it with people in New York." I have often wondered whether in fact some of the lawyers at the decentralized management locations, who had developed particularly close relations with their management "clients", had learned of the price fixing activities under circumstances which led them to feel that it was their professional obligation to those who confided in them not to betray the secrets and confidences which had been imparted to them.

I certainly felt no such professional obligation. However, the outside lawyer retained by one highly placed GE manager who had been disciplined following an interview with me wrote a strong letter to my superior, the

4. *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962). I would note that it was in the course of denying a claim of lawyer-client privilege by GE for these memoranda I had prepared that Judge Kirkpatrick, in *Westinghouse*, one of the civil cases brought to recover treble damages, enunciated the "control group" theory as a basis for determining the group whose communications with counsel would be protected from discovery. None of my interrogees, including Mr. Ginn, save one executive vice president, was found by the Judge to be a member of the "control group." The Supreme Court, in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), disapproved the "control group" test, only about 25 years too late to do me or my client any good. Another instance confirming Justice Holmes dictum that "Hard cases make bad law."

General Counsel, arguing that the disciplinary action taken against his client was based upon an unlawful and unethical disclosure by me of confidential communications, that his client believed that I was acting at least in part as his lawyer when he made his disclosures to me, and that, in the circumstances, his client's discipline should be reversed. It was also argued that his client's being disciplined would become known to prosecutors and thus my conduct had put his client in jeopardy, rendering him a target for indictment. While I believed there was no basis to the claim that I had given the impression that I was acting as the manager's counsel, these claims were very troublesome to me, and caused me to do a great deal of soul searching as to whether I had acted properly in handling my assignment.

The claims that I had acted wrongfully were not pursued after the manager was named as a defendant in an indictment containing detailed allegations of price fixing in the product line for which he was responsible, and the issues raised by his lawyer as to my conduct were never resolved. However, I knew that all of the individuals who had been disciplined were resentful of my role and that their friends were wide spread throughout the organization. I felt that my future career in the company could well be adversely impacted by the hostile reaction of those who saw me as the engine of destruction of their friends' careers. I realized that it might be very difficult to establish effective working relations with many in management whom I might in the future be called upon to advise, given this background.

My career at GE did progress. I was given responsibility for the civil antitrust suits by the 4000 utilities that followed in the wake of the criminal charges. However, I accepted an even more challenging offer to join ITT in mid-1964; this feeling that my reputation among many of the operating managers was that I was an informer was certainly a factor in my decision to leave GE.

Lawyering involves both advocacy and counseling. The basic difference is that as an advocate, a lawyer is stuck with the facts, whereas an advisor, at least in the corporate setting, is in a position to shape policy and influence the facts for the future. It is in this latter role, that of counselor, that an inside lawyer has a great opportunity to contribute to the success of his or her client and to our society as a whole. "Preventive practice" is the key phrase. The most important element is the early involvement of the lawyer in situations, transactions, or conduct that may have significant legal or ethical consequences. As previously indicated, early involvement of the lawyer often depends upon the prior establishment of a reputation for being a "team player," a "can do lawyer," a lawyer who supports management.

Can a lawyer who works in a corporate setting maintain his or her objectivity even when it is clear that the appropriate advice would be unwelcome? Doing so requires self-confidence and inner strength. Does a fear of adverse impact on a career in such situations lead an inside lawyer to "get along by going along"? It depends upon the individual, of course, and

I would submit that the issue is no different for an inside lawyer than it is for an outside lawyer with concerns over keeping a major client. But in the long term we all know that a lawyer's reputation and career will be adversely affected when a client gets in trouble because the lawyer didn't advise properly. There is no reason to believe that an inside lawyer will be less cognizant of such long term reputation and career considerations than would an outside lawyer.

Although it is not easy for inside counsel to bring to the attention of the corporation's Board of Directors situations in which senior management is failing to take appropriate action, in the end, his or her career may depend upon doing so. I have taken such action while at ITT; it wasn't an easy step to take. However, after agonizing reflection it appeared to be the better course for the long run. Some might say "you had better be sure you are right," invoking the Machiavellian precept that when you go for the king you must kill him or be killed. I was lucky and it all worked out, with neither the king nor I having to be killed.

Consider however the fate of a recent General Counsel of Salomon Brothers. According to a report by the SEC⁵ dealing in part with his responsibility under the securities laws, his career at Salomon was brought to a screeching halt by the Company's Board of Directors because he had not informed the Board of senior management's failure to follow his advice that remedial action be taken after it was learned that the firm's chief federal bond trader had seriously violated trading rules.

My good friend Brian Forrow, for many years the General Counsel of Allied Signal, has put the question of the independence of inside lawyers this way:

"Is the hallmark of a lawyer—independent judgment—blurred because the lawyer serves as inside counsel? Or is inside counsel better able to bring independent judgment to a corporation's problems, even perhaps to go beyond the law to activate the corporate conscience?"⁶

Let me give you a personal example of an inside lawyer's role in going beyond the law to activate the corporate conscience.

Almost twenty years ago, in April of 1974, a letter from a former Director of Contracts Administration of an important ITT Subsidiary was received by the then Chief Executive of ITT. The writer alleged that he had

5. In the matter of John H. Gutfreund et al., Release No. 34-31554, 85,067 Fed. Sec. L. Rep. (CCH) ¶¶ 83,597 - 83,610 (Dec. 3, 1992).

6. Brian Forrow, *The Corporate Law Department Lawyer: Counsel to the Entity*, 34 BUS. LAW. 1797 (1979).

been wrongfully discharged because he had refused to go along with a plan to make a relatively large payment to foreign government officials who had been influential in the awarding of a large contract to the company. The Chief Executive, disturbed by this allegation, referred the letter to me. He asked that the situation be looked into and that he be advised as to what, if anything, should be done.

After investigation, I determined that there was nothing to the ex-contract administrator's allegations. The record of his poor performance, which was the basis for discharge, was clear. I concluded that the story of foreign bribery had been advanced in the hope that management concern that he had information which, if made public, would be an embarrassment to the Company, might lead to his reinstatement.

However, in the course of reviewing these charges, I learned that in other instances covert arrangements *had* been made by some ITT managers who operated abroad selling in export markets, to make payments to persons not regularly engaged in the commercial activity of providing legitimate sales representation. In fact, it was expected that most, if not all, of the payments would be turned over to governmental officials in a position to direct or influence the award of business.

My report to senior management of what I had learned provoked intense discussions as to what to do in the circumstances. None of the senior executives involved in the discussions had personal experience in markets where the making of clandestine payments, bribes that is, was said to be a customary practice. All were aware that often the explanation given by field management for the loss of a major contract to a competitor was the close relationship which that competitor had achieved with a high official of the customer, an official who was in a position to influence the award. It was part of the folklore of international marketing that such close relationships frequently were achieved through clandestine corrupt payments. That's the way the real world is, I was told.

Each of the senior executives affirmed that doing business in this way was contrary to his own personal code of ethics, but the question was raised as to whether there wasn't also a responsibility to the enterprise, its stockholders, and employees not to lose business to competitors whose ethical sensitivities could accommodate the payment of bribes. The general acceptance of the use of such payments in aid of exports in foreign countries, including the fact that governments of other exporting nations sanction such payments, for instance, by financing them through export loans and by allowing them to be deducted for tax purposes, was mentioned. Exports were of great significance to many of ITT's foreign based companies, who needed these orders to keep people employed. Why, it was asked of me, would I not let sleeping dogs lie?

A quick survey of the laws of some of the developing countries that were important markets disclosed that while each of them had laws prohibiting

bribes, these laws had never been enforced. The issue posed to me as counsel was would it be right to impose rules based on the personal ethical standards of the senior management, when doing so could have adverse consequences for employees, creating hardship for many people? For me to insist that conduct conform to the dead letter of laws honored in the breach rather than by observance, simply because there was a law on the books, could give rise, I thought, to a loss of effectiveness as an advisor. Please remember that this situation arose in 1974, several years before the SEC insisted upon disclosure of such payments and even longer before the passage of the Foreign Corrupt Payments Act. Though clients would listen, they might ignore advice which to them appeared to be academic, lacking in realism.

But there were countervailing practical factors that I advanced to reinforce the ethical and legal concerns. It was immediately clear that whatever had been the experience in the past, attitudes toward such corruption were changing, both in the United States and in developing countries. I argued that inevitably disclosure of the use of bribes, or to use the euphemism employed at the time, "questionable payments," was more probable than not. Assuming that the facts came out, what could be expected? Among the possible adverse consequences that I raised were the following:

Public disclosure through a leak or otherwise of improper payments could give rise to significant risk of loss of corporate property in the jurisdiction involved. Indeed, the physical safety of company personnel at the contract site might be put in jeopardy. Certainly disclosure of such payments could put at risk the completion of contracts in progress. Realistically the opportunities to continue to do business in that country in the future would not be too promising. Damage worldwide to a reputation for integrity and ethical behavior could be a serious consequence.

Then there were the concerns about management control. How would anyone know whether disbursements were really made for the asserted purpose? Does some of the money stick to the fingers of the intermediary or, worse yet, to the fingers of our own employees?

I suggested that management should be concerned that use of such techniques for securing business could dull the competitive spirit. Is there a need to provide appropriate values at competitive prices when business can be secured through a payoff? The question was, if we don't strive to be competitively better today, what are the implications for our future?

Consideration had to be given, I argued, to the corrosive effect on discipline in the organization, and of the adverse effect on the manager who feels the expected, but unjustified promotion must be provided, or who hesitates to fire, a nonperforming employee because of concern that he will disclose information about clandestinely made questionable payments.

Even more serious was the clear risk of falling into the hands of blackmailers; for instance, disgruntled ex-employees who claim they will

make embarrassing disclosures unless a substantial payment or other benefit is forthcoming. This certainly appeared to be the situation in the case of the letter writing ex-contract administrator I told you about a few minutes ago.

At the end of the day, senior management decided that it would issue a policy statement forbidding the making of such corrupt payments to influence the award of business, directly or indirectly, and other unethical conduct. In addition, a compliance function was established in the legal department with responsibility for providing advice regarding compliance to managers at all levels, for investigating indications of policy violations and advising senior management as to remedial action to be taken, if any.

Inside counsel in ITT had and has a very important role in the development and then the implementation of this ethics program. The compliance officer appointed was, as he is today, a senior lawyer in the legal department. In addition to reporting to the General Counsel, the compliance officer has direct access to the Board of Directors through its Legal Affairs Committee.

How has the ITT program worked? Better and better over time, as the management has gotten the message. "Getting the message" in effect meant changing management attitudes, changing the corporate culture, if you will. The issuance of a policy, even when the boss says at every management meeting that he really means the policy to be carried out, sometimes doesn't convince those who are determined to meet their company sales and revenue goals by whatever means might be available.

Thus, shortly after the ITT Code of Conduct was promulgated throughout the system, the managing director of one of our major European companies, a man who was my friend, called me aside at a meeting in Brussels and said that he had been told he would have to make a substantial payment to a government official if his company were to secure a very large order on which the company had been working for a year. He asked me whether the ITT policy against the making of such payments was for real. When I assured him that it was, he said that this was such an important order for his company that he said he couldn't believe that it would apply to this kind of situation. The order was needed to make budget and he had to do everything possible to meet that goal. His compensation, if not his job, depended upon meeting the budget. I cautioned him that failure to abide by the ITT policy would most certainly result in discharge. I urged him to talk to the Chief Executive. He did, and later reported to me that he had been told that if it took a bribe to get the order, the Chief Executive didn't want it. The managing director said that he now realized that the boss really meant it; there were no winks, no body language to convey another message.

But suppose that the European manager hadn't been convinced, had gone ahead and authorized the bribe; suppose further that I found out, told the Chief Executive and he was fired. My friend, the foreign national who ran an ITT overseas subsidiary, had turned to me for advice and counsel in this situation: he certainly acted as though he thought I was his lawyer. I am sure

that he would expect that if he got into trouble, I would be his advocate as well. He certainly did *not* think, I can guarantee you, that I would be an informer, a cop, or a prosecutor. Yet that is what I would have been compelled to be because of my professional responsibility as lawyer to the entity, were he to violate the company policy. Should I have given him a warning of my primary role? I wonder had I done so whether he would have talked to me about his problem. Remember the GE manager's unwritten rule—never talk to the company lawyer.

Bartow Farr, then the General Counsel of the Singer Company, found himself in a similar situation a dozen or so years ago according to a contemporaneous report in an antitrust newsletter. Mr. Farr received information suggesting that executives of one of the company's units had been engaging in price fixing in violation of the antitrust laws. According to the account, Mr. Farr dropped everything else and probed the informer's suspicions. He was quoted as saying "I questioned all the people in top positions in one day." Upon completing that effort, and securing admissions from some, and denials from none, Mr. Farr told the Singer Chief Executive of his findings. The next day Mr. Farr informed the Antitrust Division of the Department of Justice, and Singer made a public disclosure in a news release. There were ten utility customers affected by the price fixing, and they were told that "Singer would make them whole."

It appears that those involved in the price fixing effort thought—however misguidedly—that they were acting in the corporation's interests. Certainly, there was no indication they were seeking to serve their own interests. According to the media account of the incident, the executives involved were given no advance word that the Singer General Counsel might turn over the incriminating information to Justice. Mr. Farr was reported as saying "We told them to get counsel *after* they told us they knew what we were talking about." It would appear that Singer might have hoped to avoid indictment by cooperating with the prosecutors. Singer officials said only that they believed that what they did was the right thing to do.

There was a similar disclosure to law enforcement officials of information received from ITT executives in the course of an investigation by corporate counsel of a violation of the Iranian embargo during the hostage crisis. What happened was this: ITT Blackburn, a subsidiary of ITT based in St. Louis, Missouri had shipped products to Iran in violation of a Presidential Executive Order, employing the subterfuge of routing the shipment through a customer in Finland who agreed to reship to Iran via the Soviet Union. In this situation, the public disclosure was made by a would-be blackmailer, a foreign national, who, acting as an independent sales representative, had arranged this circuitous transaction. His demand for a payoff to keep silent was rejected by ITT, and an internal investigation was immediately commenced by the corporation's compliance officer, and as indicated, it appeared that the charges had substance.

By law, ITT was required to report the violation of the Executive Order to the Department of the Treasury, the branch of the Executive Department charged with enforcement. In fact, the results of the in-depth investigation of the blackmailer's charges, including the lawyer's report of interviews with those responsible, were turned over to government enforcement officials. The enforcement officials were also informed that there had been terminations of those found to have wilfully violated the embargo.

While the corporation could have claimed the privilege recognized by the Supreme Court's decision in the *Upjohn* case for the lawyer's report to top management of the investigation, it was decided that it was not in the corporation's best interests to do so. The possibility that those interviewed might raise a claim of privilege, if provided the opportunity, was given only passing consideration. Had the sentencing guidelines, to which I will refer more extensively later, been in effect then, and assuming that there had otherwise been in place a qualifying compliance program as described in those guidelines, there would have been little choice. The need to disclose the employees' wrongdoing as a means of mitigating the very heavy penalties which otherwise would be imposed on the corporation as a result of their wrongful acts would compel such action.

What was once a difficult decision for a general counsel to make, that of waiving the corporation's privilege and seeking to gain the benefits of cooperation with the authorities, is now the standard, as a result, first of the voluntary adoption of the so called Defense Industry Initiatives, a multifaceted compliance program proposed by the Packard Commission in 1987, and more recently, the Sentencing Guidelines.

The Defense Industry Initiatives have a self-reporting requirement. However, even before the adoption of these initiatives, crimes associated with government procurement had been an exception to the normal practice of defense attorneys of asserting the lawyer-client privilege and seeking protection for work product. The reason is simple: for the corporation the consequences of such a crime are not limited to pleading guilty and paying a fine; the consequences include suspension of eligibility and ultimately debarment from all future procurements. This could be a death sentence for the firm. Even a temporary suspension can cause serious injury. Accordingly, when a problem arises and a company is suspended, its major efforts are directed to establishing that it is a "responsible" contractor and securing relief from the suspension or debarment order. Procurement agencies, particularly the Department of Defense, routinely require, prior to such relief being granted, that following a full investigation as to who was responsible, the erring employees be terminated and the results of the investigation be disclosed to the agency.

Under the more recently adopted sentencing guidelines for corporations, a company can mitigate the very substantial penalties that are mandated for corporate crimes by showing that it has an otherwise effective law compliance

program, which includes among its more significant elements: the adoption and promulgation of a clear code of conduct; the carrying out of an assessment of the company's operations to identify the risks that might lead the corporation into law violation and the adoption of preventive programs, including training at all levels of the organization regarding the corporate code and law compliance; establishment of a compliance investigative function, the swift imposition of discipline upon those found culpable; and, most importantly, a commitment to inform law enforcement officials of law violations discovered and to turn over investigative materials to those enforcement authorities.

Now, twenty years after the adoption of its code of conduct by ITT and some other large companies, such corporate codes of conduct are the norm, rather than the exception. In 1992 the Conference Board reported that a 1991 survey disclosed that over 82% of a representative sample of U.S. corporations had codes of conduct. It would seem that many, if not most, of these codes were prompted by the need to be in a position to seek mitigation of penalties under the sentencing guidelines.

Otto Obermaier, until recently the U.S. Attorney for the Southern District of New York, recently said with respect to the Sentencing Guidelines: "For the first time, corporations have been conscripted into the fight against crimes. Good corporate citizenship is now defined by expanded obligations—the traditional prevention and detection of crime, and now the reporting of crime when detected." These obligations fall almost entirely on the shoulders of corporate counsel. Lawyers in the securities fields and banking fields particularly are being challenged as the regulatory agencies have sought to require disclosure by counsel to the regulatory agencies of wrong-doing by their clients. I need only mention the proceedings by the RTC against law firms that advised S&Ls and refer again to the SEC's proceeding relating to the Salomon Brothers General Counsel.

There has been a good deal of discussion among corporate counsel as to whether an employee should be given "Miranda" type warnings before being questioned in an internal investigation, or if not that, be given an opportunity to consult his or her own lawyer before submitting to interrogation. I have concluded that carrying out my professional responsibility to the corporate entity requires that neither of such courses be followed. It is my task to find out what the facts are as fully and as quickly as possible. It is the obligation of an employee to respond truthfully to questions put to him by the corporation as to activities in the course of his employment for which the corporation may be held responsible, whether civilly or criminally.

It certainly appears to me to be inconsistent with the duties of an employee to take the position that he will only respond after consultation with an independent counsel. It is not that I fear that counsel will uniformly advise his client to refuse to cooperate, although that does happen. However, usually the prospect of immediate discharge for cause, ending all corporate

support, including the advancement of legal fees, leads independent counsel to refrain from advising "stonewalling" the internal investigation.

Rather, my main concern is that experienced outside counsel will point out to his client that the only hope for mitigating personal criminal penalties is through the culpable employee's cooperation with the prosecutor, that is, making a deal to provide testimony implicating "higher ups." Regrettably, human nature being what it is, it is predictable that the desire to avoid criminal penalties by having something to give to the prosecutor will frequently lead to "recollections" of alleged conversations with superiors that would not have been "recollected" in the course of an inquiry by the corporation's counsel carried out before the employee is given such advice. So our internal investigations bear down on the issue of responsibility of superiors early on, so as to pin down the facts.

So not only am I a cop, I am a tough cop. Having such a reputation does, in fact, adversely impact my ability to establish good working relationships with a certain segment of management that tends to believe that getting ahead in business and corporate life requires cutting corners. It is a challenge to balance the traditional roles of a lawyer as a counselor and advocate with the newer roles of investigator, informer, and sometimes prosecutor. But I submit that it is a challenge that corporate counsel must meet appropriately in order to successfully carry out his or her professional responsibility to the entity.

With apologies to T.S. Eliot, I would like to end these remarks with more of a bang, rather than what might appear to be a whimper.

The enlargement of the role of corporate counsel, which I have described in somewhat personal terms, is clearly good for the client, good for our society and good for the lawyer. Corporate lawyers who know the business of their company can identify areas of risk and provide advice that informs management as to how to accomplish their goals in ways consistent with legal, regulatory and ethical requirements. This is preventive law practice. It is not just predicting the outcome of cases, but also anticipating the way in which people will act in given circumstances and developing approaches that help management to avoid legal pitfalls.

Protection of the corporation and its stockholders from the harsh impact of criminal and civil penalties, public opprobrium, and loss of hard earned reputations for integrity, which can result from wrongful management conduct, is clearly a social benefit. This is particularly true as institutional investors serving as intermediaries for pensioners and similar beneficiaries own an ever increasing proportion of corporate America.

Of course, it is the obligation of all management levels and all management functions, not just the lawyers in the corporation, to be "keepers of the corporate conscience." It is, however, the task of corporate lawyers to make sure that management understands the full scope of this responsibility.

Thus, lawyers employed by corporations are now called upon to take a leadership role in bringing those business entities into the 21st century as major participants in the drive to achieve a just society. As John Subak put it: "As part of or advisor to management, the lawyer can be and is a powerful force for ethical corporate conduct, not because he is a lawyer nor because he knows best, but because the law so often embodies our society's ethical judgments. By training, interest and background, a lawyer is more often than not a thinking animal pretty well atuned to what is right and what is wrong."⁷ There is now a broader meaning to the status of lawyers as "officers of the court," perhaps a more significant role than that which was envisioned by the profession when I left law school over 40 years ago. To all those of you who have the opportunity to serve in our country's corporations, I encourage you to take up this challenge.

7. John Subak, *Special Problems of Inside Counsel* 33 BUS. LAW. 1433, 1434 (1978).