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A Convocation on the Rise and Role of General/In-House Counsel to Large Law Firms

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JUDGES OF THE
NEW YORK STATE COURT OF APPEALS

HON. JONATHAN LIPPMAN, CHIEF JUDGE

HON. CARMEN BEAUCHAMP CIPARICK

HON. VICTORIA A. GRAFFEO

HON. SUSAN P. READ

HON. ROBERT S. SMITH

HON. EUGENE F. PIGOTT, JR.

HON. THEODORE T. JONES

NEW YORK STATE JUDICIAL INSTITUTE
ON PROFESSIONALISM IN THE LAW

JOURNAL OF THE NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

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A CONVOCATION ON THE RISE AND ROLE OF GENERAL/IN-HOUSE COUNSEL TO LARGE LAW FIRMS

OPENING SESSION AND KEYNOTE ADDRESS

PAUL A. SAUNDERS
CHAIR, NEW YORK STATE JUDICIAL INSTITUTE
ON PROFESSIONALISM IN THE LAW

Chief Judge Lippman and Judge Ciparick, both of the New York Court of Appeals, welcome and thank you very much. I also want to thank the Fordham Law School, in general, and Dean Treanor, in particular, for making this space available to us and for helping us in embarking on this somewhat ambitious beginning of a series of programs.

Let me just tell you a little bit about the Judicial Institute on Professionalism in the Law. Ten years ago, after receiving the report and recommendations from a commission headed by Lou Craco – whom probably all of you know – that examined issues of professionalism in the law, then-Chief Judge Judith Kaye accepted the recommendations of the Craco Commission, one of which was to establish a permanent institute in New York State to examine issues of professionalism for lawyers. The judicial institute that she founded was then headed by Lou Craco, who was its chair until about two years ago when he stepped down as chair and remains, even today, as chair emeritus of the Institute.

The Institute is a group of lawyers who are interested in and dedicated to examining issues of professionalism. It includes members of the judiciary like Judge Ciparick (who is a very active member of the Institute), members of the practicing bar, and members of the academy.

We, in the Institute, debate and examine issues of professional values among lawyers. We do such things as holding town halls around New York State to hear from citizens about their perceptions of professional behavior and conduct by lawyers. We conducted a series of convocations a couple of years ago in which we did a longitudinal study of the practice of law beginning in law school[2] and ending at the end of our study and at the end of the longitudinal chart, with retirement, the practice of senior lawyers.[3] We have a mandate to speak out on issues of professionalism, and we have done so.

Today, we are embarking on a two-year study on lawyer independence. We begin here at Fordham. We will hold similar convocations over the next two years in Albany and Rochester and Westchester and Long Island. We are going to examine issues of lawyer independence from the perspective of government lawyers, corporate lawyers, and lawyers in big and small firms, as well as solo practitioners.

So why, you may ask, are we doing this? Why is lawyer independence such an important issue? If the rule of law is essential to our democracy, then lawyer independence is its central mechanism. As Lou Craco himself said, "the law is both the glue and the lubricant of our

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[2] *See* 1 J.N.Y.S. JUD. INST. PROF. LAW (2001).

[3] *See* 5 J.N.Y.S. JUD. INST. PROF. LAW (2007).

society."[4] But the rule of law, again to borrow from Lou, is not "'a brooding omnipresence in the sky.' It is the composite of thousands of cases and matters, laws made and used, advice given and received, day in and day out."[5] Lawyers are essential to the implementation of the rule of law. Those of us in the Institute believe firmly that lawyers, no matter how private their practice may be, perform an essential public service. I have said in the past that that is exactly where the rubber meets the road. Let me say that again. No matter how private our practice may be, we believe that lawyers in the practice of law perform an essential public service. Every day, lawyers deliver advice to their clients about what the rule of law permits or requires precisely because they know that the full coercive power of the government will stand behind them. That is an awesome but essential responsibility.

This brings me to the issue of lawyer independence. In order to perform this essential public service, lawyers in our country enjoy a collective autonomy from supervision. But, because they enjoy that autonomy, it is essential for them to be able to give disinterested – and by that I mean independent – legal advice to their clients. That is the public service aspect of our practice. More than any other group, lawyers interpret, advise about, and enforce the law, day after day, and lawyers are at their best when their advice is independent and dispassionate. And the rule of law is best served when, again let me quote from Lou Craco, "[w]e are allowed to be independent because it is necessary" for us to be able "to give disinterested advice to our clients."[6]

Lawyer independence has been under attack both from within the profession and from without. The practice of law, as you all know, is becoming more of a business than it had been, although one could not argue with a straight face that it never was a business. Volumes have been written about the tension between the practice of law as a business, on the one hand, and the practice of law as a profession, on the other hand, which brings us to the beginning of our dialogue on lawyer independence.

Our beginning is one of introspection. We begin our work by examining not so much why lawyer independence is essential to the practice of our profession or indeed by examining the outside forces that challenge or attack or jeopardize the first essential characteristic of independence, that is, freedom from outside supervision. Rather, today, we are going to begin by looking inside our profession by asking ourselves how we are coping with the internal or inside-the-Beltway constraints on our ability to afford our clients the most dispassionate and independent advice that we can give them.

Some of those internal constraints are obvious: demanding clients who are searching for a clever way around the rule of law or, even worse, conflicts of interest – lawyers who put themselves or their own financial interests or, today, their celebrity interests ahead of all else. But there are other internal constraints that are less obvious: incompetence, the almighty billable

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[4] Louis A. Craco, *"Carpe Diem": An Opportunity to Reclaim Lawyers' Independence*, 27 PACE L. REV. 1, 5 (2006).

[5] *Id*. (quoting Southern Pac. Co. v Jensen, 244 U.S. 205, 222 (1916)).

[6] *Id*. at 6.

hour, and competition for clients.

Law firms have met those challenges in different ways, and today we are going to examine one of them: the emergence of the law firm general counsel. When I began practicing law, the notion of a general counsel for a law firm was unheard of, but so too was suing lawyers. That simply was not done. The most common complaint before the Disciplinary Committee when I began practicing – which seemed to be the only subject we covered in our ethics courses in law school – was the prohibition against stealing from your client's escrow account. Today, as you all know better than I do, things are much more complex and nuanced.

Some of the questions we hope to explore today are why law firms have general counsel, what they do, what is expected of them, and how the phenomenon of law firm general counsel can enhance the professionalism of our shared endeavors as lawyers. So, under the guidance of our two program co-chairs, Steve Weiner and John Gross, both of whom are members of the Judicial Institute, we have put together three panels of the most prestigious and knowledgeable and experienced lawyers and commentators we can find to talk about the phenomenon of law firm general counsel. We also have the pleasure of hearing from an academic who has assisted the Institute in examining the issues we are going to talk about today and who is probably the most prominent academic who has studied in detail the issue or phenomenon of law firm general counsel. Professor Chambliss, whom we will hear from in a minute, will give our keynote address, addressing that very issue.

Before I introduce Chief Judge Lippman, let me say one other word of thanks to the staff of the Judicial Institute, who have been absolutely essential in putting together today's program: Lauren Kanfer, our Executive Director, and Takemi Ueno. I speak for all of the members of the Judicial Institute in thanking Lauren and Takemi.

Now, I would like to introduce a person who really needs no introduction, but I will try just a brief one nevertheless. There are probably two people in the state of New York who understand the judicial system better than anybody else. One of those is former Chief Judge Judith Kaye, who founded the Judicial Institute on Professionalism. But the other one of those is our current Chief Judge, Jonathan Lippman. Judge Lippman began his studies at NYU, where he graduated Phi Beta Kappa. He then attended NYU Law School and then spent the rest of his career in the judicial system of the State of New York. He knows it as well as anybody else on the planet. He was the Chief Administrative Judge, he was the Presiding Justice of the First Department, and he is now the Chief Judge of the New York State Court of Appeals. It is my distinct honor and privilege to present to you our own brooding omnipresence in the sky, Chief Judge Jonathan Lippman.

HONORABLE JONATHAN LIPPMAN
CHIEF JUDGE OF THE STATE OF NEW YORK

Thank you. It is a delight to be here in this lovely space at Fordham Law School, and I do want to thank the Dean for making it available to us. On behalf of myself and the Court of Appeals, and my colleague, Judge Carmen Ciparick, the Senior Associate Judge of the Court, we are pleased to join you this morning at the inaugural Convocation in your Lawyer Independence series and express our appreciation for your efforts, how important this work is, and how central

it is to the fiber of who we are as a profession.

Independence of the profession is so important, and on the judicial level, any discussion about independence is concomitant with accountability. We hold ourselves to high standards, and independence is so fundamental to everything that we do as lawyers and judges, and holding ourselves to the highest and most taxing ethical standards is so important. The work you are doing today highlights this.

As Paul mentioned, ten years ago, my dear friend and predecessor, Judith Kaye, decided to join practitioners and judges in a meaningful and visible way to address what had been a continuing crisis of public confidence in the legal profession and promote awareness and adherence to professional values and ethical behavior by lawyers in New York State. Over the past decade, the Institute has pursued this mandate by exploring professionalism in the context of how law schools teach ethics,[7] access to legal services for immigrants and new Americans, and the impact and influence of the internet on the delivery of legal services,[8] to name just a few.

Certainly, we have an obligation to raise the profession's collective ethical conscience. Indeed, as a truly self-regulating profession, we are ever vigilant about insuring the viability of our attorney disciplinary rules and codes of judicial conduct. To be sure, we have made progress in restoring public confidence, but the challenges to our profession remain. Public confidence in our governmental institutions clearly is fragile. Look at the public discussion today, what goes on in our State and in our country. The difficult economic climate we now find ourselves navigating only amplifies the pressures on attorneys, firms, judges and the courts to resolve the gamut of social, economic, and criminal issues confronting our citizens in an ever more expeditious manner.

Yet, to be most effective, we, as members of the bar, must remain true to the enduring values which have made the legal profession a motivating force for public good throughout our nation's history. Undoubtedly, many of you chose law as your profession as a noble way to serve the public good. I hope and believe that is the case with all of the young people coming out of our law schools, here at Fordham, and around the state.

It is through meaningful discussions organized in a forum like today's convocation that we have an opportunity to assess trends and evaluate current practice and traditional protocols. I applaud the Institute for launching this initiative to explore influences, pressures, and biases affecting lawyer independence.

I want to take just a minute to thank those of you and your firms who have joined in the court system's programs to provide pro bono services both to individuals in need of legal assistance, and to the many lawyers whose jobs and careers have been temporarily derailed as a result of the austere fiscal climate by offering counseling to those new attorneys who have had this hiatus. Since this week marks the ABA's National Pro Bono Week, it is particularly gratifying for me to see how the joint initiatives undertaken by the court system and the City and the bar associations around the state have been embraced by all of you and your firms. These efforts resonate with good will and highlight again the core values of our profession.

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[7] *See* 4 J.N.Y.S. JUD. INST. PROF. LAW (2005).

[8] *See* 2 J.N.Y.S. JUD. INST. PROF. LAW (2002).

As the subject of today's Convocation demonstrates, many firms have established internal channels to ensure that both the practitioner's and the firm's practice of law are ethically responsible. The evolution of the general counsel to a law firm itself reflects the profession's awareness of the ever-changing regulatory landscape, not to mention the tremendous pressures created by technology that is now perpetually evolving to ensure that we are all in touch all the time.

The Institute's mandate offers us a unique opportunity to examine, reflect and, if need be, consider recalibrating some of our ethical protocols. As we all know, open dialogue fosters understanding and promotes transparency. As the role of the attorney is expanded, it is critical that we draw upon the lessons learned today to reinforce the precept that professionalism is a core value of the legal profession. As we mark this Institute's ten-year anniversary, I am confident that it will continue to fulfill its mission and present forums that inspire debate, encourage review of our professional values in everyday practice, and promote professionalism.

I want to thank you again for inviting me here today. I know that you are going to have an enjoyable day. Judge Ciparick and I had an interesting last session at the Court, and we are returning to our chambers to work on some very interesting decisions. It is a pleasure to join you this morning and have a little respite from that, to see all of you committed to this issue. I applaud you. I again wish you a very informative and meaningful day individually and for our profession and the high ethical standards that we all aspire to. Thank you so much. Great to be with you. Enjoy the day.

MR. SAUNDERS

Thank you very much, Judge Ciparick and Judge Lippman. Thank you very much for being with us. Let me now introduce Steve Weiner, who is going to introduce our keynote speaker.

STEPHEN A. WEINER
CONVOCATION CO-CHAIR
MEMBER, NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

Good morning. As Paul mentioned, I am Steve Weiner, and I and my colleague John Gross are the chairmen of today's event.

I join Paul in welcoming, as our keynote speaker, Elizabeth Chambliss. Elizabeth is a professor of law at New York Law School and the co-director of its Center for Professional Values and Practice. Elizabeth specializes in the empirical study of the U.S. legal profession and teaches courses in the American legal profession, law firms, and professional responsibility. Before joining New York Law School, she served for four years as the Research Director of the Program on the Legal Profession at Harvard Law School. While at Harvard, she designed and conducted research on the changing structure of law firms and the challenges that such changes pose for professional regulation. Elizabeth is also the author of numerous articles and legal publications, including one that is particularly relevant to our program today entitled *The Professionalization of Law Firm In-House Counsel,* which appeared in 2006 in the North

Carolina Law Review.[9] I should also mention her article in 2002 entitled *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*.[10] Elizabeth, welcome.

ELIZABETH CHAMBLISS
PROFESSOR OF LAW, NEW YORK LAW SCHOOL
CO-DIRECTOR, NEW YORK LAW SCHOOL CENTER FOR PROFESSIONAL VALUES AND PRACTICE

Thanks very much, Steve, and thanks to John and Paul and Lauren. The organizers of the Institute have been so gracious in all the preparations for this. I am delighted to be here, and I am delighted not just personally but substantively to see the topic of law firm general counsel as the kick-off for a convocation on professionalism.

I am trained in sociology as well as law. I started my academic career as an organizational sociologist and have become increasingly interested in legal ethics. I see these two fields (the study of organizations and the study of legal ethics) as a natural fit: first, because most lawyers these days practice within organizations, and the structures and cultures of those organizations affect lawyers' individual habits of mind and practice patterns; and, second, because professional organizations themselves are professional entities, and the stewardship of those organizations seems to me an obvious professional duty.

We so often focus on professionalism at the individual level as if it were solely an individual attribute, but from the perspective of organizational theory, organizations themselves have professional responsibilities and duties, and the focus on professionalism in our profession should more often include a focus on organizational management and the organization as a unit of analysis. This seems to me to be an uncontroversial point of view, but so often in legal ethics, I come across the argument that a focus on large law firm management or regulation, law firm discipline, and related topics, somehow is a distraction or a threat to individual-level ethics or to the attention and awareness that individual lawyers might have.

It's unclear to me by what mechanism this distraction is supposed to happen. Some of it reflects a distrust of centralized management in law firms. Lawyers traditionally are thought to be resistant to centralized management either for psychological or professional reasons, and so there is general distrust of formal or centralized structures, even in very large organizations. But, more specifically, some people imagine that a focus on and investment in risk management efforts, and specialized management positions like law firm general counsel, invites shirking or a withdrawal on the part of individual lawyers rather than being facilitative. There is this idea that the law firm general counsel position and the so-called "professionalization of ethics" that it represents is a threat or is somehow problematic. This is a misguided notion that has no empirical support.

This is not to say that having a risk manager, or an ethics specialist, or a professional firm counsel, alleviates problems at the individual level or takes the place of individual ethical

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[9] 84 N.C. L. REV. 1515.

[10] 44 ARIZ. L. REV. 559 (co-authored with David B. Wilkins).

decision-making. In fact, one thing I want to suggest in this talk is that we need to start thinking about the reach of centralized efforts within large complex organizations.

I'm going to make four points. My first point is that the organization – the firm as an entity – is an important unit of analysis for people interested in professional responsibility and ethics. We need to think about firms as independent entities that have their own duties and professional responsibilities, whether or not they are directly regulated in the rules of professional conduct. The law firm general counsel position and the formalization and recognition of this position is an important first step in that enterprise, so I am delighted to see that we are talking about this in the context of professionalism today.

The second point I would like to make is related to the first and has to do with management authority. The law firm general counsel position, as many of you know very well, is at a crossroads in many firms and within the industry as a whole. Most of the people who currently hold the position are the first in their firms to do so. Most of them came into the position gradually over a period of years and performed the functions informally for a long time before getting a formal title. In smaller firms, many people probably still perform those functions without a formal title. Many of the current law firm general counsel, in large firms especially, grew up within their firms and enjoy the trust of their peers and have had long relationships with them and a long tenure in the firm and have a lot of personal and professional authority. They have this authority even if they have given up their outside practice, which often happens because this is a greedy job, or even if they have given up their partnership status, which law firm general counsel have done in some firms to increase protection of the privilege, to increase structural independence. But even if they don't practice any longer or are not technically partners in the firm, they enjoy the kind of ties with equity partners and top management that gives them personal gravitas and authority in the firm.

This generation is nearing retirement in many firms. In the last round of interviews I did with law firm general counsel, which was in 2008, I was really struck by how many of them are worried about succession and are thinking about succession and are thinking about their own retirement. In fact, two of the people I interviewed used the same language, telling me that they were worried about what would happen if they were "hit by a bus." So, the "hit by a bus" problem is coming up. Many of the people I talked to were worried about the same issue. I want to read one quote from the full-time general counsel at one of the nation's largest law firms, someone who has been in the position for a while, who said: "One thing that I have been thinking about is succession. When I look around at people who hold this position, I see people who backed into it. You were there, we saw a need, you started part-time, and it got to be more and more and more and more. And, since it was from within the firm, it tended to be people who knew the firm and understood the firm and were respected, people with authority. But now, the next generation, where are they going to come from?"

The issue of succession obviously isn't unique to the law firm general counsel position in professional service firms. Generally, leadership succession is a dicey proposition and depends a lot on personal and professional authority and ties, more so than for instance in more hierarchical organizations like corporations. So, it is not that it is unique to law firm general counsel, but the law firm general counsel position currently is at an *institutional* crossroads, by which I mean that we don't just need succession in individual firms. This is a moment of definition of the position.

Once this pioneering first generation starts to transition, how is the position going to be defined? In particular, is it going to be defined as an executive management position, or is it going to be defined as an administrative position on sort of a parallel track to management by partners? It may be that it will not be all one way or another, but this issue is immediately in front of this first generation of law firm general counsel.

To the extent that the position is to remain as powerful as it has been in some firms, there needs to be some proactive attention to this issue. So, one of the challenges facing those of you who are in this position is to think about the issue of succession in a proactive way. Some firms are starting to do this; they are actively grooming people, taking on assistant general counsel. In many firms, there is a committee that assists the general counsel, and members of that committee may be persuaded to move to the title position when the incumbent retires. So, there is the grooming of successors, which is an issue for law firms and leadership generally. Obviously, the support of top management is important in this process.

Institutional support is also culturally important. When the general counsel position initially became popular as a formal position in 2004 and 2005, we got a lot of surveys about it, and consultants were interested, and it was in all the trade press. A lot of attention was paid to the role. It has subsided as if it were established, and I would like to suggest that it is tenuously established, especially in lean times. So, point two is that there is a management authority issue lurking that is timely right now.

The last two points that I want to make come from a study I have just started on law firm culture. It is kind of an anthropological study, which is a little outside my normal approach, where we are interviewing multiple people in individual firms and doing fairly in-depth interviews and some participant observation to try to get a handle on what affects the reach of centralized efforts. I referred to this earlier. We are mainly focusing on so-called "good firms," that is, firms that have made, at the management level, a fairly sincere and sizable investment in ethics and risk management and have people in place whom they reward in their governance and compensation systems. They are doing everything they can from a management perspective to promote professional behavior, compliance, transparency, owning up to mistakes. But the question is, what makes those efforts work? It is, to some extent, a cultural question or something that has to be measured through soft variables. In any case, we are early on in this project, and I don't have any bold findings from it, but I do have two tentative observations that are relevant to the topic today and to law firm general counsel as a group.

The first has to do with the conceptualization of law firms as a unit of analysis, if I may be so sociological. I started by saying it is important to recognize that firms are an independent ethical entity and that they require attention and that there are professional responsibilities at the firm level. I want to add now that the large law firm – and here I am thinking primarily of multi-office firms – really has multiple units of analysis, and I want to suggest that the next decade or so of risk management is going to need to be increasingly attentive to what happens at what level.

So, there is the firm as a legal entity, the firm as a whole represented by its executive management. That is one level of analysis, and that is the level that my previous work has focused on, primarily. But there are office cultures that reflect city differences. There are practice group cultures that reflect differences in the kinds of work that lawyers do. Even work teams may have their own cultures. In terms of ethics and risk management, our tentative

observation, based on this new study, is that practice groups are hugely important for a lot of ethical issues. That is where the rubber hits the road for certain, the framing and the awareness and the response to day-to-day things that come up in practice. I'm sure that many of you who serve as law firm general counsel know this far better than I do, and I hope that you will talk to me about it and help to educate ethics teachers about this issue.

But the question I am struggling with that is interesting for you all as well is, what helps centralized management efforts reach into these other levels? How do we integrate office culture with firm culture? How do we integrate practice group cultures throughout a firm? Even when a firm is doing everything right at the entity level, how do we get the kind of integration of professional culture that we would want to see? So, I want to throw that out as an issue deserving of increasing attention and collaboration between those of you on the job and those of us studying you.

My last point from this project has to do with civility or what social scientists and psychologists call "procedural justice." Interpersonal relations appear to be especially important as an ethics or risk management issue, and this is actually an eye-opener for me.

Legal ethics scholarship and academic scholarship are divided on the civility issue. Insiders – lawyers with big practice experience, judges, professional bar associations – talk a lot about civility, especially in litigation, and the lack of civility as evidence of professional decline. That is a constant refrain that you see in the literature and at events like this. Sociolegal scholars, social scientists, and academics, who are positioned somewhat as outsiders to practice – and I would include myself to some extent in this group – have on the whole been cynical about this concern and view it as primarily rhetorical and, to some extent, self-serving or maybe even as some kind of dodge to the real issues. For example, "ethics beyond the rules," an empirical study that generated several papers published in the *Fordham Law Review*[11] – and, to date, one of the best empirical bodies of work on ethics in large law firms – looked at litigators' working ethics, and a lot of the social scientific articles in that study were critical of litigators' discussion of civility and the importance of fair treatment and honest dealing. They viewed those kinds of concerns as secondary to the "real" issues (or, as one author said, the "big-'M'" morality) of litigation ethics and access to justice.[12] These articles were very critical of this focus.

In our new project – and again, this is early days for the project, so this is just speculative – we asked lawyers at a number of different levels, firms, and offices to define the culture of their firm without giving markers as to what we were looking for, and they all talked about interpersonal treatment. That was the first thing they talked about. They were very reluctant to talk about ethics. They viewed ethics as a non-issue, but they talked a lot about whether anyone yells at anyone else. "Our firm screams; our firm doesn't scream; my old firm used to scream; my new firm doesn't scream." There was a lot of talk about screaming and yelling. This caused a number of us on the research team to go back and do some research in other organizational

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[11] *See* Douglas N. Frenkel, Robert L. Nelson & Austin Sarat, *Bringing Legal Realism to the Study of Ethics and Professionalism*, 67 FORDHAM L. REV. 697 (1998).

[12] *See* Marc Suchman, *Working without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837 (1998) (criticizing lawyers' focus on civility).

contexts.

It turns out that the issue of how you are treated interpersonally at work, in organizations generally, is very predictive of whether people feel attached to the organization, whether people follow the rules of the organization or try to identify with organizational goals. This is not so surprising really. If someone yells at you at work every day, you probably do not feel that attached to the organization or its goals. But it has interesting implications as an ethical issue, not just for associates, but also for partners who talk about the transparency of the compensation system or whether appeals about compensation are handled fairly – not whether they get their way but whether they are treated respectfully, transparently, whether there is a feeling of basic fair treatment at the firm. That seems to be very important to lawyers at all levels in different practice groups and in offices in different cities of the firms that we have been talking to, and it suggests that one thing that might explain the variable reach of management efforts of ethics coming from the top is how well the organization does in insuring fair interpersonal treatment.

If you have a really good firm that tries really hard to do ethics and risk management and has a lot of resources and has an open-door policy and all the things that structurally people like me say organizations should have and yet tolerates a good bit of stressed-out yelling or has very narrow compensation differentials that make everybody feel ripped off or does not address instances of interpersonal abuse that need to be immediately countered, that can undermine ethical goals in a firm more than I had expected in advance and certainly more than some of the literature reflects.

I may be preaching to the choir on this issue since, after all, this is a convocation on professionalism and you all probably already think that civility is important, but for the literature and social scientists among any of us who have been studying this issue and kind of writing that off, there seems to be fairly good psychological evidence that day-to-day interpersonal treatment within an organization has as much to do with its ethical climate – generic ethical, but I would assume, professional ethical as well – as any top-down management efforts. So those of you in the position of watching out for your organization – law firm general counsel – that is an important issue, and it will provide additional ammunition to try to counter abusive conduct of underlings especially, but interpersonally at every level.

So, I leave you with that. Focus on the organization, worry about succession and management authority, and pay attention to interpersonal relations and expectations in the firm as a generic foundation for ethical compliance. All three of those issues are worthy of inclusion in a discussion of professionalism in large firms. Thank you.

MR. WEINER

Thank you very much, Elizabeth.

PANEL I – FUNCTION OF GENERAL COUNSEL AT THE LARGE LAW FIRM: ALTERNATIVES AND ISSUES OF INDEPENDENCE

STEPHEN A. WEINER
CONVOCATION CO-CHAIR
MEMBER, NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

Our first panel this morning is entitled "Function of General Counsel at the Large Law Firm: Alternatives and Issues of Independence." I will serve as moderator of this panel. Let me introduce our four panelists, who represent four of the leading large law firms in the United States, if not the world. I will introduce them in the order in which they will be speaking.

Jerry Snider has been the general counsel of Davis Polk & Wardwell LLP since 2006. He also serves clients as a member of the firm's litigation department. From 1983 to 2006, Jerry was a litigation partner with the firm, and he was an associate for six years prior to that time. Jerry has served on both the Professional Responsibility Committee and the Professional Discipline Committee of the New York City Bar.

To Jerry's left we have Grant Hering. Grant has been general counsel of the firm Cadwalader, Wickersham & Taft LLP since 1996. He also chairs the firm's Professional Responsibility and Risk Management Committees. From 1969 to 1998, he was a partner in the firm's litigation department. Grant lectures on legal ethics and law firm risk management at professional meetings and continuing legal education seminars. He is also a former president of the Federal Bar Council.

Third, we have Stuart Gold. Stu is a partner in the litigation department of the firm Cravath, Swaine & Moore LLP. He joined Cravath in 1973 following a clerkship with Judge Edward Weinfeld in the Southern District of New York and became a partner in 1980. While Stu does not have the title of general counsel at Cravath, nor does anyone else at Cravath, he functions as Cravath's designated hitter in addressing professional responsibility issues.

Finally, Wally Larson. Wally is the professional responsibility counsel for the firm Cleary, Gottlieb, Steen & Hamilton LLP and an ex officio member of the firm's Professional Responsibility Committee. He joined Cleary in 2007 from the Milbank Tweed firm, where he had been an associate. He is a member of and special assistant to the Committee on Professional Ethics of the New York State Bar Association and has served as co-chair of the Professional Ethics Committee of the New York County Lawyers Association.

Each of our speakers will address the handling of professional responsibility and risk management issues at their respective firms under their supervision. I may have some questions for each of them to supplement their presentations and, of course, we will give our audience a chance to comment and ask questions as well.

Jerry, why don't you tell us about your role at Davis Polk?

JEROME G. SNIDER
DAVIS POLK & WARDWELL LLP

I just want to mention that before starting with Davis Polk in '77, I actually began my

career watching Paul Saunders trying the IBM case, and that has sort of set the rest of my career in motion.

As Steve mentioned, I was a litigator for most of my career, a litigation partner. At the end of my period as litigation partner, I was co-head of that department and became general counsel in '06. Prior to that time, the functions that I performed and that we probably perform were given out on an *ad hoc* basis by the management of the firm to me and a number of other partners. It was decided and it made sense to consolidate those assignments and have one person for consistency and continuity of knowledge.

At this point, we have a three-partner management committee, and that committee is deeply involved in ethics and risk management. We don't have a separate conflicts committee or a separate risk committee. I don't have a deputy general counsel with that title, but there are senior lawyers in the firm who assist me or work with me in a number of areas such as handling document preservation notices, responding to subpoenas when the firm gets a subpoena, dealing with firewall issues, dealing with our conflicts, and so forth. So, it is more informal than a committee, but I do have a significant interaction with people who share those responsibilities with me.

In terms of more junior-level support, I am still in the litigation department. I am still a senior litigator, and I use litigation associates on "as needed" basis, the same way I would and do on regular litigation matters.

I am not the general legal officer of the firm. As a general matter, I don't handle leasing. I don't handle many employment matters. I get involved in some of those on an exceptional basis, but it is not as if all legal matters go across my desk.

Most of my work is the professional responsibility area, as you would assume. Some of it deals with those issues on an exceptional basis, that is, getting phone calls from people in the firm asking, "Is this a conflict?," "If it is a conflict, what do I need to do?," "How many waivers do I need?," "What does the waiver have to say?," "Do I need an engagement letter?," "What does the engagement letter have to say?," and so forth. Those questions are a daily event; frequently, an evening event, often a weekend event.

In addition to those issues, I proactively look at our compliance systems. I try to improve them. There are a number of our systems that I monitor exceptions on so that, for instance, I regularly call partners in the firm and make sure that they have counter-signed engagement letters and so forth.

I will get involved if there are requests for discovery or testimony from the firm. I get involved in questions about whether or not a client is sufficiently upset that there might be a potential claim against the firm. I get involved in insurance issues, although that is an area where I have another person who deals with that more directly than I do. And, probably because of the title or the age, I receive a large number of questions from non-legal parts of the firm about a variety of questions. Someone on the management side has been asked to sign a confidentiality agreement – would I look at it? That sort of thing. There is a trademark question – would I get involved? So, there are a lot of matters that arise that are really quite beyond my ability to plan. I get up in the morning and I put on my belt and I see what the day has waiting for me.

One question that Steve asked us to consider was whether or not it was important for a person doing this job to be a partner. I am no longer a partner of the firm, but I don't think it

matters. I know that there are people who disagree with me, but I don't think it matters whether you are a partner or senior counsel or an employee or an equity partner or a non-equity partner or anything else. Except for my life with Paul Saunders, my whole life has been at Davis Polk, and I can't imagine giving different advice because of how much it would affect the value per point or what my partner's share would be. I just don't think that is a realistic concern. The independence of advice has to do with the personality and character of the person giving the advice. It doesn't have to do with the amount of financial leverage.

In terms of reporting, I report to this three-person management committee. I do not speak to anybody off the record. I view my client as the firm, and I do consult with outside counsel, both academics – one of whom is in the room – and practitioners. That is a really valuable and important part of what I do. I also consult with some of the people here in the room, and I find that to be extremely valuable.

We have a total of nine offices. My role as to each of those offices is the same except that I am much more familiar with the ethics rules in New York, Washington, and California than I am with respect to the rules in France and Madrid, so there is much more reliance on local people both inside and outside for those branch offices. The other thing is that when you field conference calls from partners in Hong Kong, you can be sure that it will not be at the right part of the day.

My role is entirely advisory. Professor Chambliss knows much about what I do. I do not really view myself as part of management. I do not have any management or executive authority, that is, I don't have any authority to tell people "do this" or "don't do this" in any binding way. People ask me questions; I give them advice. If they want to escalate it to the management committee, they can. If I want to escalate to the management committee, I can. If it is a difficult business or conflicts issue, the management committee or one of them will probably be involved anyway. In terms of what happens if people don't follow my advice, if I thought someone was not going to follow my advice, I would escalate that to the management committee. In firms like ours, I don't think that is a significant issue.

That is pretty much the topic Steve asked me to look at. There was a question about the extent to which we try to make sure that people are following the rules, and we do that to a certain extent. As I said, I do try to make sure that we monitor, and we follow engagement letters. I have the ability to see whether waivers were obtained and so forth. But, again, most of these issues at our firm really depend on the culture of the firm, the process that leads to one becoming a partner at a firm like ours, and we really do place principal reliance on the integrity of individual partners.

MR. WEINER

Since this forum is concentrating on independence, do you see any issues from that point of view? Do you get pressure from clients or partners to try to shade things in any way, or has that not been a problem?

MR. SNIDER

There are frequently differences in view as to particular issues, and I would suspect that client loyalty is a factor in how a partner views a situation. We have a lock-step compensation system, so I don't think there is any significant weight placed on partners trying to get results so that they will make more money. The safety and the soundness of the firm are the primary concerns. Client relationships may influence the way people argue things, but I do not think it is a big deal.

MR. WEINER

Finally, can you briefly address the question that Elizabeth [Chambliss] raised about succession?

MR. SNIDER

I would if I could. I am the firm's first general counsel. There have not been discussions about succession, and I haven't had any discussions with the management committee as to who that might be. I have personal views as to what sorts of elements would make someone successful or unsuccessful at the job, but it is really a question that has not been discussed at our shop.

MR. WEINER

Thank you Jerry. Grant.

GRANT B. HERING
CALWALADER, WICKERSHAM & TAFT LLP

With a few more years going back, my history and job description are very close to what Jerry just described – I would say between 90 and 95% the same. I was a summer associate at Cadwalader. I spent four years in the firm's tax department. I went to the U.S. Attorney's Office, Southern District, when Bob Morgenthau was U.S. Attorney, which most people don't realize he was. I came back after three and three-quarter years and became the firm's chief operating partner. I was called Managing Partner, but it is really misleading. The head of the firm was then called the Presiding Partner. I was really the chief operating partner. I was pretty much full-time in that position for something on the order of a dozen years, after which I transitioned back into litigation practice. But during the twenty-nine years of being a partner, I always was involved in various degrees in firm management. During the dozen years when I was chief operating partner, I was a member of and chair of virtually every committee in the firm except for the Management Committee, and in those days we had a lot of committees. Today, we have few committees, which I will come to in a moment.

In or around 1996, there was a decision principally geared to shoring up the privilege to

name me general counsel. I was then a litigation partner. A couple of years later, in 1998, I withdrew as a partner and became full-time general counsel, substantially giving up work for firm clients. I have been in that position for eleven years now. We have a thin management structure, and we are not as large as some of the firms in this room. Today, we are about 550 lawyers. Three years ago, we were a bit larger. We have a seven-member management committee. One seat is currently vacant. We have a couple of other committees, but they don't act in an administrative sense. They act more on a project basis. If you looked at our intranet and looked at the list of officers and committees, there are other committees, but most don't meet on a regular basis. They meet on a demand basis or function through e-mail exchanges.

Steve mentioned that I was chair of the Professional Responsibility Committee and the Risk Management Committee. That is true on paper, but the committees never formally meet. We communicate by phone.

Because I have that history of deep involvement in firm management, the functions of general counsel have been concentrated in me for the last thirteen years – two as a partner and eleven as full-time general counsel. I do not have any designated assistants. Being a member of the litigation department, attending litigation partner meetings, I call upon litigation associates when I need them. My direct report is to the management committee – more accurately, to the chair of the firm – and that occurs on special projects and specific topics such as the ever-present topic of conflict resolution.

Basically, the way it works is this: partners come to me with conflict situations. I would say a consensus resolution is reached in the 90% realm, maybe higher than 90%. When it cannot be reached, either the partner contacts the chair of the firm or I do, or we do it together. I can recall three very tough conflicts during the credit crisis, where on a spontaneous *ad hoc* basis, we had a grouping of five or six partners – for these purposes, I am including myself, even though I am not technically a partner. As Jerry said, if you grow up in the firm, people do not realize or do not really pay attention to your status very much. You are still a senior colleague. And, because I help with the transition to bring laterals into the firm, dealing with conflicts and other due diligence, and I make it my business to get to know those laterals, I really do know my partners, which is very important in carrying out this job. So, we have had these occasions of intense focus on individual conflict situations.

Every firm on this panel represents most of the well-known financial institutions. Because of the credit crisis, we found ourselves with many conflict situations – some legal, some business, and many overlapping – with regard to financial institution clients. Fortunately, both our former chair and our present chair are extremely talented in sorting out both legal conflicts and business conflicts.

To go back down again into the process, Steve asked me in a warm-up today, "What happens when you get into a contretemps between partners with respect to conflicts?" My short answer is that by delving down into the facts and bringing out points of view from both sides (sometimes there is more than one partner on one side of the issue), most of them get resolved. If it is getting to a situation where there is an impasse, my line is, "Okay. Maybe the next step is we take it to Chris." Chris is our chair-partner, Chris White. Two things happen at that time. Either the dialogue continues and we reach a resolution because one or both of the partners don't really want to go there, or we do go and invoke Chris' assistance, and he is very effective, very even-

handed, very analytical and very creative in how to handle these tough conflict situations.

I would say that about half of my time, roughly, is dedicated to conflict resolution and risk management. Like Jerry, I spend a fair amount of time on systems to make sure that the risk management aspects of systems promote the goal of risk management, so I work closely with our IT manager and with our conflicts department to constantly know what they are doing, constantly trying to upgrade our systems, and I count that in my risk management activities. Perhaps it is more than half if I think about it.

The rest is of it is the miscellany of handling anything that crops up in the firm. I occasionally get special projects from the Management Committee. I recently did a study of the history of our firm agreement, of our death benefit, of our retirement benefit. Some years back, we decided to scrap our partnership agreement and write a new one from scratch. I and a corporate partner spent roughly a year and a half, off and on, doing what we believe is a very good, effective partnership agreement, which, by the way, almost no one reads. But there is a level of confidence that it is there and it is fair. It sets forth the rules of the road and is well-accepted.

In the lateral partner context, I am often the one who hands out the partnership agreement and what is known as the "Partner Policy Book." Briefly, a dozen years ago, I realized that our policies were all over the lot, so I spent about a year compiling something called the "Partner Policy Book," which contains all our policies. It morphed into the "Associates' Manual," too. They are very similar, but the Partners' Policy Book contains other material. By the way, maintaining those, updating them, and keeping them current, is also part of what I consider to be one of my risk management activities. By handing out those two items to laterals and answering their questions, I get to know them, as I previously mentioned.

Other jobs that I do include overseeing employment disputes. We do hire outside counsel for tough ones. We try to resolve them in-house, if possible. We have a very effective HR manager whom I lean on very heavily.

I generally interact with the key managers of the firm: the Associate Development Manager, H.R. Manager, IT Manager, and Conflicts Manager. The Conflicts Manager is also the Records Manager. He thinks he is the "knowledge manager," but I don't particularly like that title, so I haven't succumbed to that. Our managers are excellent and help make my job advising them a pleasure.

Then there is this category that I'll simply call "ombudsman." Having been at the firm for forty years, starting as a summer associate, I have never had another private employer. People tend to come to me with anything that is going on in their mind that they think I can help out on, including finding them a divorce lawyer, so my day has an incredible variety. Like Jerry, I wake up in the morning, I think I'm going to do x, y and z and maybe a couple of other things, and none of them gets addressed because by the time I hit my Blackberry and certainly by the time I hit my office, things are hopping that divert me from my planned agenda for the day.

MR. WEINER

Grant, do you think it is an advantage or a disadvantage of performing your job that you don't really work through any kind of committee system?

MR. HERING

Compared to some firms in the room, we are on the small side of large law firms with 550 lawyers, about 110 of whom are partners. Since we went through a change of leadership in the early 90's, we've had very lean management. Basically, the Management Committee is very hands-on and runs the firm.

MR. WEINER

You say that two of the committees you refer to are non-functioning. Many firms do risk management through professional responsibility committees in which the general counsel is chairman. You seem to be a very effective lone wolf.

MR. HERING

Well, not a lone wolf. Somebody said in a focus group last December that we tend to be like emergency room doctors. I consider myself available 24/7. I cannot remember a day in the last six years when I was not on my Blackberry or my cell phone wherever I was, literally.

Moving to independence, which we are supposed to be talking about, I am very fortunate because my history has given me credibility and – if you want to use this term – "gravitas," which allow me to be independent and also encourage people to come to me. You have to have both elements.

The other ingredient of independence is the commitment of the firm's management to independence. The two chairs whom I have recently served under have been very good at conflicts resolution with a keen eye to the interests of the firm and doing the right thing. They have the respect of our partners.

The other thing I can think of in addition to needing a general counsel who has DNA of independence and a management with the same is that we have these external constraints known as the rules of professional conduct and professional liability lawsuits, which – if you need any reminders – are there as an omnipresence to promote independence in terms of doing the right thing.

MR. WEINER

Thanks, Grant. Stu.

STUART W. GOLD
CRAVATH, SWAINE & MOORE LLP

How did I get to the position or the non-position I'm in? In 1994, due to the untimely and ill-timed death of one of our partners, I was handed the responsibility of overseeing all internal employment matters, which means that since 1994, nobody who is an employee – attorney or non-attorney – gets fired unless I have signed off on it and have been at least part of the process.

I then was partially responsible for the formation of the committee that administers our policy on discrimination and harassment and became the untitled (as happens a lot at Cravath) co-chair of that committee, which deals with all complaints regarding discrimination or harassment, hostile work environment. As a function of that, at some point in the last decade, I became, at least to most of my partners, if not all of them, the *de facto* general counsel.

I have no title, as Steve said. When I try to describe to my daughters what I do, they tend to look at me and say, "So you are like Cravath's Michael Clayton, although not as good-looking?" I take that the right way.

I control virtually no business. I spend about half of my time on general counsel type matters and half my time on practice, and that can fluctuate. There are periods where I have very little to do in my role as the *de facto* general counsel and periods where it can sometimes take up a great deal of my time, especially in matters where, for instance, people at the firm are going to be testifying in litigation.

The way we operate, I, along with the person I will mention in a little bit who works with me on this, handle litigation against the firm. We handle a lot of it in-house. Part of my job is to decide when we should handle it in-house and when we should go outside.

But, back to my authority, since I don't hold the title and I control virtually no business, it really comes down to, as it seems to be for this generation of general counsel, my longevity at the firm. The partners understand that I have the support of the presiding partner and the deputy presiding partner. In my role on employment issues and on the committee that administers the anti-harassment, anti-discrimination policy, as well as what I do as the *de facto* general counsel, I think I built up a reputation that my decisions are the right ones and that people should listen to me. When I do get into areas – as I have on a couple of occasions in the last few years – where I think there will be a significant difference of opinion on my advice, I, with the authorization of the presiding partner or the deputy presiding partner, hire outside counsel to provide a second opinion so that, before we decide anything, I can also have that counsel come in and discuss.

Probably the biggest weapon I have at Cravath is the institutional loyalty. It is very strongly ingrained in the partners. They understand that when we make decisions on conflicts, employment, or litigation that the firm is involved in, what I do along with the other partners who deal with these things is that we are trying our best to protect the institution and make the best decision for the institution which is really the client, although I think we have a reputation of also considering the individuals and their practice and the effect of our decisions on their practice.

It would be very difficult, certainly at a firm like Cravath, for an outsider to act as general counsel. There may be somebody who could over time, but it would be very hard the way we operate. Because of that, about four years ago, as I realized how old I was getting, I asked that another, young partner be assigned to work in this role as well. She is right now, in essence, a co-general counsel and I hope building up a body of credibility such that when I leave this role, probably within four or five years, she will be able to do that.

We also have a back-up expert on ethics – one of our partners who functions also on serious ethics conflicts. Sometimes I may be told about it, sometimes not, but he really is another resource whom we use. There is also a risk management committee which looks into the typical risk management issues. Two members of that committee also handle all of our insurance matters, and I am brought in as an ex officio member when they think they need some guidance

from me. And some things go on without my necessarily being called in that are handled by the managing partners and things like that.

One thing that is very important in the role is to get people to come to you; another is keeping your ears open. The partners have lunch formally once a week; we have our own lunchroom. It would be more efficient and I think my family would prefer if I had lunch at my desk. I go up to the lunchroom a lot because you hear things, and it is important to stay plugged in because sometimes people do not realize that they are starting to march into a very difficult area where there are a lot of ethical problems or dangers. Especially as a litigator, when I hear the chatter, that allows me on a number of occasions to pick up the phone and say, "I overheard this . . . It is very interesting. Why didn't you tell me about this?" You will find out earlier that things are going in a direction that you think you need to step in.

Fortunately, we have only one other office. That is London. It makes the job manageable. I do not know how you do it when you have multiple offices, especially understanding what is going on there. I try to go to the London office once a year; if I do not go, then my colleague goes to spend some time. We do it in the context of training. My colleague and I are also in charge of training all new associates and all non-legal employees about the harassment and discrimination laws. We go over once a year to do that training in London, but it is also an opportunity to sit with the partners over there and try and figure out what is going on and whether there are any issues.

My time is pretty evenly split between conflicts issues. I, my colleague, and one other partner clear conflicts for all incoming lawyers except for lateral partners, of which Cravath historically has very, very, very few, but we have had a couple and I think we have a committee that looks into that, but we clear all the non-partner conflicts. The conflicts as to taking on matters, that is the responsibility of the individual partners, and that will usually get resolved without my involvement. Occasionally, it is a difficult enough issue that somebody decides to call me in on that, but the managing partners along with probably the deputy presiding partner and the partner who is going to take on the work are responsible for running a conflict check through the system and, if there is an issue, raising it with the appropriate people. Certain issues I farm out because I think I need the help of a second opinion because I know my partners pretty well and I know that there is going to be a serious potential difference of opinion.

When it comes to representing the firm, we decide that in consultation with the presiding and deputy presiding partner based on things like time and other matters such as privilege because I do not hold the title and my read is – and there is going to be a panel this afternoon about it – even if you do hold the title, whether or not what you are doing is privileged is a real question. A lot of what I do employment-wise, I know is not privileged probably because we are going to rely on the investigation and I very often am overseeing that investigation. So, a lot of times I will recommend that we go outside, and I pretty much have authority, although I usually clear it with either the presiding or deputy presiding partner, to hire outside counsel both for privilege issues and then sometimes my call is that we are just too involved, even if we are not going to necessarily be witnesses, although that is unlikely. Sometimes you need a totally outside view of the world and somebody who can say what we are used to saying to our clients: "I know why you want to do that, but I am not going to let you while I am your lawyer." So, we do farm that out. Also on employment issues, I have a lot of expertise and my colleague has a lot

of expertise, but it is not unusual that sometimes we are just out of our expertise or comfort level and we will call in a firm.

That is generally how the job is operated. As I said, I really hope and expect that my successor is in place already.

MR. WEINER

Thank you. Stu, I am just contrasting your situation with that of Jerry and Grant. Do you regard this as an advantage, a disadvantage, or simply a non-event that you do not have the title "general counsel"? Indeed, on the Cravath website, your biography makes no reference at all to the duties that you perform that you described this morning.

MR. GOLD

It is generally understood that that is the role I am going to play, so I do not think my lack of a title affects it. Indeed, I hadn't mentioned it, but I think part of my authority comes from the fact that I also sit as the chair of the Harassment and Discrimination Policy Committee. When I show up on a non-litigation floor, everybody tends to run the other way, and if I come into the office of one of my partners and we are not working on a matter together, the first thing I hear, not infrequently, is "Do I need to call a lawyer?"

At some point, it may turn out that it is important to have the title. Right now, for me, I do not think that is important or an impediment to getting things done.

I always find it troubling when my partners want to tell me something in confidence. My answer, as it would be to a client (*e.g.,* an individual employee of a client) is, "I am the firm's counsel. I need you to trust me that if I can keep it confidential, I will, but I can't make that promise." I have never had anybody walk out of my office or throw me out of their office because I would not guarantee them confidentiality. As I said, we have been successful in building this institutional loyalty, where while they do not like that and it's sort of "I'm disappointed, Stu, you said that," they understand why I said it.

MR. WEINER

Ok. Wally is our next speaker. As you may recall from the introductions, Wally's background is somewhat different than that of the other three panelists.

WALLACE L. LARSON, JR.
CLEARY, GOTTLIEB, STEEN & HAMILTON LLP

I should mention as a preliminary note that I'm elated to be sitting to Stuart's left. You can't see his cufflinks, but he has trial verdicts on his cufflinks, and I am on the "not guilty" side, so that is a big relief.

MR GOLD

Although my wife says, when she hears me talking about my clients, that we have to write "not guilty" on the other one.

MR. LARSON

I also should note that I am up here with a great deal of humility because some of these guys were practicing law when I was still in the sandbox, so they have a lot of experience and wisdom in the area.

I am at Cleary, Gottlieb, which prides itself on being a consultative, democratic, lockstep partnership culture. For someone in my position that could be a great asset, especially when you are dealing with conflict issues and it is one partner's client against another partner's client. And, which client are we going to take on? Are we going to seek a waiver potentially injuring the client relationship? It does not completely solve the problem or remove all the tension, but it does help to have a lockstep democratic culture where people are willing to see it as a firm issue as opposed to my client versus your client.

Because of the democratic culture, there is a de-emphasis on centralized management. We do have an executive committee comprised of eleven partners, but the membership of that committee is constantly changing. The heads of other committees of the firm are constantly changing so that there is not one partner who has his or her committee. And so, when I think about whom I report to, it is not necessarily as if there is one person or one committee. I am an ex officio member of the Professional Responsibility Committee and the Knowledge Management Committee, and the people whom I talk to most directly would be the chair of the Professional Responsibility Committee and a member of the Executive Committee who serves as the chair of the Business Conflicts Committee. If there is a business issue where it is no longer an ethics question but a question of how it is going to affect business, then it would go to that partner.

My background with the firm . . . I started with Cleary Gottlieb in 2007, so I am the outlier in terms of being an outsider at a firm. People say it is tough if you did not start out at the firm, so we will see how it goes and then, maybe someday, Elizabeth will be writing an article about how it went. But, thus far, it seems to be going pretty well, and it has been a good cultural fit. I think the reason the firm approached me in the first place was because they were looking for someone to fill this position with a certain skill set. Personality probably also matters, and culture. The general counsel of a firm or someone who fills a similar position will tend to be a reflection of the firm's culture and how people relate to each other. So, it was a challenge coming in – not having been at the firm – for a variety of reasons, but I went on a whirlwind tour of our European offices just so that people could meet me, and I did CLEs for them. Over time, people have gotten to know me and have become more comfortable about consulting me on things.

The percentage of time that I spend on the responsibilities is pretty much full time. There are a small number of hours that I bill to clients, but most of my time is internal to the firm, and I came to the firm with the expectation that it would be a full-time job.

The extent to which I work with others . . . Someone has referred to the office of "professional responsibility counsel"; I am the only lawyer who fills that function. I do have a professional responsibility paralegal who helps me with certain tasks, and I also have an audit inquiry coordinator, which is a position that I was able to get the firm to approve to help with the large volume of audit inquiries that we get from clients. We have a thousand lawyers, so we get a lot of inquiry letters, especially in audit season from September through December.

So, the types of things that I do, 25% of my time tends to be involved with systems and IT projects. Others have mentioned that when you have a big firm, you cannot simply talk things through to spot conflicts; you have to have a system. What kind of software are you going to use? What is your new matter intake system going to be? When you get engagement letters or conflict waivers, where are you going to save them, and are they going to be accessible so that people can find them if they need to figure out whether we have a waiver already from the client?

The other 75% of my time is ongoing daily work: reacting to things that are happening, consulting as people ask questions all over the map. Professional responsibility and risk management tend to be the two biggest areas, but every day is different and you never know what kind of questions you are going to have coming through your door, which does make it interesting but can also make it scary at times when you hear the questions.

MR. WEINER

Wally, your situation in contrast to those of the other three panelists is really quite striking. Jerry, Grant, and Stu have only been with the firms that they are with now; they have been there for 20, 30 years or more. You joined Cleary a couple of years ago from another firm. These gentlemen mentioned the advantage of being with their colleagues, growing up with people to whom they give advice in terms of lawyer independence, having their positions and expressions of views given deference, etc. As the new kid on the block, what has your experience been in having the attorneys at your firm pay attention to you?

MR. LARSON

It is important for someone in my situation to be humble and gentle when I am consulting with someone on an issue, especially when it is a sensitive issue. You could say that it is an advantage coming from the outside so that perhaps I am more of a blank slate politically, am not viewed as having a portion of the firm that I am loyal to so that if there is tension then I will go with this group rather than that group. It also helps that I have been involved with organizations outside of the firm like the New York State Bar Ethics Committee, New York County Ethics Committee, and City Bar Committee on Professional Responsibility, so that I can bring in some knowledge and experience from outside the firm to bear when I am consulting with someone on an issue. But it is a challenge.

MR. WEINER

From the point of view of independence, have you had any issues in terms of people

leaning on you?

MR. LARSON

I am guessing that everyone up here would acknowledge that there are days where you feel beaten down because there is constant pressure and you know when people are coming to you that they are thinking, "Oh great. I have to talk to that person. I may get a 'no.'" They want to do something and are pushing to do something, they want to help their client or they want to get some new business for the firm. So, that is a constant challenge, but at the same time, I have been grateful that at Cleary Gottlieb, I feel that when partners come to me, they come to me because they want an independent viewpoint, they want to hear the truth. They know that they may not always enjoy hearing it, but they want to get objective advice so that they can avoid problems for themselves and also for the firm.

MR. WEINER

I am going to ask each of our panelists one more question, and then I am going to give our audience a chance. Jerry, what is the greatest challenge you face in performing your task?

MR. SNIDER

The greatest challenge I face follows up on what Wally just said. I have gone from being a litigation partner and head of the department to being someone whose job it is to interact with a firm that is largely not a litigation firm. We have a large litigation department, but we have a larger transactional practice, and I am constantly in the position of telling people things that they wish I had said somewhat differently. And it has to be done with an appropriate tone and appropriate self-confidence but not too much self-confidence. Because of my own personal psychology, not because of the job, the hardest thing I do is make sure that my tone and my attitude are appropriate day after day, dealing with questions from a wide range of people.

MR. WEINER

Grant, I ask you the same question.

MR. HERING

Same answer.

[*Laughter*]

MR. WEINER

But, not to give up that easily, I will ask a related question, which is, what worries you the

most?

MR. HERING

What worries me the most is the knowledge that people do not always come to you when they should come to you. One of my approaches has been to really stay in touch with my partners. I try to get to partnership meetings early and go around the room during the lunch segment. I tend to stay after the meeting for sidebars. I attend every function I can in order to be highly visible. So, in short, I worry about what I do not know, and my way of overcoming that is various subjective means and also the fact that I have been at the firm a long time and I know these people, and I think they have confidence that they can call me with reliance on the notion that I will only try to do the right thing or find the right result or right solution for the firm.

MR. WEINER

Stu, what is your greatest challenge and/or worry?

MR. GOLD

I have three. One is how do you keep up with developments, even if you focus on ethics, and recently – I may have been the last of the people to do this kind of thing – to focus on the red flag rules? It really brought home to me, how do I make sure? Now, it turned out that we have very good HR people and while they hadn't yet gotten to writing a policy, when I called and asked them, "Do we have a policy ready?," they said, "We don't have a policy yet, but we know what you are talking about" So, that is one fear.

The second, as Grant said, is getting people to come to you. One of the reasons I handle some litigation against the firm in-house is the hope that by getting a good result, without anybody having any serious consequences, it creates in the partners the sense, "I can go to them and if I go early, this can be fixed."

My third greatest challenge is getting very smart lawyers – and even I have this problem in my regular life – to take the same advice we give to our clients. Recently, somebody wrote an e-mail, and it required a very lengthy response. After I sent the e-mail response, I picked up the phone and asked, "How are you?," and this person said, "You didn't have to write this treatise. Do I have to read this whole thing? You didn't have to do that." And my answer was, "I wouldn't have had to do it if you had picked up the phone and asked me this question. Now you've put it into an e-mail and this is the consequence." Right away, the light bulb went on, and this person said, "Oh yeah, you know, it was 2:00 a.m. when I sent it, Stu. I am really sorry. It won't happen again." I said, "Don't write these. Wait until the morning and then call me." And that is the same thing you tell your clients all the time, you know. This person is two doors down, get up, get some exercise and talk.

MR. WEINER

Wally, your challenges and worries.

MR. LARSON

One is what Elizabeth touched on, which is what I would call "law firm federalism." We have offices in Europe and Moscow and Asia, and we have a presence in Argentina. I can't say that I know all of the laws in all of those countries or speak the languages of each of those countries, so we have to figure out what we are going to try to regulate on a central basis and what things are we going to leave to each office to regulate on its own.

The other I would call "internal forum shopping" – in other words, if people might choose to go to the person who they think will give them the answer that will enable them to move forward even if that person is not me.

MR. WEINER

All right, thank you. Let me open this up to the audience. Yes, sir.

QUESTION FROM THE AUDIENCE

I am not angling for a job, but have you absolutely ruled out someone from outside your firm as your successor?

MR. SNIDER

My own view, and I obviously would not be the one hiring someone, is that with great respect for Wally, the conversations, first of all, require a great amount of fluency in the business of the particular institution, so that if you get a caller who wants to talk to you about a double derivative behind the back transaction ... (I just made that up, guys.) [*Laughter*] It doesn't work if you know a lot about ethics but you don't know much about the business. You have to know an awful lot about the business to have the conversation.

Secondly, in order to be listened to in an appropriate way, it makes a lot of sense for the person delivering the conservative news to be someone who has been a person's partner or colleague for a long period of time. So, if I were asked by our management whether I thought it made sense to hire someone from the outside, I might say you can hire Stu or someone from another large comparable firm, but I would not suggest hiring someone whose skills were great in professional responsibility but who did not spend a lot of time being a partner in a firm like ours.

MR. GOLD

I pretty much agree with what Jerry said. The one exception I would consider – and I will probably not make the decision – would be perhaps a general counsel of a client that had been a

long-term client of the firm and actually knew and appreciated the culture and had experience with enough partners to come in with at least the minimum level of credibility so that he or she could effectively function in this role.

MR. LARSON

It might be premature for me to be thinking about succession, but as we are in the process of establishing what my role is (it is kind of an ongoing conversation), if the point came, then probably what I would do is seek to groom someone internally, sort of as a deputy.

MR. WEINER

Okay. Thank you. Any other questions or comments? David?

DAVID G. KEYKO
PILLSBURY WINTHROP SHAW PITTMAN LLP

Some of the policies and practices we follow are a result of our insurance carrier. What has been your experience?

MR. GOLD

Certainly in my case, our insurer has not done that. The key is keeping them apprised early. Unlike insurers for my regular clients, they have been reasonably hands-off, even in a couple of litigation areas. Maybe the exposure has never been enough to get them concerned, but I have not run into a problem.

MR. HERING

Everyone on the panel is insured by the same insurer, which is not the one that you have, David. They are hands-off except, as Stuart indicated, they are very eager to be constantly updated.

MR. GOLD

And they are a good resource.

MR. HERING

They are a good resource. They run risk management sessions and do other good things.

MR. WEINER

Janis?

JANIS M. MEYER
DEWEY & LEBOEUF LLP

Sometimes, I wish insurers were more proactive. It is easy for me to say to my partners, "We have to do this because our insurance carrier requires it."

MR. WEINER

Any other questions? Yes, sir.

QUESTION FROM THE AUDIENCE

Mr. Gold, I was fascinated by the fact that when you walk into people's offices, they ask, "Do I need a lawyer?" How do you handle this situation?

MR. GOLD

It varies. Usually, my answer is, "You don't need a lawyer because I hope we can talk this through as colleagues and partners and you will understand that I do have your interest in mind as well as the firm's, but let's talk and if at any point you think that our interests are diverging, certainly, you are free to get counsel." That is the usual conversation. There have been occasions where because of the nature of the issue, I did not tell them that they did not need counsel. When they asked, "Should I get counsel?," I said, "Let's talk a little bit." It has only happened twice where I said, "You need to make that decision independently. Let me tell you what this is about, and if you say you want counsel, you can get one and I will put a stop and resume when you have somebody." On both occasions, the person did not retain a lawyer. I had one occasion where somebody brought another partner in as their "counsel." Actually, the two things that happened were not so much in my role as general counsel but more in my role on the committee that enforces the policies against harassment and bias. There were two instances where there was a possibility of sanctions and I felt that if the person felt that they needed a lawyer, because there was the possibility of an internal sanction, I really should not say "no." But, in those two instances they did not decide to go get counsel. You're right, it is a difficult situation. But my usual answer is, "Let's just talk first and see what you think after you get the parameters to see where I am coming from."

FOLLOW-UP QUESTION FROM THE PERSON WHO ASKED THE PRIOR QUESTION

Don't you think there is some danger in doing that because, when you start, you don't

know how the situation is going to end up?

MR. GOLD

There probably is a little risk but, overall, I think it is the right way to go because based at least on my track record, we usually are able to come to a resolution that does not require outside counsel, except once where there was a possibility of a partner being sued by a third party, and in that instance I did suggest that the person might get outside counsel. Their view was basically, "No, it is okay. I think our interests are together."

MR. WEINER

Let me thank our panel for an interesting and informative discussion. Now we will take a lunch break and resume in about an hour, and we hopefully will have two equally fascinating panels this afternoon.

PANEL II – ATTORNEY-CLIENT PRIVILEGE ISSUES CONFRONTING GENERAL COUNSEL

STEPHEN A. WEINER
CONVOCATION CO-CHAIR
MEMBER, NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

Unfortunately, Paul Saunders has to be in federal court this afternoon in connection with the ongoing trial in the massive *Vivendi* matter,[13] so I will pinch hit for him. Let me introduce our four distinguished panelists in the order in which they will be speaking.

Eddie Reich is deputy general counsel of the firm of Sonnenschein Nath & Rosenthal LLP and a member of the firm's ethics committee. He is a partner in the firm's litigation department and co-chair of its lawyers' professional liability practice group. Eddie specializes in representing lawyers and law firms in litigation matters and other disputes and has a wealth of experience in law firm risk management and ethics compliance.

David Keyko is a partner in the litigation department of Pillsbury Winthrop Shaw Pittman LLP and is the executive partner of the firm's professional responsibility committee. He is the immediate past chair of the Professional Responsibility Committee of the New York City Bar Association. David has been a columnist for the *New York Law Journal* on ethics matters and has written several dozen articles on litigation and ethics issues for such publications as the *National Law Journal* and *Metropolitan Corporate Counsel*.

Janis Meyer is general counsel of the firm of Dewey & LeBoeuf LLP. She is also a partner in the litigation department and an ex officio member of the firm's executive committee. Janis is a member of the firm's diversity and women's initiative committee and is currently the chair of the New York City Bar Association's Committee on the Recruitment and Retention of Lawyers.

Bruce Green is Louis Stein Professor and the director of the Stein Center at our host today, Fordham University School of Law. Bruce was a former law clerk to Judge James Oates of the Second Circuit and Justice Thurgood Marshall of the U.S. Supreme Court. He has published numerous articles on legal ethics issues and is certainly one of the country's leading authorities on that subject. Bruce currently serves as the reporter to the American Bar Association task force on the attorney-client privilege.

The panel is going to split up the topic as follows: Eddie will discuss recent caselaw developments that have had an impact on the applicability of the attorney-client privilege to law firm general counsel. David will address obligations of a firm to make disclosure to its own clients and circumstances compelling attorney resignation from an engagement. Janis will focus on practical issues for general counsel presented by the matters which Eddie and David will be discussing. And finally, Bruce will be our clean-up hitter who will comment on and supplement the preceding presentations from an academic perspective.

So, Eddie, we will start with you.

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[13] In re Vivendi Universal, S.A. Sec. Litig., 02 Civ 5571 (S.D.N.Y.).

EDWARD J. REICH
SONNENSCHEIN NATH & ROSENTHAL LLP

Good afternoon, everyone. As Steve said, my task over the next ten minutes is basically to review the entire body of case law that addresses this subject. As we learned this morning, the concept of general counsel for law firms is relatively new, so all the authority out there is pretty recent. Really the topic I am addressing is the attorney-client privilege as applied to communications with the law firm general counsel or, in Stu[art Gold]'s case, non-general counsel, concerning a current client of the firm. We are still not at the point where the concept of a law firm in-house counsel is accepted as a given by the courts, and the case law is really kind of a roller coaster in terms of how courts address this issue, so fasten your seat belts.

Let me start with the good news. Courts have generally upheld intra-law firm communications as privileged as against third parties, so to the extent there is communication between a lawyer and the law firm general counsel, courts have generally upheld that privilege as against a third party. In 1991, there was a case called *Lama Holding Co. v. Shearman & Sterling* out of the Southern District of New York.[14] There the privilege was applied as against a former client. *U.S. v. Rowe* [96 F.3d 1294], which is a Ninth Circuit case from 1996, involved a grand jury subpoena. I am going to mention one more only because it really is a recent development. Three days ago, the Supreme Court of Maine ruled in a case called *In re Motion to Quash Bar Counsel Subpoena*.[15] That involved a former general counsel of a law firm who was subpoenaed for information regarding his investigation of lawyer misconduct. The former general counsel of the firm was in fact willing to testify and to talk about his investigation. The law firm jumped in and said, "No, we are asserting privilege." The whole discussion that the court had was whether the crime-fraud exception applied. It didn't directly address whether the privilege exists in the first place, but the fact that they were talking about the crime-fraud exception was a tacit acknowledgment that the privilege did apply. So, at least in Maine, it can be taken as a given that the privilege applies. It makes sense if you think about it because the same public policy considerations and more apply to lawyers and law firms as anyone else. The ability to have open and frank consultation with counsel promotes the broad public interest and observance of law and in particular, with respect to lawyers, it promotes the lawyer's compliance with his/her ethical obligations.

So, why is the current client issue different? Why is this so vexing to the courts? The question that gets asked in these cases is whether the firm's interest in seeking legal advice relative to the conduct of its lawyers conflicts with its obligations to its client, and it has led some courts to create a fiduciary duty exception to the privilege.

The first case that really addressed this was in 1999 – a case out of the Eastern District of Pennsylvania called *In re Sunrise Securities Litigation*.[16] It was a suit against a law firm arising

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[14] 1991 WL 115052, 1991 U.S. Dist. LEXIS 7987 (June 17, 1991).

[15] 982 A.2d 330, 2009 ME 104.

[16] 130 F.R.D. 560.

from a failed S&L. Interestingly, this case involved communications among lawyers in the firm, but the lawyer was not designated as a general counsel and did not serve as such. It was people who had been involved in the underlying matter.[17] The court initially rejected the notion that there could be any privilege at all.[18] On reconsideration, it found that it is possible that lawyers could also need legal advice.[19] It recognized that the possibility exists but also flagged the issue of a conflict.[20] The court stated that when a law firm seeks legal advice from its own in-house counsel, the law firm's representation of itself might be directly adverse to the law firm's representation of another client,[21] thereby getting into the whole conflict of interest arena.

Sunrise, as you will see in couple of minutes, is the grand-daddy of these cases; a lot of the cases that come after rely on it. But the holding really is just a restatement of the question. The holding is that there is no privilege if there is a conflict,[22] so it doesn't really tell you a whole lot when you get down to it. In fact, the court really did not focus on the rules of professional responsibility in reaching its opinion. It looked for guidance to shareholder derivative actions and lawsuits by minority shareholders in the fiduciary context. I like movie analogies, and I will call this one "Lost in Translation" because *Sunrise* relied on a case called *Valente v. PepsiCo.*,[23] which relied on a case called *Garner v. Wolfinbarger*,[24] and *Valente* got *Wolfinbarger* not quite right, and *Sunrise* didn't quite get *Valente* right.

One of the flaws in the decision is that it shifts the burden of proof. The court presumed a conflict when you are dealing with communications regarding an existing client and shifted the burden to the firm to show that there is no conflict. Also, the focus of those fiduciary duty cases was really on the individual lawyer. Here, the focus is not on the individual lawyer but on the firm, the firm's interests as opposed to that of the individual lawyer.

The end result is that if the communication involves a current client, generally speaking, it is held not to be privileged, regardless of when the communications took place or the underlying posture in the underlying representation. *Sunrise* did note that it would be a different situation if the law firm had gone to outside counsel,[25] although it didn't really get into the

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17 *Id*. at 572 n.35.

18 *Id.* at 572.

19 *Id*. at 595.

20 *Id*.

21 *Id*.

22 *Id.* at 597.

23 68 F.R.D. 361 (D. Del. 1975).

24 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

25 *See Sunrise*, 130 F.R.D. at 597 n.12.

reasons why.

A succession of cases within the next few years followed *Sunrise* and turned to it for guidance. The first one was a case called *Koen Book Distributors [v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.]* – it is also out of the Eastern District of Pennsylvania[26] – in which a client asserted a malpractice claim against the firm but continued to use the firm for the underlying matter. The firm later tried to claim the privilege on communications regarding the potential claim. Relying on *Sunrise*, the court said, "No, sorry, they were a current client, and you, law firm, should have either gotten a waiver because you are adverse, or you should have withdrawn from representation." In this case, it was tough because the trial was imminent; it was within a couple of weeks. There was really no incentive for a client at that point to give a waiver because the law firm was saying, "You've asserted a malpractice claim against us. We want to talk about it. Will you let us do that?" There is no reason why the client would do that.

Another case that followed *Sunrise* was *Bank Brussels [Lambert] v. Credit Lyonnais [(Suisse), S.A.]*. This is out of the Southern District of New York in 2002.[27] It really came down along the same lines. There the question involved a conflicts check after a potential conflict arose. The firm did conflict checks, and the court found that the conflicts checks were not privileged, nor were the identities of the other clients who were being checked. What is interesting here, and this is only 2002, is that the court referred to the idea of having a privilege with law firm general counsel as a "novel idea."[28] So, as recently as a few years ago, there were courts that were still hostile to the notion that lawyers dare claim a privilege in seeking legal advice.

In the *Sunrise* line of cases (including the *VersusLaw[, Inc.] v Stoel Rives[, LLP]* case,[29] which reached a similar result), two presumptions are evident. The first is that to the extent the communication involves a current client, it is a conflict. The second is, while acknowledging that law firms can have general counsel and maybe they enjoy some special status, for purposes of imputation of conflicts the courts treat law firm general counsel the same as any other lawyer in the firm. The general rule is that if one lawyer has a conflict, then the entire firm has a conflict. These decisions apply that without any analysis in terms of, "Should there be a carve-out for the general counsel who is not involved in the underlying matter and is not like a regular other lawyer in the firm?"

In the wake of these cases, there was a body of secondary authority that weighed in on these issues. They challenged these presumptions, basically saying, "The law firm's analysis of its own ethical obligations is part of what we do as lawyers. It is not a conflict. It is inherent in our duties and in our work as lawyers. The consultation does not impair the independent

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[26] 212 F.R.D. 283 (2002).

[27] 220 F. Supp. 2d 283.

[28] *Id.* at 286.

[29] 127 Wash. App. 309, 111 P.3d 866 (2005), *review denied*, 156 Wash. 2d 1008, 132 P.3d 147 (2006).

judgment of the lawyer. It helps the lawyer, and it ultimately benefits the client."

The New York State Bar Association issued an ethics opinion, 789 in 2005, which directly acknowledged the *Sunrise* line of cases and took issue with them. I will just read a little bit from the opinion: "A lawyer's interest in carrying out the ethical obligations imposed by the Code is not an interest extraneous to the representation of the client. It is inherent in that representation and a required part of the work in carrying out the representation."[30]

There is also an Illinois Bar opinion from 1994 which quotes a Restatement and says that "[t]he need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved."[31]

Also, Professor Chambliss – I do not know if she is still here –

DAVID G. KEYKO
PILLSBURY WINTHROP SHAW PITTMAN LLP

She had run off to catch a bus.

MR. REICH

That is better because I would rather not have to describe someone's work when they are sitting right in front of me. Professor Chambliss argued likewise that consultation is a good thing and is something that should be encouraged.[32] We want a culture where lawyers are free to seek legal advice. They are not immune from needing legal advice just because they are lawyers. So, really it is a positive development. She also challenged the application of imputation of conflict to general counsel and made the point that it really does a disservice to everyone, to both the client and to the law firm, to do a rote application of the imputation rule without acknowledging the status of the general counsel.[33] Now, of course, if the general counsel was involved in the underlying matter, then you have a different situation, but where the firm takes steps to ensure that the general counsel is separate from the underlying matter, the imputation should not apply.

The tide starts to turn a little bit after these articles come out. There are two cases out of the Northern District of California, *Thelen Reid & Priest [LLP] v. Marland*[34] and *In re SonicBlue*

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[30] NYSBA Ethics Opinion 789, ¶ 12.

[31] Illinois State Bar Association Advisory Opinion No. 94-13 (quoting RESTATEMENT OF THE LAW GOVERNING LAWYERS § 58 cmd d (Tentative Draft No. 4, 1991)).

[32] *See* Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1724 (2005).

[33] *See id.* at 1747-48.

[34] 2007 WL 578989, 2007 U.S. Dist. LEXIS 17482 (Feb. 21, 2007).

[Inc.],[35] which took a different approach while acknowledging *Sunrise*. They recognized that the duty of loyalty to a client largely overrides the privilege but recognized the importance of a lawyer being able to consult with in-house counsel regarding his/her ethical obligations. To quote from the *Thelen* case, "A rule requiring disclosure of all communications relating to a client would dissuade attorneys from referring ethical problems to other lawyers, thereby undermining conformity with ethical obligations."[36] But the *Thelen* court stopped at a point where it was determined that a claim exists and went on to say:

> Specifically, while consultation with an in-house ethics adviser is confidential, once the law firm learns that a client may have a claim against the firm or that the firm needs client consent in order to commence or continue another client representation, then the firm should disclose to the client the firm's conclusions with respect to those ethical issues.[37]

The *SonicBlue* case also noted a restrictive approach in applying privilege law to law firm general counsel but again recognized the public policy in favor of encouraging lawyers to consult with in-house counsel regarding their ethical obligations.[38]

The bottom line from these two cases is that communications that are used to facilitate a determination as to whether a conflict or a claim exists are privileged, but communications about handling the conflict or the claim, once they are identified, are not privileged. The *SonicBlue* case also acknowledged that communications with outside counsel would not be affected.[39]

Before everyone gets too comfortable, the tide shifts back a little bit. There are two cases in 2007 and 2008 that really head back to the *Sunrise* line. There is a case called *Burns v. Hale & Dorr [LLP]* out of the District of Massachusetts.[40] This is an unfortunate case, principally because the facts could not possibly be worse. It involved a trust created by Hale & Dorr for the benefit of Burns. Burns was an infant who suffered permanent damage and received a $2.5 million judgment for medical malpractice. The money was put into a trust by Hale & Dorr. One of the trustees was the infant's father. They never appointed the other trustee, they never finalized all the documentation, but at the father's request, the affiliate of Hale & Dorr who administered the trust released about $1.5 or close to $2 million to the father, not knowing that he was sitting in jail and using the money for his own benefit. Under those facts, the court held no privilege. It did not help matters that the law firm made a technical argument that the infant wasn't actually a client, that she was only the beneficiary, not a client. As I said, the facts there

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[35] 2008 WL 170562, 2008 Bankr. LEXIS 181 (Jan. 18, 2008).

[36] 2007 WL 578989 at *7, 2007 U.S. Dist. LEXIS 17482 at *20.

[37] 2007 WL 578989 at *8, 2007 U.S. Dist. LEXIS 17482 at *20-21.

[38] 2008 WL 170562 at *9, 2008 Bankr. LEXIS 181 at *25-27.

[39] 2008 WL 170562 at *11, 2008 Bankr. LEXIS 181 at *32-33.

[40] 242 F.R.D. 170 (2007).

really could not have been worse and obviously, it is difficult to tell whether that motivated this decision, but the decision did go back to *Sunrise* by basically saying, "Sorry, you cannot avoid disclosure of communication simply by having it with in-house counsel."

Another step backwards, at least in terms of recognizing the privilege, is the *Asset Funding [Group, L.L.C.] v. Adams & Reese[, L.L.P.]* case out of the Eastern District of Louisiana. It is a case from this year.[41] Plaintiff sought documents relating to a conflict analysis similar to the *Bank Brussels* case. The court really just reverted to the *Sunrise* line and assumed that the law firm's interests conflicted with those of the current client.[42] The court backed off a little bit on reconsideration but stood by its ruling. What is unfortunate about this decision, other than the result, is that it was really not necessary at all because the court also went on to determine that, even if the general counsel privilege were to apply, there would not be an attorney-client privilege here because the substance of the documents was not seeking legal advice.[43] So the court did not have to reach that issue, but unfortunately did. There have been discussions, as I think a number of people here know, about the possibility of bringing this to the Fifth Circuit, but the Fifth Circuit declined to take that appeal.

That is basically the entire body of case law on the issue, and there are no appellate decisions on it.[44] So, now that it is all crystal clear to everyone, I am going to turn it over to David and Janis to tell you how to actually deal with this.

MR. KEYKO

The flip side of what these cases are discussing is, what is the obligation of a law firm or a lawyer when the lawyer realizes that he/she has made a mistake? These cases in effect assume that lawyers are going to try to hide their mistakes. I am going to talk about the fact that the rules do not really allow lawyers or law firms to ignore the fact, to the detriment of their client, that a mistake has been made.

I am going to talk about four different issues. The first one is, once a lawyer discovers that a mistake has been made, does the lawyer have a duty to say something to the client? The second is, what is that obligation – what does the lawyer actually have to say? Third, are waivers appropriate? Finally, under what circumstances does the lawyer have to resign?

There is not a lot of authority in New York State on this issue. The rules and comments do not specifically address it. Neither did the DRs [disciplinary rules] and ECs [ethical considerations]. There are only two New York opinions that address it. There is a 2000 New

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[41] 2009 WL 1605190, 2009 U.S. Dist. LEXIS 48420 (June 5, 2009).

[42] Asset Funding Group, LLC v Adams & Reese, LLP, 2008 WL 4948835, *4, 2008 U.S. Dist. LEXIS 96505, *10 (E.D. La., Nov. 17, 2008), *reconsideration denied*, 2009 WL 1605190, 2009 U.S. Dist. LEXIS 48420 (E.D. La., June 5, 2009).

[43] *See* 2008 WL 4948835 at *3, 2008 U.S. Dist. LEXIS 96505 at *9.

[44] *But see Rowe*, *supra* (a Ninth Circuit case).

York State opinion and a City Bar decision in 1995, both of which concern legal aid societies and their obligations. Those opinions are still helpful even though they don't discuss law firms.

I would like to go first to the source material and look at the current rules on this subject that could be applicable. The most important one is Rule 1.7. I will quote it for you in case you haven't memorized it – I know I haven't:

> "(a) Except as provided in paragraph (b) [paragraph (b), I'll get to in a second], a lawyer shall not represent a client if a reasonable lawyer would conclude that ...
>
> (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests";

i.e., because the lawyer has committed malpractice, the lawyer may have an interest in potentially losing the case so that the malpractice becomes irrelevant, or cratering the deal so that the malpractice is no longer an issue.

What is (b)? It says: "Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client ..." In other words, the issue is whether despite being faced with a potential malpractice claim, is the lawyer still going to be able to continue to represent the client competently? We will talk about that in a minute.

Comment No. 10, which is tangentially relevant, states, "If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice." What that addresses is, if a law firm has closed a deal and there is litigation over the deal that calls into question whether the lawyer properly drafted the documents, can the lawyer's firm handle the case? The language also calls into question (1) whether a lawyer can continue to handle a case if the lawyer has committed malpractice and (2) whether a lawyer can continue handling a corporate deal if, in the middle of a transaction, it is apparent that the lawyer has overlooked an issue that can now not be readily addressed.

Before Rule 1.7, there was DR 5-101(a). The language was slightly changed when Rule 1.7 was adopted in a couple of ways that are interesting. DR 5-101(a) just addressed when a lawyer could *accept* employment, and did not address the fact that a problem might arise in the middle of employment. Rule 1.7 changed that to "accept or continue employment." DR 5-101(a) focuses on whether the lawyer's judgment "reasonably may be affected ... unless a disinterested lawyer would believe." Thus, the old rule provided for an objective test. The new rule has a combination subjective/objective test. It focuses on whether the lawyer reasonably believes his or her judgment will not be affected.[45] So a lawyer has to believe there will not be an issue, but it is not just the lawyer's judgment; the belief has to be reasonable.

What else is potentially relevant? The rule on business transactions with clients, Rule 1.8(a), comes into play. Why do I say that? Because, potentially, the lawyer is going to be negotiating with the client. If the lawyer continues to handle the matter, there may be discussions about a tolling agreement, a settlement, or something of that nature. Consequently, a lawyer

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[45] *See* Rule 1.7(b)(1).

must consider this rule (formerly DR 5-104). Note, however, that Rule 1.8(a) applies only if the lawyer and client engage in a business transaction and – here is the important proviso in New York that does not exist in all states – the lawyer is expected by the client to exercise professional judgment regarding the transaction for the protection of the client.

If a lawyer commits malpractice, is the client depending on the lawyer to give advice about what the consequences of this wrongdoing are? The answer is probably "yes." The lawyer should specifically say, "No, I cannot give you advice on this subject." Indeed, if the lawyer is going to be negotiating with the client, he or she has to make clear to the client: "I am not your lawyer; you need to get someone else to advise you." In fact, the rule goes on to require, as you probably all recall, that the arrangement with the client has to be fair to the client.[46] So, if the lawyer somehow manages to convince the client that it is in the client's best interest to waive all claims against the lawyer so the lawyer can continue the trial or conclude the deal, and in retrospect, that really was not fair to the client, the settlement will probably be thrown out. The lawyer has to make disclosure to the client in writing that the client should consult independent legal counsel,[47] and the client must give informed consent, in writing.[48]

Another important rule is Rule 1.4. The requirements contained in Rule 1.4 effectively existed before, but are now explicit. Part (b) of Rule 1.4 states: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Why is that significant? Because, if a lawyer has screwed up part of a matter, or potentially screwed it up, the client is going to have to make some choices: should the transaction or case go forward or shouldn't it go forward? If the lawyer is going to fix the mistake, is the fix going to come at some cost? Is something going to have to be given to the other side? Is that going to create a problem? So, the rules make it clear that if the client is a current client and the mistake is going to affect how the case is being conducted or the deal negotiated, the lawyer has to tell the client about the mistake as well as the fact that there are future implications, so that the client will be able to make appropriate judgments about what to do on a going-forward basis.

So, when does the lawyer have a duty? A lawyer has a duty to make disclosure when the lawyer or law firm has made a mistake that affects the client's rights or causes injury to the client, or potentially may cause injury to the client. In some cases a lawyer can make a mistake but the mistake has no real importance to the client (for example, if the lawyer blew through a deadline but it turned out to be completely irrelevant because the court later extended the date). There are situations where there will be no prejudice to the client. However, that is not always the case even though a mistake readily can be fixed. For example, a lawyer may miss a date and have to plead with the other side, saying, "I can claim office failure. I can get this thing overturned." The opposing counsel may respond, "If I do this favor, you are going to have to do a similar thing for me." If the lawyer accepts the arrangement, the lawyer has given up something. That may be fair and appropriate, but the lawyer needs to discuss the proposed

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[46] *See* Rule 1.8(a)(1).

[47] *See* Rule 1.8(a)(2).

[48] *See* Rule 1.8(a)(3).

arrangement with his or her client. The lawyer must explain that the lawyer proposes to offer a compromise that could impact the client's rights. If the client requires information in order to make decisions, the lawyer must provide that information.

How about dealing with a former client? A lawyer discovers a mistake, but the deal is already closed. The client has become a former client. Does the lawyer have some obligation to say, "I was just going through some old files and realized that in this deal I closed for you two years ago, we never filed UCC statements"? If it is an ex-client, do the rules obligate the lawyer to do that? In my view, the lawyer does not have an ethical obligation to make this disclosure. Indeed, to the extent that the law firm has discussed the issue internally, the firm can probably claim privilege because the discussion concerns a former client to whom there are very limited continuing fiduciary duties. Is that the right decision to make, particularly where there is a chance to mitigate the damages by filing it or by trying to get back some of the client's rights? It is probably not the right decision to just ignore the mistake but, again, I don't think that you have an *ethical* obligation at that point to make disclosure.

Now let's consider a slightly more complicated situation: the deal has closed, but the lawyer is representing the client on a completely unrelated matter, *i.e.*, the client is a current client, but the lawyer is no longer giving the client advice concerning the matter on which the mistake is discovered. Is the client looking for advice from the lawyer so that the client can make decisions about the deal? No, the client is not. The deal already closed. The client is not looking to the lawyer for advice. The lawyer must be very careful because the lawyer has to make sure that there is no ongoing representation with regard to the matter. Even if a deal has closed, the client may still be looking to the lawyer for ongoing advice about separate closings where there is a financing and funds will be provided in a series of tranches. There may be an argument that knowledge of the error, in fact, is relevant to future decisions: does the client fund these other tranches? If in fact the mistake concerns a current client, but the matter is now closed and the client is not looking to the lawyer for any advice on the matter, the lawyer may not be ethically bound to make disclosure. The lawyer, however, is probably going to lose the client relationship if the client discovers the error on its own and sues the lawyer. Furthermore, a reasonable settlement probably will be more difficult to achieve than would be the case if the lawyer made disclosure. Thus, there may be good reason to make disclosure. Perhaps steps can be taken to mitigate the damage. But I don't think that the lawyer has an *ethical* obligation to make the disclosure at that point.

Now, what does the lawyer have to say to the client when he or she discovers this problem? The lawyer actually does need to say, "I made a mistake." I do not think you need to utter the other "M" word – "malpractice" – but, I think the mistake has to be acknowledged. "I missed something; I did this." Malpractice involves a number of legal conclusions in addition to a mistake having been made. I also think that to the extent that the mistake is going to affect how the client is going to conduct the activity as to which the lawyer is representing the client – which it invariably will because otherwise the lawyer wouldn't be disclosing it to the client – the lawyer needs to say to the client, "You should consult some other counsel and not me, in terms of what the implications are for you and before making your decision as to whether to continue with me on this matter" (assuming the lawyer concludes that it is appropriate to continue to represent the client). It will rarely be the case that there is no issue about whether what the lawyer is going to

be doing on a going-forward basis is going to be in the client's best interest.

Once the lawyer has discovered the mistake, in most cases, a waiver is going to be required if the lawyer is going to be able to continue to represent the client. In order to be able to obtain a knowing waiver, the lawyer has to alert the client to the issues. Remember, waivers now have to be confirmed in writing, and in this case, the lawyer and client will want a signed written waiver. As I mentioned earlier, the lawyer has to confront the fact that whatever arrangement is made can be considered a deal now between the lawyer and his or her client, which is another reason why the waiver and any related terms have to be in writing.

Is a waiver appropriate in all circumstances? Will a waiver work? That brings me to my final topic: resignation.

Resignation may be appropriate if the mistake that the lawyer has made will incentivize the lawyer to take actions that relieve the lawyer of the threat of a malpractice claim and are contrary to the client's interest. For example, if the lawyer loses the case on a ground unrelated to the mistake, or the deal doesn't close, the mistake will become irrelevant. If the lawyer is incentivized by the mistake to do something of that nature, then a waiver is not going to work because the lawyer's own personal self-interest is contrary to the interest of what the lawyer is supposed to be doing for the client. It is one of those rare cases where the conflict cannot simply be resolved by disclosure and a waiver.

If, as a result of the error, one ground on which the client might have succeeded has been lost, but the lawsuit still may be successful on one of the alternative causes of action and a complete recovery obtained, the lawyer obviously has an extra incentive to make sure the case is won on the alternative grounds. That may well be a circumstance where it is appropriate for the lawyer to continue to handle the case, but only after the lawyer has made the disclosure, given the advice in writing about consulting separate counsel, and obtained an appropriate waiver. Only then may the lawyer continue with the representation.

I actually had occasion recently to litigate the issues I have just been discussing. Fortunately the mistake was not made by my own firm. I represented a corporate client dealing with a law firm that had committed malpractice in connection with litigating a case. The corporate client was very interested in having the law firm continue. Why? Because the firm was on a partial contingency and the client had made substantial up-front payments to cover investigation costs and the initial phases of the litigation. The law firm clearly blew it. They lost a cause of action because they did not make a filing on time. The cause of action was dismissed and the law firm said, "Oh! We made a mistake and you are saying it's malpractice, so we're out!" The corporate client said, "Whoa! You have to be kidding. You're not out. I paid you a fortune, and the rest of your work is on a contingency fee basis. You cannot quit." So we argued about how to handle the situation. The client told the law firm, "We won't give you a waiver. We'll enter into a tolling agreement. You're incentivized to win," and so forth. What did the state court judge do? I don't think the judge really understood the issues. Her opening comment was, "Lawyers are not indentured servants. They can quit anytime they want." I said, "Well, your Honor, that actually is not the rule. You can only resign or withdraw under a number of circumstances where the client will not be prejudiced. Here, the client will be severely prejudiced." Ultimately, the judge held that because the law firm was not comfortable in continuing to handle the matter, it could resign.

Do not forget that this was under the old rule under the old test. I do not think the court made the right decision; but as Ed Reich explained earlier today, judges do not necessarily understand how things work within law firms. Judges don't necessarily understand the lawyers' codes of ethics or the rules of ethics. Judges make certain assumptions that are not necessarily correct. So, despite my little speech about how I think the ethics rules work, a judge may view the situation slightly differently, and there is not a lot of authority on this subject to cite to the court.

That dispute, however, did have a happy ending. I suspect that the law firm was very uncomfortable about what might happen on appeal, and the firm still had to address the fact that it had committed malpractice. The law firm and its former client quickly reached a settlement that both considered to be fair.

JANIS M. MEYER
DEWEY & LEBOEUF LLP

That seems to me the logical ending. Give the money back.

My task today was to talk about what firms can do to protect ourselves, so I will have very short remarks because this is a very revolting situation. [*Laughter*.] I was naïve because when I took on the role of general counsel back in 2002, I automatically assumed that everything was privileged, and then one day, I happened to pick up a case and said, "Oh my goodness." It was terrible. I often feel that the best way for a law firm to avoid risk is for it not to take on any clients, and we know that is not one of our options.

The second one would be not to make any mistakes. I know no firms in here make mistakes, but occasionally, we do have questions we want to ask. There is a story about a famous partner, probably deceased now, at one of the firms represented in this room, who apparently woke up every day and said, "Thank goodness I've lived another day and the statute of limitations has run on another one of my mistakes."

In any event, to me, this is not a question of what the cases say. This is a question of good policy. It cannot be that law firms should be discouraged from trying to figure out if they have made a mistake because their deliberations about those mistakes will be revealed to their clients.

So, what can we do? The following is in some sort of order but not necessarily in any particular order. The first one is we can try – and I think a number of firms are doing this – to include some protective language in our engagement letters. For example, my firm has put in some language to try to get prospective waivers – language saying that the client recognizes that it may be necessary for the firm to consult with its internal ethics experts or general counsel and that the client consents to that representation. Interestingly, since it was added to our engagement letter, which was about six to eight months ago, many times I get calls from my partners that a client will not sign the engagement letter with our standard prospective waiver of conflicts, but I have never had a single client question that language, other than to confirm that the consultation is at the firm's expense. But I also have language that says, "We recommend or welcome you to consult with other counsel concerning this provision." We never had anyone really ask us what it is all about.

MR. KEYKO

If you put that in and a client insists that you take it out, is it almost an admission that you therefore have no right?

MS. MEYER

That is a good point. It is just like when you have a clause that says you agree that we can represent other people in the same industry and they take it out. You have to weigh which danger is greater. We have not had that happen yet, and I do not know if it will. I am not crazy about the language that we have in our letter, but it was the best I could do.

The second thing that I would suggest we do is to make sure that there is a clear delineation of roles. When I started doing what I do, I said, "If I'm going to do this, I think I better be called the general counsel." And I am not into titles. Until recently, I did not even have that on the website. It is important to have someone who has a title so that you can say, "Yes, I am now seeking legal advice," as opposed to, "I am walking next door to talk to Joe about this issue." In one of the cases that Ed talked about, the problem was that they gave a group of associates some research tasks and there really was not any designated general counsel.[49] It was a whole bunch of people doing research for the law firm's problem, but you could not really tell whether they were actually doing it as counsel for the firm or whether they were just frolicking and thinking it was an interesting issue. So it is important that, if you do have a problem or issue that needs to be looked at, be clear that it is being done either by the firm's general counsel or at the direction of the firm's general counsel or ethics counsel or whatever particular title your firm uses, but not to have it be *ad hoc* – this week it will go to Joe, and next week it will go to Jane.

MR. REICH

While Professor Chambliss was very critical of the *Sunrise* case and its analysis, she indicated that even under her test, there would be no privilege in that case. The end result was correct for precisely the reason that the lawyers who were involved were not separated from the underlying matter.[50]

MS. MEYER

Perhaps I am placing too much emphasis on the title. It may be that the fact that someone does it over and over again, for years and years, means that the person is in that role, but it makes it a little less mushy if the person actually has a title.

A third thing that I would suggest is to educate your partners on privilege issues. It has been my experience that many lawyers think that anything that they say is privileged, and

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[49] *See Rowe*, 96 F.3d at 1296.

[50] *See* Chambliss, *supra* note 32, at 1750.

particularly anything that they say in an e-mail is privileged, so some of the things they say in e-mails, as you all know, are mind-boggling. Lawyers really need to understand that, if they have a problem or an issue that they want to discuss, they should go to the person who is designated to deal with these kinds of issues and not just bring it up with the practice group head first. Or maybe ask the practice group head, "Whom should I talk to about this?" They need to understand that we want to, to the extent possible, couch things in privilege.

I remember several years ago we had an issue at the firm. We had a partners' meeting and discussed it, and we said, "Please don't discuss this with anyone. If you really want to talk about it, go talk about it with Janis." I then was going up in the elevator after the partners' lunch, and one of my partners was there talking to two other partners about the exact matter that we had just finished talking about at lunch and telling them not to discuss with anyone. My mouth dropped open. At least it was only firm people in the elevator. I said, "Didn't we just say don't talk about that?," but he was oblivious. So, try to educate people that they have to be careful about what it is they say and what it is that is privileged and what is not.

A fourth thing, and this is an obvious one, but I will say it anyway. E-mails are easily misunderstood. Writing should be kept to a minimum; instead, people should walk (as Stuart said this morning) two doors down to get some exercise, and if you need to consult on something, call somebody up. I mean that is what telephones are for. So, you know, give a telephone call or go down the hallway.

MR. REICH

Just don't leave a voice mail.

MS. MEYER

Don't leave a voice mail. [*Laughter*]

People need to be very careful in their choice of words. I was thinking of David using the "M" word. The other word that gets used a lot is the "C" word, the "conflict" word. When a new matter is coming in, someone will say, "I think we have a conflict." Or, even before they call me, they will call up the client and say, "We have a conflict." Then I look at it and say, "There is no conflict here." As a business matter, you may want to call up your client and say, "We are going to be taking on XYZ as a client and I just want you to know it, but we don't have a conflict," but by then they have told the client that there is a conflict. So, people need to think about what kind of words they use and to be careful in using those words.

Every single training session that I do at the firm – it doesn't matter what it is about – includes a slide or two on e-mail and the appropriate and inappropriate use of e-mail. Several months ago, I had a real-life example. We were doing a document production on a third-party subpoena, and we had to review lawyer e-mail. Some of the associates on the case were e-mailing back and forth things like, "We have a conflict here" – this is in the middle of the deal – or, "This deal is going down." When I used this example in a training session, one of my partners asked, "Isn't it good that the associate was alerting the partner that there might be a problem?" I said, "Yes, by telephone or in person, but not through e-mail." There wasn't any

conflict, but I think it was an associate at two o'clock in the morning, who was very tired and didn't like the client and was venting. So, people need to be careful about putting things in writing and about their choice of words.

This is an obvious one, but David mentioned this at a meeting we were at the other day. If there is an issue that needs to be discussed, one of the things you should tell your partner when she comes to you is, "Do not charge the time that we have now spent talking on this to the client." I find it incredible that people will call me up and ask, "So, what do I bill my time to?" Because God forbid you haven't billed every thirty seconds of your time. Obviously, if this is time that is spent on "the firm as the client" issues, having a time sheet that says "15 minutes discussing potential mistake with David" is not something that is a good piece of evidence to have if there is a dispute later on.

Now I get into some things which we really prefer not to have to do but which we may end up having to do. One of them is consider using outside counsel. I am a believer in going to outside counsel, partially because I always think they are much smarter than I am, and it is nice to get outside advice. On the other hand, it is difficult, every time one of these issues arises, to say, "I have to get outside counsel," so you have to be careful about that. But, if something begins to look like a problem, at that point, it is important – in order to preserve whatever privilege there may be – to discuss with outside counsel.

David mentioned withdrawing. This is the last resort. Occasionally when I have listened to issues – you notice I am not using the word "problems" – that my partners have raised, I have said to them, "Maybe we're in a position where we cannot continue the representation." That does not make me popular, for two reasons. One, because nobody wants to give up a client. Two, because people are always afraid that if some other law firm comes in, they are going to find more things that may have happened. So, people don't want to do that. But, sometimes, there is no choice but to withdraw if you really feel at this point that you are conflicted and that there is no way to preserve privilege. Fortunately, I have never had a situation where we had to withdraw.

Especially in litigation, there may be a situation where you are just not allowed to withdraw – for example, where you are on the eve of trial and you discover that some incredible mistake was made and you cannot withdraw because you are leaving the client in the lurch. The rules will not allow it. At that point, you have to have a heart-to-heart discussion with the client and say, "We need a waiver." If the client will neither let you withdraw nor give you a waiver, then it is only right to go to the court and say, "Judge, we are stuck between a rock and hard place here, and we need to be able to go forward on this." You cannot go into detail to the judge about why you need this, but at the same time, you are cornered in an impossible situation. At that point, you are representing two clients who don't necessarily have the same interests. Yes, you have the interest to win, but at the same time, in the back of your mind you are thinking, "What is this going to mean to the firm?"

I would have liked to have had a top ten list. I only had eight. I guess if you include "don't make a mistake" and "stop practicing law," you get to ten. In any event, that is all I could come up with in terms of how to get out of this revolting situation.

MR. REICH

I'm going to add an eleventh. This really is not so much in terms of educating the lawyers but, once this issue comes up, how to deal with it. We have been talking in terms of a law firm asserting the attorney-client privilege, but when people assert privilege, they have a tendency to reach as far as they can, and they often assert work product as well. But if you are asserting work product relative to communications between a lawyer and law firm in-house counsel regarding a current client, work product requires anticipation of litigation. Whom are you anticipating litigation against – a client? If you are saying that, then it is pretty hard to say you are not adverse to the client at that point, which is what a lot of the cases, really all the cases, talk about.

MS. MEYER

That is part of the education and the nature-of-the-privilege point that I was making before. Many lawyers do not understand that the term "work product" has that meaning and think instead that "work product" means anything that they have produced. I've had this happen where we have been subpoenaed and partners brought documents and said, "These are all work product," and I said, "Do you mean that when you were negotiating the deal, you were litigating it going in? Because otherwise, it is not work product." It is something that sometimes people do not understand.

BRUCE A. GREEN
LOUIS STEIN PROFESSOR, FORDHAM UNIVERSITY SCHOOL OF LAW

I must say that I am very disappointed with law schools if practicing lawyers think that they can talk in elevators and that the work product doctrine applies to everything they write. And I am usually defending law schools.

I want to focus on a topic that ties everything together really – the general counsel's role in giving advice about issues involving current clients.

But I just want to say how pleased I am to be here. This is the second CLE program I've done in the past two days. Yesterday's was with the CLE Board, and today's is with the Judicial Institute on Professionalism. In the late 1990s, I was a member of Lou Craco's task force [the New York State Task Force on Attorney Professionalism and Conduct], where I worked on two things: the proposals for a CLE board and for a professionalism committee or institute. And then I had nothing to do with them for about ten years. This convocation is very gratifying. All of you work on bar association things and sometimes great things come out of the work and sometimes they don't. To see the great work now being done by the Judicial Institute that got its start in a proposal in which I had a small hand is really very meaningful to me.

Professional independence – the theme of your two-year study – is, of course, very important to me as an academic, but for us independence has a slightly different meaning; it means we have tenure and can say whatever we damn please. Part of that freedom pushes us to take views as devil's advocate whether we believe them or not. That basically boils down to,

"You are all wrong." So I feel compelled in my academic reflections to say that everybody is wrong. But that is very difficult to say because you have the courts on one side and the bar associations' ethics opinions on the other side. I am not sure what that leaves me to talk about, but I am going to try to come up with something.

First of all, there are points of agreement. Definitely, I value the law firm general counsel's role in giving advice to lawyers in the firm, and I thought this morning's panel was terrific. Second, I take the view that there is no conflict of interest between the lawyer giving advice as general counsel and the law firm's clients. I'm on record, because I was an expert in the *Bank Brussels* case on the losing side, and I was also on the State Bar committee that issued opinions saying it's not a conflict. But that doesn't answer the question of whether the communications are privileged vis-à-vis the firm's client, because the courts are right in saying that attorney-client privilege is a different animal. It does not necessarily follow that there is privilege because there is no conflict; it is a different question. The courts are analyzing it wrong, but they are coming at it the right way, or at least their intuitions are right.

The other thing that law professors do is ask hard questions and not resolve them, so that is probably what I'm going to do. They do it with hypotheticals, so I was thinking about three hypotheticals which maybe explain the courts' intuition here, and then you can tell me if I'm wrong. These are not necessarily the issues that general counsel is dealing with, but this is just so that we can get out in time because some of the judicial decisions are factually complicated.

Here is the first hypothetical: a firm suspects a partner of overbilling. Maybe an associate looked at the bills and said these are inflated, but you can't tell on the face of the bills. There is a question and it is a good firm and it wants to inquire, but it doesn't know anything, and there are always issues of intent – did you write things down wrong, etc. Let's suppose this is pre-whatever the year is when general counsel was invented; then you just had a managing partner or some old lawyer who wanted to get to the bottom of this. So, he – and it would have been "he" in those days – interviews the partner whose bills are suspect and gets admissions that there was overbilling. So, what does the firm do? First of all, it advises the client for the reasons that David discussed. It adjusts the bills and asks the client – I am not sure whether this is privileged or not, but I assume this information might be privileged vis-à-vis the client – "Do you care if we report?" If the client says, "I do not care," then, if it is serious enough billing fraud, there is a reporting obligation, and that is consistent with the new Rule 8.3 and the old rule before that, which reflect the firm's self-policing or self-governance obligation. And all is right with the world. Right?

MR. KEYKO

You also have to report to the Disciplinary Committee.

PROF. GREEN

That's what I was talking about. You report to the client and then you report to the Disciplinary Committee, and the Disciplinary Committee does its magic, and you have promoted client relations and your self-policing obligation, and that is terrific. So, that is one model.

Hypothetical number two: the bad firm. The firm does not tell the client (in breach of its obligations), but it makes amends by deducting from its next bill, without explaining why, the amount that it owed the client. It doesn't report to the disciplinary authority in violation, perhaps, of its disciplinary obligation. Let's suppose this is a lawsuit and the case later settles. The client somehow learns that it was overbilled, even though there was no harm, and it says two things. One is, "You've breached your fiduciary duty to me, and at the very least I am entitled to reimbursement of my attorneys' fees." Then the client says, "And by the way, why did we settle? The legal fees were so damn high that we wanted to save on fees, and we would have won had we continued to trial." Therefore, it sues you not only for fees; it also sues you for damages. Then the question is – and this is before the general counsel days – does the client get these records (whatever internal records you may have made)? Does it get to depose the managing partner or senior lawyer about the internal investigation? I assume the answer is pretty clearly "yes." There is some interesting area of ambiguity about which internal files are client property, and *Sage Realty*, for example, leaves some little area where you don't have to turn over documents relating to internal deliberations,[51] but I would think if push comes to shove in a litigation, this all gets turned over. Then the disciplinary authorities learn about it and it is the bane of the law firm because maybe they withheld stuff that they should have disclosed, and that is all to the bad.

So, those are my two starting models. Now we fast forward to 2009 and the rise of the general counsel. The general counsel is assigned the task of interviewing the partner and figuring out what happened, and presumably all the interviews are protected under *Upjohn*[52] as attorney-client communications the way a corporation doing an internal investigation would be protected. You have this information that is protected by the privilege before you suspected, and now you know – because you got admissions from the lawyer – that he deliberately overbilled and it was a lot of money and he was venal and he should rot in hell. So, what do you do? You fixed the bills, but do you have to tell the client? If you tell the client, are you waiving the privilege by disclosing the knowledge? I would say "no," and I recently did a memo on that, but there is a big debate in the attorney-client privilege task force which I'm reporting to about whether taking *Upjohn*-protected information that is initially privileged and then using that knowledge and making disclosure is a waiver of the privilege.

Let's suppose you do not disclose that and you want to protect privilege – can you go to the disciplinary authority? If the disciplinary authority comes to you, can you argue, "We are not giving it over because we heard of the *In re Motion to Quash Bar Counsel Subpoena* case recently in Maine"? Presumptively, these things may be privileged. Maybe not. But if you take the view that all this stuff is privileged and protected because we use general counsel and we call the person general counsel to do something that we would have done anyway in the old days with a senior partner or managing partner, it undermines both your duties to the client and your self-policing obligations to the disciplinary process. I am not saying where I come out, but I can

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[51] *See* Matter of Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, 91 N.Y.2d 30, 37-38 (1997).

[52] Upjohn Co. v. United States, 449 U.S. 383 (1981).

understand the intuition of the courts when they say that simply labeling yourself "general counsel" is problematic.

From the academic perspective, you ought to know, we do not believe in *Upjohn* anyway. Not me because I am on the task force and they would have run me out on a rail if I rejected *Upjohn*. But some academics say that the privilege is in derogation of the public's right to know, and you should only have it when the public's interest in privilege outweighs the public's interest in knowing, and if corporations are going to be using lawyers anyway, then the privilege does not serve the purpose of incentivizing the use of lawyers or candid disclosure. Here in particular, I do not know that recognizing a privilege changes anything because, as you say, Janis, you are going to use and confide in lawyers regardless of how unclear the privilege is in this area – and it's mighty unclear.

So then I get to the question, assuming there is a privilege, is there some intuition on the courts' part about the use of inside counsel versus outside counsel? Because I have to think that as a doctrinal matter, the courts would clearly recognize the attorney-client privilege if a law firm goes to outside counsel. Courts are not going to monkey with that, even though academics would.

There are many benefits to having a general counsel, and we heard a lot about them this morning. For example, it is someone who knows your culture and someone whom everybody knows and can be honest with, and it is quicker, and they will keep confidences, and fifty other reasons. But, from at least an academic point of view, what you lose is what this program is about, which is independence. We heard this morning about the importance of loyalty within a firm, and you are going to be, at least in an academic and theoretical sense, loyal to the firm. You have fiduciary duties to the firm, you are going to care about the lawyers in the firm, it is going to influence you at least in theory in a way different from if you go to outside counsel. That is in theory; in practice, maybe not. I wish Elizabeth were still here because everything I know about the social sciences I learned from her. Even from a social science perspective, the approach you would have if you are a member of the organization, there are issues of identity bias that social scientists talk about and, whether you realize it or not, you are going to strongly identify with the law firm differently from the way someone you hire on the outside will, and that person is going to identify with the firm simply because it is a client.

While I don't really take sides on this issue, the doctrine may actually be getting at something, and maybe there are reasons for the doctrine to encourage law firms in some of these cases to be getting outside counsel.

MR. KEYKO

I will respond in thirty seconds. The purpose of the attorney-client privilege is to help people do the right thing – to assert their rights appropriately, or to settle, or to do whatever they are supposed to under the law. That is what we talked about earlier – about the process as the oil as well as the glue. Law firms have the same sorts of issues that every other institution does, and they are dealing with very complicated areas of law. We are talking about ethics issues that the lawyers on this panel study all the time, but we are not even sure what the answers are. If we aren't sure, certainly our partners who are focusing on tax or certain types of corporate

transactions are not going to have a clue when confronted with these issues. It is important to encourage lawyers in a law firm to talk to the person within their firm who focuses on ethics issues to make sure that the law firm does the right thing – to make sure that the firm makes appropriate disclosure to the client when disclosure is required. To the extent that you deprive the law firm of the protection of being able to get advice about what they have to do based on the presumption that the firms are not going to follow the advice, that is wrong. I don't think you would say to any other institution, "You are not entitled to the privilege because you are likely not going to follow the advice." We need to make sure that law firms, in this very complicated ethics world in which we are all practicing (and it has gotten only more complicated), do the right thing; thus, law firms need to be afforded the privilege.

MR. REICH

Thirty seconds. Just picking up on that theme, if you are going to draw the analogy to twenty years ago when there were no general counsel, the practice of law was very different twenty years ago. Law firms were smaller; they didn't have the same kind of presence and didn't face the same kind of issues. It was another thing that we talked about this morning. Twenty years ago, there weren't general counsel, but twenty years ago there weren't legal malpractice actions like there are today.

MS. MEYER

I have to add another thirty seconds [*laughter*], even though, as Steve knows, I have to leave. One can be the good firm and still assert the privilege. Let us use the hypothetical of the overbilling and the partner does the investigation regardless of whether it is the firm's general counsel or just someone in the firm. At the end of the day, the fact that there was overbilling and the fact that the money needs to be repaid and the fact that a report may need to be made are not privileged. However, if there are e-mails from the general counsel or conversations between the general counsel and partners in the firm as to, "What should we do about this? Do we have a problem? Is this illegal?," lawyers should be allowed to have those discussions. You can change the hypothetical to a conflicts check. The actual conflicts check should not be privileged, but the discussion of the conflicts check (*e.g.*, "Do we have a conflict? Under this rule, we may be able to say we do not") is privileged or should be privileged. That is a distinction that we need to make in looking at this as a policy.

MR. WEINER

Let me thank our panel. Do we have any questions or comments from our audience? [*Applause*.] Okay. We will have our next panel.

PANEL III – "GATEKEEPING" ISSUES FOR GENERAL COUNSEL: SARBANES-OXLEY AND OTHER REPORTING OBLIGATIONS

JOHN H. GROSS
CONVOCATION CO-CHAIR
MEMBER, NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

I am John Gross, member of the Institute. We have three very distinguished panelists to address gatekeeping issues for general counsel.

Irwin Warren, who is immediately to my left, is a co-head of the securities litigation and corporate governance practice of Weil Gotshal & Manges. He specializes in shareholder and complex litigation. He was co-chair of the ABA Litigation Section Committee on Class Actions and Derivative Suits, among other committees, including Ethics and Professionalism, for that Section. He is currently co-chair of the Section of Litigation's Federal Practice Task Force; in that role, he is looking at up-the-ladder reporting and whistle-blower issues under Sarbanes-Oxley. He has twice been a member of the firm's management committee and is a founding member of its ethics committee. He attended Columbia undergrad and Columbia Law School.

Joe Neuhaus is in the middle. He is a partner at Sullivan & Cromwell. His practice is focused on international commercial litigation in both court and arbitration. He is co-coordinator of the firm's arbitration practice. He has been a member and former chair of the New York State Bar Committee on Professional Ethics. He is a member of the State Bar Committee on Standards of Attorney Conduct (COSAC), which has been mightily involved in the application of the model rules to New York State. He is a member of the New York City Bar Committee on Professional and Judicial Ethics. He attended Dartmouth and Columbia Law School.

Barbara Gillers teaches professional responsibility and legal ethics at NYU and Columbia Law Schools. She has also taught professional responsibility at Fordham. She has been a member and chair of the City Bar Committee on Professional and Judicial Ethics, and a Liaison to the ABA Standing Committee on Ethics and Professional Responsibility from the Association of American Law Schools Section on Professional Responsibility. She is a member of the COSAC Committee of the State Bar. From 1998 to 2009 Ms. Gillers was of counsel to Fried, Frank, Harris, Shriver & Jacobson LLP, where she practiced in the area of the law governing lawyers and law firms, advising law firms, not-for-profit and corporate law departments and others on compliance and regulatory matters including matters before government regulators and courts. She attended Barnard College and NYU Law School.

The order of the presentation will be as follows: Irwin will speak about gatekeeping issues related to and arising under Sarbanes-Oxley. Joe will do the same with respect to the model rules and the New York Code. Finally, Barbara will address the area of attorney liability under aiding and abetting causes of action.

IRWIN H. WARREN
WEIL, GOTSHAL & MANGES, LLP

The issue of the gatekeeper general counsel of the firm is a little too narrow. Under

Sarbanes everybody gets to be a gatekeeper, and to go back to an old saw from years ago, if you are not part of the solution under Sarbanes, you are part of the problem.

The so-called "up the ladder" rules actually have a long history. It goes back to Stanley Sporkin and the days of Charles Keating and Lincoln [Savings & Loan] when people asked, "Where were the lawyers?" When – about fifteen years later – Enron and WorldCom and a bunch of others came up, the question was asked again; and Congress, this time, in Sarbanes-Oxley, passed a statute that directed the SEC to come up with standards for attorneys appearing and practicing before the Commission and requiring a reporting of evidence of material violations of the securities law or breaches of fiduciary duty to the chief legal officer of an issuer, to the CEO of an issuer, and, if necessary, to an audit committee of an issuer.[53]

The SEC acted on that.[54] The SEC got an enormous volume of comments from the organized bar and, to its credit, actually made material changes in the rules. It would have been a nightmare under the original proposal.

I will give you one big-picture caveat at the beginning. I really like Sarbanes-Oxley's rules. For the in-house general counsel or indeed, for any counselor in the securities or governance area, if you are ethical, if you are diligent, this is like giving you a two-by-four. But I also like Sarbanes-Oxley because it gives spine to the spineless. If you are somebody who plays client golf on the links and thinks your advice should be given the same way – i.e., if they look at you cross-eyed, you back down – this might just give you some spine.

As general counsel of a law firm, you have to consider: first, what do the rules provide, i.e., what do they cover? Second, what do they require? What is it they say? Third, what do you want to have in place as your structure or your process to try to make sure that you are complying with Sarbanes-Oxley, that you are enforcing it, and that you are training people? It is also useful every once in a while to do some double checking to see whether anybody is actually paying attention to what you have been saying to them; otherwise, you may get back to our last panel on what is privileged or not privileged when you discuss it.

Sarbanes can be very simply summarized, to some extent, as to what it says: namely, that attorneys "appearing and practicing" before the Commission have to report where there is credible evidence that it is reasonably likely that a material violation of U.S. federal or state law – including a possible breach of fiduciary duties, because you may have fiduciary duties under ERISA, for example – has occurred or is occurring or is about to occur.[55] But that is something of a mouthful and needs to be broken down.

The first and threshold question is what it means to say that you are an attorney "appearing and practicing" before the Commission. The really important thing for the general counsel to understand and communicate to the lawyers in the firm is that appearing and practicing before the Commission is a functional task and can require an extremely micro analysis.

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[53] 15 U.S.C. § 7245.

[54] *See* 17 C.F.R. Part 205.

[55] *See* 17 C.F.R. §§ 205.3(b)(1) and 205.2(e), (i) & (d).

Some ways that you "appear" are fairly obvious. If you are a litigator and your client is an accountant who is on the short end of a "2(e)" proceeding and you are appearing of-record, that is an easy one,[56] but the up-the-ladder rules apply, as well, any time you transact any business with the SEC.[57] If you are writing to get a no-action letter, if you are simply responding to an information request, if you simply provide advice with respect to the securities laws, including concerning any document that you have "notice" will be filed with or submitted to the SEC or even incorporated in such a document,[58] you are "appearing and practicing." If you provide advice as to whether somebody has to make a disclosure or file a document, you are appearing and practicing.[59]

In addition, you are appearing and practicing if you directly supervise an attorney who is appearing and practicing, even if you are not personally appearing and practicing. If you are simply the department head of the person who is appearing and practicing, that will not be enough – but if you have a more direct role vis à vis the person who is doing it, you are appearing and practicing.

It can get very dicey, particularly if you are an international law firm. There are exceptions for foreign lawyers, assuming they are under the supervision of a lawyer who is here and appearing and practicing.[60]

But this can potentially apply to almost anything. You are a litigator and you are writing a litigation description that may be included in a 10K. You are writing an audit response letter that you know is going to be picked up by the outside auditors in deciding, "Is this litigation material enough to require disclosure in a footnote?" All of that is "appearing and practicing" before the Commission, so the scope is very broad; and one of the things that the general counsel of a law firm has to do is make sure that everybody understands just how easy, and at times inadvertent, the process of "appearing and practicing before the Commission" under Sarbanes can be.

The second question is: what is required of someone appearing and practicing before the Commission? Let's go back to the definition. You have to report up the ladder if you have credible evidence that it is reasonably likely that a material violation of federal or state law, including breach of fiduciary duty or similar violation of law, is occurring or may occur.[61] That raises a host of questions.

No. 1: What is "credible evidence of a material violation"? If some crackpot, disgruntled

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[56] *See* 17 C.F.R. § 205.2(a)(1)(ii).

[57] *See* 17 C.F.R. § 205.2(a)(1)(i).

[58] *See* 17 C.F.R. § 205.2(a)(1)(iii).

[59] *See* 17 C.F.R. § 205.2(a)(1)(iv).

[60] *See* 17 C.F.R. §§ 205.2(a)(2)(ii) & 205.2(j).

[61] *See* 17 C.F.R. §§ 205.3(b)(1) and 205.2(e), (i) & (d).

former employee is really, really angry and sends a letter accusing the CEO of insider trading, do you have to report forthwith if you are appearing and practicing? This raises a number of questions. One of the things the SEC did in response to comments when they were adopting the rule was to say that "[*e]vidence of a material violation* means credible evidence ...,"[62] but then it becomes a lot more complex. Everybody has to sit up because this is not an easy one. "[C]redible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred ..."[63]

Now, you are all sitting there asking: "Who would ever have drafted a double negative?" It was actually an extremely intelligent thing to do – and, indeed, critically important to do – because the original rules said that you had to report when a reasonable attorney would conclude that it was reasonably likely that a material violation would occur.

In my practice, I regularly have to sit down with one of my partners to discuss, "Do we have to make a disclosure? And if we do, is this sufficient?" We all bat that around for a half hour and finally, somebody says, "Look, I really have to do some work here today. Reasonable lawyers could differ, but here is where I come out." So the question was raised, how could you be at risk under Sarbanes if a reasonable lawyer could come out that way – even though another reasonable one might not? It is phrased as a double negative for just that reason.

However, what does "reasonably likely" mean? This is sort of like the old commercial when the little old lady asks: "Prunes: are three enough, are six too many?" Reasonably likely is not "more likely than not." It is not "better than fifty percent." It is not articulated in the Rules, but my assessment is that if it is a forty percent shot or a thirty-five percent shot, then it is at least reasonably likely that there is a violation, and you have to go pursue it. If it is ten or fifteen percent, probably not; and I am not sure what happens if the odds-maker puts this one at twenty-five or thirty percent. But that is the point to keep in mind. It is an objective standard, but it is not probability.

In addition, violation of what? The regulation does refer to U.S. federal or state securities law, a material breach of fiduciary duty created by federal or state law, or a "similar violation" of federal or state law.[64] I have no guidance to give you as to what a "similar violation" would be: but if you are the general counsel of your firm, you ought to consider trying to figure out what might fall within that; and I would take an expansive view.

"Materiality": you may use the basic *Northway* test,[65] though I am never sure if the SEC believes there can be an immaterial violation of the securities laws.

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62 17 C.F.R. § 205.2(e) (italics in original).

63 *Id.*

64 *See* 17 C.F.R. § 205.2(i).

65 TSC Indus., Inc. v Northway, Inc., 426 U.S. 438 (1976).

"Forthwith": you have to report forthwith.[66] Again, this was the subject of substantial comment from the bar. If you read the release, "forthwith" does not mean "immediately" because, in fact, you really do need – and have – the time to act as a reasonable lawyer: that is, to investigate the evidence you have to see whether it is credible at all; and to see whether there is yet additional evidence that might lead you to think everything is okay.

Assuming somebody reports up, you have to have a process for "what has to be done next?" The person who reports up has to be satisfied that he or she has received a reasonable response. What is a reasonable response? That is not clear. It will depend on the circumstances. A reasonable response, though, would mean, for example: (1) a conclusion that no violation has occurred; (2) there may have been a violation, but it has been remedied; (3) it may be that the company has retained counsel and been advised that there is a colorable defense – perhaps the statute of limitations has run.

If the reporting lawyer does not get a reasonable response in a reasonable time, that person has to go over the head of the supervisory lawyer. The supervisory lawyer who gets this report has to go up the chain, get a reasonable response and at some point, that may mean going to the chief legal officer of the client. And, if you do not get a satisfactory response from the chief legal officer of the client, that may mean going to the audit committee of the board or going to the entire board itself.[67] Note: the person to whom that response is given does not have to agree with the conclusion, but she does have to believe that the conclusion given has been at least a reasonable one under the circumstances. But you have to keep going up the line until this process is satisfied.

The question then becomes, what exactly do you do about this if you are the in-house counsel or the general counsel? There are several things that you need to focus on. One is training. I'm going to use what we do at our firm, although I don't by any means suggest that it is the only way or the best way, or that somebody couldn't come up or hasn't come up with a better one. To a great degree, it is sensitivity training, to make sure that everybody understands the basic principles and concepts, because any lawyer could wind up "appearing and practicing" without knowing it. Give lectures; put it in your attorney manual; have people certify compliance to having read the manual. I know that I re-read our Sarbanes-Oxley rules a week ago when our staff reminded me to submit my certification for having read this material.

But you also need further structure because this is not easy. The question, in any particular situation, as to whether there was a disclosure requirement at all, whether what has been disclosed is adequate, or whether there has been a breach of duty can be extremely subtle; and the general counsel of the firm therefore would be wise to put a structure in place. We have a Senior Review Committee: it consists of approximately a dozen lawyers, including those who head our Securities Litigation group, our Public Company Advisory Group, our M&A group, our bankruptcy practice, and one of our foreign offices. They are a dozen of the most senior people, and the firm policy, set out in the manual, is that if you are involved in a situation where you think there is or may be a violation of law, or a disclosure issue, or something like that, you are

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[66] *See* 17 C.F.R. § 205.3(b)(1).

[67] *See* 17 C.F.R. § 205.3(b)(3).

supposed to get at least one (and it is recommended to get two) of this group involved so that people can come to consensus on the appropriate course of action. If somebody has to go up the ladder, senior resources are involved.

It is hard to monitor or see, but we know that lawyers are aware of and follow these procedures. We had one situation in which two very experienced securities lawyers from a non-New York office called me to say that they had given advice to a company's senior management that the company's disclosure was not appropriate and that the company had to make a further disclosure. Management said they would. The next disclosure came out; they hadn't. The lawyers told management, "You'd better correct it," again. The lawyers got radio silence; and they called to ask what to do. Each of them probably had more securities experience than I do, but they understood what our process was supposed to be. We all put our heads together and wrote a letter to management and the Board of Directors, explaining that we were resigning the engagement; explaining to them what the disclosure issue was; and suggesting that they get new counsel promptly and if new counsel told them the same thing, listen to them. Then we had an internal debate about whether our lawyers should or even could go to the SEC about it – which is the last point I will leave you with. When Sarbanes first came out, the big fight was whether there would be "noisy withdrawal" – that is, the lawyers must report the matter to the SEC. After extensive comments and debate, the SEC shelved that proposal. It is still on the shelf. The Rules do provide for non-mandatory, permissive disclosure.[68] But in New York and many other jurisdictions, you permissively disclose at your peril, because there is a significant argument that that rule does not trump state ethics rules on confidentiality obligations owed to your client. We had a discussion about that jurisdiction's confidentiality rules and concluded that if we did blow the whistle at the SEC, we would violate the ethics rules of the jurisdiction we were in, so we could not do more than we did. But it was a great reality check that, in fact, experienced, savvy securities lawyers outside of the New York office were sufficiently sensitive to the issues and to the firm procedure that they went to the review committee. That gives great comfort.

JOSEPH E. NEUHAUS
SULLIVAN & CROMWELL LLP

My assignment is to talk about gatekeeping issues as embodied in the ethics rules. There are probably four rules that are relevant here. One, I am going to deal with only very briefly. It is sort of the mini Sarbanes-Oxley in Rule 1.13, a reporting-up requirement if you represent the organization and you know of an officer or employee or other person in the organization acting in violation of a legal obligation of the organization that is likely to result in substantial injury to the organization.[69] Very similar to the Sarbanes-Oxley triggers. The major differences with respect to the rule are (1) it is a "knows" standard and not a credible-evidence standard the way it is under Sarbanes-Oxley, (2) it applies to all lawyers, not just those appearing before the SEC, and (3) it applies to matters related to the representation, not more generally.

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[68] *See* 17 C.F.R. § 205.3(d).

[69] *See* Rule 1.13(b).

The most important difference is that it is not a strict reporting requirement. It is a requirement that the lawyer proceed as is reasonably necessary in the best interest of the organization.[70] The rule lists a bunch of options or suggested paths that you can pursue in these situations[71] culminating, as an option, in referring the matter to a higher authority in the organization,[72] a much more flexible approach. This is all pre-Sarbanes-Oxley; DR 5-109(b) has been in the code since 1999 [effective June 30, 1999]. It is a much more flexible approach that was evidently thought of as insufficient by Congress and the SEC when it enacted Sarbanes-Oxley.

What I am really going to talk about are the three rules that deal with reporting out: when you can or have to rat on a client in the case of two rules, and when you can or have to rat on one of your colleagues, another lawyer, in the case of the third rule.

MR. WARREN

Can I object to form – "ratting"? [*Laughter*]

MR. NEUHAUS

It is a technical term. It is defined in the new rules.

Rule 3.3 is the first rule; it pertains to the reporting of client fraudulent conduct before a tribunal. It is the one on-its-face obligatory reporting-out requirement, if you want to call it that. It is a brand new rule – it is in the new rules that came into effect on April 1st – and it is a sea change in New York law.

The rule has, broadly speaking, two overlapping parts; both have to do with conduct in connection with proceedings before a tribunal. The first is if the lawyer or the lawyer's client or a witness called by the lawyer "has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."[73] So this rule applies only to evidence presented to a tribunal – in the main, testimony by a client or a witness called by a lawyer.

The second rule is broader and probably swallows up the first rule. A lawyer who represents a client before a tribunal and knows that a person – any person – "intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."[74] So it is much

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70 *Id*.

71 *See* Rule 1.13(b)(1)-(3).

72 *See* Rule 1.13(b)(3).

73 Rule 3.3(a)(3).

74 Rule 3.3(b).

broader. Any person, not just a client or a lawyer or a witness called by the lawyer, and it is any fraudulent conduct related to the proceeding, not just offering false evidence. I will come back to what that means.

The important point here, in case anybody missed it, is that the rule goes on to say that these duties apply even if compliance requires the disclosure of information otherwise protected by Rule 1.6 (the confidential information rule).[75] This rule that we just adopted is essentially the same as the ABA rule: essentially, but with some differences. It is a complete change from old DR 7-102, which provided somewhat different triggers but, importantly, provided that you had to reveal the fraud to the tribunal except when the information was protected as a confidence or a secret.[76] A confidence, of course, includes privileged information,[77] and a secret is any information gained in the course of the representation, the disclosure of which could be detrimental and embarrassing for the client,[78] which can be pretty much everything. So the exception basically swallowed the rule. Under DR 7-102, confidentiality was above the duties to the court. Ethics opinions and the Court of Appeals in New York had chipped away somewhat at that balance, but the black-letter rule really was, confidentiality above the lawyer's duties to the tribunal.

Under Rule 3.3(b), "fraudulent conduct related to the proceeding" is not just testimony presented in court. Clearly, depositions are covered. Depositions may also be covered by Rule 3.3(a)(3) since they are material evidence offered, but maybe not. But, clearly depositions are covered under Rule 3.3(b). Another thing that has come up in our practice and that is covered (we concluded) was a statement to the probation department for a pre-sentencing report. We had a pro bono client, a defendant who was pleading to crack distribution, and he told the probation department he was a drug user because, apparently – and I didn't know this – they cut you a break if you are a user as well as a seller. Who knew? But he did, and as he walked out of the interview with the probation officer, he told our associate, "You may have noticed that I lied in there, because I am not a drug user." You know, you can't make this stuff up. He actually said, "I lied in there." So we tore our hair out and ultimately felt that under the new rule, we had to disclose to the probation officer that our client had fabricated that aspect of his interview to seek sympathy. So, this phrase "related to the proceeding"[79] is broad.

A few aspects of the New York rule that are different from the ABA rule are mildly important. The ABA rule specifies that the duty to disclose continues to the conclusion of the proceedings. The New York courts, in their wisdom, eliminated that limitation, so there is no apparent temporal limitation in the rule on when you have to correct false testimony, false

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75 *See* Rule 3.3(c).

76 *See* DR 7-102(B)(1).

77 *See* DR 4-101(a).

78 *Id*.

79 Rule 3.3(b).

evidence, or fraudulent conduct that a client or any person has engaged in that you learn of. One limitation would appear to be that you have to be able to take measures that "remedy" the fraud. So a potential time limitation is "while there is still an opportunity to remedy the consequences of the fraudulent conduct," but that will continue for a long time after the conclusion of many proceedings.

The other wrinkle is that the New York courts took the definition of fraudulent conduct which is the trigger in the broader rule, and they defined it so that it is not limited to actual fraud under some applicable law. The ABA rules define "fraudulent conduct" as "conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction *and* has a purpose to deceive."[80] The aim was to eliminate merely reckless conduct that under some legal regimes like 10b-5 has been equated to fraud. The rule had been proposed in the "and" form by COSAC to the New York courts, but they changed the "and" to "or." So the fraudulent conduct that triggers all this is any conduct, whether it is fraud under the applicable law *or* has a purpose to deceive.[81] A practicing lawyer might wonder, "What if it is a technically accurate but purposefully incomplete deposition response? Or taking advantage of vagueness? Or even a question that has a purpose to mislead?" It probably wouldn't be fraudulent, I think most of you would think. For example, a witness is asked, "Did you go to the store that afternoon?" You know that a full and complete answer would be, "No, I went at 11:00 a.m. It wasn't yet afternoon." But the witness just says "No," knowing this may throw the questioner off. That is technically accurate, but the witness has a purpose to mislead. Is it fraudulent? Not in the ordinary meaning of the term. But, technically, the rule is very broad.

This prosecutorial bent to the new rules – the elimination of the temporal limitation and the "or" – is somewhat impractical. This probably results from the courts' process for revising the New York State Bar Association's proposed rules. The courts referred the rules to a committee that was comprised, with one exception, of disciplinary counsel or lawyers associated with the courts. The exception was a long-time in-house counsel. There were no lawyers practicing in law firms on the drafting committee. Now, I respect the experience of the people on the committee. They are very smart people and their depth of knowledge is extraordinary, but it is a particular kind of experience; no one there is likely to have had to wrestle with lying clients or possibly lying clients from the other side of the table, from our side of the table. So, that is Rule 3.3, the key reporting-out rule.

The second reporting-out rule that I will deal with is Rule 1.6, which is the basic rule on client confidentiality. It contains permissive rather than mandatory exceptions to confidentiality that are relevant to the gatekeeping issues. The most important one is that New York law has long permitted disclosure to prevent a future crime. That was before April 1st[82] and continues to

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[80] Model Rule of Professional Conduct 1.0(d) (emphasis added).

[81] *But see* the rest of New York Rule 1.0(i).

[82] *See* DR 4-101(C)(3).

this day.[83] The new Rule 1.6 made a small change to add not only "to prevent a crime" but also "to prevent reasonably certain death or substantial bodily harm."[84]

It makes you wonder what could cause reasonably certain death or substantial bodily harm but not be a crime. The comments cite two examples. One is the accidental discharge of toxic waste into a town's water supply.[85] Maybe. My guess is that would often be a crime. The other – this is the most interesting one – is wrongful execution. It is not a crime but is likely to cause certain death.

The New York rules and the ABA rules are slightly different. The ABA rules have a slightly broader set of permissive disclosure requirements having to do with preventing a fraud – not necessarily a crime – "that is reasonably certain to result in substantial injury to the financial interests or property of another" if the lawyer's services were used in the commission of the fraud,[86] or similarly, "to prevent, mitigate or rectify substantial injury to the financial interests or property of another" that has already occurred from fraud in which the lawyer's services had been used.[87] Those are facially broader than the New York rules because they relate not just to crimes but also to fraud and not just to bodily injury but also financial interest and, most importantly, not just to future actions but also to rectify past ones. However, because of the limitation that the crime or fraud must have involved the lawyer's services, the ABA rules are actually not that much broader than the New York rule, which already contains permission to withdraw a statement made by the lawyer, believed by the lawyer still to be relied upon and which is based on materially inaccurate information.[88] In both cases, if the lawyer's services were used in committing a fraud, the lawyer can withdraw the statement and disclose information to the extent necessary in withdrawing that statement. The ABA rule is broader, but not massively.

One important note, and one I suspect that Barbara will highlight, is that in all these circumstances under Rule 1.6, this is permissive disclosure, not mandatory disclosure. However, in many cases, if a client is going to commit a crime and your services have been used in the commission of the fraud or may be used going forward in the commission of the fraud, you will almost certainly be well advised to disclose where you can to avoid a claim of aiding and abetting or similar conduct. It would be a hard case to defend if you were being charged with aiding and abetting and, when asked on the stand whether your ethics rules permitted you to disclose these circumstances, you say, "Yes, but I decided not to." You do not have the shield of the privilege if the rules permit you to disclose.

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[83] *See* Rule 1.6(b)(2).

[84] Rule 1.6(b)(1).

[85] *See* Comment 6B to Rule 1.6.

[86] Model Rule of Professional Conduct 1.6(b)(2).

[87] Model Rule of Professional Conduct 1.6(b)(3).

[88] *See* Rule 1.6(b)(3).

I will very briefly touch on the third reporting-out rule, which is reporting lawyer misconduct; that is Rule 8.3. This rule does require one lawyer to report violations of a disciplinary rule by another lawyer but has two very important limitations. The first is that it applies only to those violations of disciplinary rules that raise a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer.[89] The second is that the rule does not require disclosure of confidential information.[90] "Confidential information" includes not just privileged information but also information gained during or relating to a representation that would be embarrassing or detrimental to the client if disclosed.[91] These are very large carve-outs. It means that most lawyer misconduct that I have had to worry about tends to be swallowed up by one of those two exceptions, either the raising of a substantial question as to the lawyer's honesty, trustworthiness or fitness, or where the reporting of the lawyer would involve disclosure of confidential information when it is not in the client's interest to do so. It tends to mean that conduct that is overreaching on behalf of a client, like pretexting (pretending that you are somebody that you are not in order to obtain information for the client), won't usually be in the client's interest to report to the authorities. Therefore, the rule says that you don't have to, although it does tend to mean that you will need to consult with the client on making that determination.

The conduct that tends to get reported is conduct that harms a client like theft of client funds or overbilling or illegal conduct in a lawyer's personal life that rises to that level of raising substantial questions as to the lawyer's honesty, trustworthiness, or fitness as a lawyer. There the major question is whether personal misconduct like minor drug use or not filing tax returns meets that standard. Barbara?

BARBARA S. GILLERS

ADJUNCT PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW
AND LECTURER-IN-LAW, COLUMBIA LAW SCHOOL

Thanks, Joe. Before turning to my topic, I want to thank Paul, Steve, John, the Judicial Institute, and the Stein Institute for organizing this conference. The issues addressed are quite important to practicing lawyers, and to the law firm counsel who advise them.

I was asked to talk about attorney liability on aiding and abetting causes of action.

Aiding and abetting client misconduct has become a significant aspect of litigation against lawyers and law firms today. Typically, a non-client alleges that the law firm aided and abetted a dishonest client's breach of fiduciary duty or fraud. Occasionally clients bring an action, for example when an organization or a partnership alleges that its lawyer aided the fraud or misconduct of a non-client officer or director.

The contexts for these actions vary. Claims arise out of alleged breaches of fiduciary

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89 *See* Rule 8.3(a).

90 *See* Rule 8.3(c)(1).

91 *See* Rule 1.6(a).

duties, fraudulent conveyances, asset concealments, and, especially important for these days, when businesses fail. In the latter situation, a bankruptcy trustee or receiver sues a law firm for its alleged role in the downfall of the company. We remember the growth of suits targeting lawyers that developed in connection with the S&L crisis of the mid-80's and early 90's. We may see a slew of such cases in the wake of the recent financial meltdown.

Let's turn to the issues.

Central Bank[92] made clear that there is no private right of action for aiding and abetting under the federal securities laws. But it is a significant component of state professional liability law.[93] And, to go back to the federal arena for a moment, I understand that there have been federal legislative efforts to revive a private right of action for aiding and abetting securities fraud.

In my allotted time, I will first give you some statistics about law firm liability for aiding client misconduct, then talk briefly about how the Restatement of the Law Governing Lawyers considers the issues, and, finally, discuss three cases.[94]

First, some statistics. In an article published in 2008, Doug Richmond reported the following:

> Since 1986, there have been at least forty-five publicly-reported settlements by, or verdicts against, law firms exceeding $20 million, thirty-four of which were attributable in whole or large part to the firm's representation of a dishonest client. In the last decade or so, there have been at least twenty-one publicly-reported settlements by or verdicts against law firms between $3-$20 million, and nine of those are attributable to the firm's representation of a dishonest client. The typical allegation in such cases is that the law firm aided and abetted the dishonest client's breach of fiduciary duty, fraud, or other misconduct, thus harming third

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[92] Central Bank of Denver, N.A. v First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994).

[93] For a very helpful review of this area, see Douglas R. Richmond, *Lawyer Liability for Aiding and Abetting Clients' Misconduct Under State Law*, 75 DEF. COUNS. J. 130 (2008).

[94] Of course, the professional responsibility rules prohibit lawyers from assisting a client's crime or fraud. *See, e.g.*, ABA Model Rule ("M.R.") 1.2(d) ("[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent"). The rules permit – and sometimes require – disclosure of client misconduct. *See, e.g.*, M.R. 1.6(b)(2) and (3) (permissive disclosure in the case of certain financial crimes or frauds); M.R. 1.2, Comment [10] and M.R. 4.1, Comment [3] (the "noisy withdrawal" rule). *See also* New York Rule of Professional Conduct ("N.Y.R.P.C.") 1.2(d) (same as M.R. 1.2(d)); N.Y.R.P.C. 1.6(b)(3) ("noisy withdrawal"). And, as Joe noted, even when a rule provides for permissive disclosure, revelation can become mandatory to avoid assisting a client's crime or fraud.

parties.[95]

The damage to reputation, the expense in time, money and angst, and the disruption caused by such actions alone should make general counsel take notice.

In trying to reduce risk in this area, general counsel face big challenges. Jurisdictions vary as to what states a cause of action. The factual questions are complex. Individual situations require nuanced analysis. And outcomes are difficult to predict – especially if a jury will decide the ultimate questions.

There are practical questions, too – how and when should the lawyer probe? Absent contrary information, a lawyer is generally entitled to assume that her clients are behaving lawfully. A lawyer should not be required, generally, to question a client's motive or to view the client with distrust. On the other hand, the courts will not permit lawyers to use their professional status to escape liability from knowingly and substantially assisting in tortious conduct. "Knowingly," "substantially," and "tortious" are the key words, of course.

The Restatement of the Law Governing Lawyers provides some background: "[A] lawyer is not liable to a nonclient for advising a client whether proposed client conduct would be lawful or for counseling a client to break a contract in the client's interest."[96] It explains, "The social benefit of proper legal advice and assistance often makes it appropriate not to hold lawyers liable for activities in the course of a representation."[97] It advises that "courts considering the civil liability of lawyers must consider how a ruling that affirms or precludes liability would affect the vigorous representation of clients within the limits of the law, including, for example, the candid expression to clients of the lawyer's views on any matter within the scope of the representation."[98] The point, of course, is that lawyers should be free to give advice – even in situations where the client might be liable – to say, for example, how the client would be liable – without the lawyer also becoming liable.

Let me turn to the three cases.

The first is *Thornwood[, Inc.] v. Jenner & Block*.[99] Thomas Thornton and James Follensbee set up a joint venture to develop Thornton's farm as a residential community and golf course. Thornton contributed the land, and also agreed to fund the partnership until it was able to secure equity investors. Thornton's "assets were quickly dissipating into the [p]artnership without any indication that the [p]artnership was likely to have any success in the near future," so

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[95] Richmond, *supra* note 93, at 130.

[96] *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 56 cmt c (2000) (references omitted).

[97] *Id.*

[98] *Id.* cmt b.

[99] 344 Ill. App. 3d 15, 799 N.E.2d 756, *appeal denied* 207 Ill. 2d 630, 807 N.E.2d 982 (2004).

he decided he wanted to get out.[100] Meanwhile, and without telling Thornton, Follensbee was negotiating with the PGA and other investors to develop the property as a high-end golf course.

Follensbee apparently knew that his secret negotiations with the other investors would result in the success of the joint venture.[101] (In fact, they did.) Without revealing these separate negotiations to his partner Thornton (and with the law firm's help, it was alleged), Follensbee negotiated with Thornton to buy out Thornton's interest.[102] Thornton's complaint charged the law firm with aiding and abetting Follensbee's breach of fiduciary duty, scheme to defraud, and scheme of fraudulent inducement.[103]

The lower court dismissed Thornton's complaint based on releases he had signed. The appellate court reversed, finding genuine issues of material fact as to whether the releases were procured by fraud.[104] Focusing on Thornton's claim against the law firm, the court said: "[The law firm] was involved in the drafting of the releases ... and, allegedly, in the acts underlying Follensbee's fraud."[105]

Explaining further, the court said, "Although Illinois courts have never found an attorney liable for aiding and abetting his client in the commission of a tort, the courts have not prohibited such actions."[106] Thornton stated a claim on which relief could be granted against the law firm, concluded the court, for essentially two reasons. First, he alleged that the law firm *knew* that (i) "Thornton and Follensbee were partners," (ii) "Follensbee had a duty to disclose the [PGA] plan to Thornton," and (iii) "Follensbee did not disclose the [PGA] plan to Thornton despite having the opportunity and duty to do so."[107] Second, he alleged that the law firm "*knowingly and substantially*" assisted Follensbee in breaching his fiduciary duty to Thornton by:

> (1) communicating the competitive advantages available to the Partnership from the [PGA] plan to other parties but specifically not to Thornton; (2) expressing Follensbee's interest in purchasing Thornton's interest in the Partnership and negotiating the purchase of that interest without disclosing to Thornton the continued negotiations with the [PGA and others]; (3) reviewing and counseling Follensbee with regard to the production of investment offering memoranda, financial projections and marketing literature, which purposely failed to identify

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100 344 Ill. App. 3d at 19, 799 N.E.2d at 761.

101 344 Ill. App. 3d at 18-19, 799 N.E.2d at 760-61.

102 344 Ill. App. 3d at 19-20, 799 N.E.2d at 761.

103 344 Ill. App. 3d at 18, 799 N.E.2d at 759-60.

104 344 Ill. App. 3d at 18 & 29, 799 N.E.2d at 759-60 & 769.

105 344 Ill. App. 3d at 26, 799 N.E.2d at 766.

106 344 Ill. App. 3d at 28, 799 N.E.2d at 768 (references omitted).

107 344 Ill. App. 3d at 29, 799 N.E.2d at 768.

Thornton as a partner; and (4) drafting, negotiating, reviewing, and executing documents, including the ... Releases.[108]

Let's turn to *Reynolds v Schrock*,[109] which tells a different story.

Clyde Reynolds and Donna Schrock bought two parcels of land together.[110] After a lawsuit between them over the jointly-owned land and other issues, they entered into a settlement agreement.[111] Lawyer Charles Markley advised Schrock in connection with the agreement, and conducted some of the negotiations with Reynolds' lawyer.[112]

The agreement provided that Reynolds would transfer his share of a property referred to as the "lodge property" to Schrock, and that Schrock and Reynolds would sell the second property (called the "timber property") and transfer the proceeds to Reynolds.[113] The agreement further provided for Reynolds to get a security interest in the lodge property if the timber property sale netted less than a certain amount.[114]

After Reynolds transferred his interest in the lodge property to Schrock, Markley advised Schrock that she could sell the lodge property. He told her, "nothing in the settlement agreement expressly required her to retain the lodge property in anticipation of the possible creation of a security interest in [Reynolds'] favor."[115] Then, with Markley's assistance, Schrock sold the lodge property to a third party before the sale of the timber property.[116] Markley asked the escrow agent to keep it confidential.[117]

Markley also told Schrock that she could "revoke the consent she had given earlier to [Reynolds'] plan to sell the jointly owned timber property."[118] Markley reasoned that Reynolds' failure to give Schrock information about the value of the timber property prior to arranging to sell it, contrary to a requirement in the settlement agreement, "freed Schrock from any obligation

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108 *Id.* (emphasis added).

109 341 Or. 338, 142 P.3d 1062 (2006).

110 341 Or. at 340, 142 P.3d at 1063.

111 341 Or. at 340-41, 142 P.3d at 1063.

112 *Id.*

113 *Id.*

114 *Id.*

115 341 Or. at 341, 142 P.3d at 1064.

116 *Id.*

117 *Id.*

118 *Id.*

to consent to the sale of the timber property."[119]

Reynolds' estate sued Schrock and Markley. It alleged, among other things, that Schrock breached her fiduciary duties to Reynolds by selling the lodge property and revoking her consent. It alleged that Markley "aided and abetted Schrock's torts."[120]

The court rejected Reynolds' claim against Markley. It established a qualified privilege from tort liability for lawyers to "safeguard[] the lawyer-client relationship."[121] Even assuming that Schrock breached a fiduciary duty to Reynolds and that Markley knowingly provided substantial assistance to her or acted in concert with her, said the court, "Markley, as Schrock's lawyer, [had] a qualified privilege from liability to [Reynolds] for assisting in that breach of duty."[122] Reynolds could defeat this privilege, said the court, only if he could show that Markley's conduct "fell outside the permissible scope of his role as Schrock's lawyer."[123]

Analyzing each of Reynolds' allegations, the court concluded that, even viewed in the light most favorable to Reynolds, they did not establish that "Markley's advice and assistance to Schrock fell outside the scope of the lawyer-client relationship or the assistance that a lawyer properly provides for a client."[124]

The last case I want to mention is *Tensfeldt v. Haberman*.[125] Some say this is an outrageous decision, that it represents a sea change on lawyer liability for aiding and abetting a client's misconduct. But I don't see why. On the aiding and abetting claim, the decision seems quite unremarkable, though important.

Robert Tensfeldt entered into a divorce agreement with his first wife.[126] As part of the agreement, Tensfeldt was required to maintain a will that gave two-thirds of his estate to their children.[127] The divorce agreement was incorporated into a court order. That is, a court determined the agreement to be fair and reasonable, approved it, and made it part of the divorce decree and judgment.

Tensfeldt later remarried. Then, with the advice of LaBudde, his lawyer, Tensfeldt re-wrote his will so that the children from the first marriage no longer got the two-thirds interest

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119 *Id.*

120 341 Or. at 342, 142 P.3d at 1064.

121 341 Or. at 349, 142 P.3d at 1068.

122 341 Or. at 354, 142 P.3d at 1071.

123 *Id.*

124 341 Or. at 355, 142 P.3d at 1071.

125 319 Wis. 2d 329, 768 N.W.2d 641, 2009 WI 77.

126 319 Wis. 2d at 337, 768 N.W.2d at 645, 2009 WI 77 ¶ 7.

127 319 Wis. 2d at 337, 768 N.W.2d at 645, 2009 WI 77 ¶ 8.

required by the divorce decree/court order.[128] LaBudde knew of Tensfeldt's obligation under the court order.[129]

The children sued Tensfeldt, his second wife, and the lawyer who drafted the new will. They claimed that the lawyer aided and abetted Tensfeldt in "unlawfully violating a court order mandating that [he] make and maintain a specific will."[130]

The court distinguished cases where a lawyer acts within the scope of her employment from cases where the lawyer assists a client in an unlawful act, i.e. violating a court order. While lawyers may have qualified immunity when advising clients on matters legitimately within the scope of the lawyer-client relationship, said the court, "that immunity is not available when the lawyer engages in fraudulent or unlawful acts."[131] Explaining its decision, the court said, "Here, [the lawyer] drafted documents that obtained for [Tensfeldt] something he was not legally entitled to – an estate plan that violated a court judgment requiring [Tensfeldt] to leave two-thirds of his net estate to his children outright. Under these circumstances [the lawyer] is not entitled to qualified immunity."[132] This is an easy case for me. It's no different than a lawyer assisting a client in destroying assets when a court order says that the client shall preserve them.

So, what should law firms and general counsel do to reduce risk? Train your lawyers to understand the context in which their services are being used and the purposes of the relevant transactions. Know the client's objectives. Examine whether the legal advice sought comes well within the scope of the lawyer-client relationship. Find out whether the matter will involve deceit or a fraud on another party. Where the state recognizes a privilege for legitimate legal advice, as in *Schrock*, make sure your lawyers stay well within the bounds. Where court orders are involved, look closely. Where possible sham transactions are implicated, talk to the client about the economic substance of the deal. Certainly, know the client. Another good resource in this area is the Report of the City Bar Task Force on the Role of the Lawyer in Corporate Governance,[133] which contains recommendations for corporate counsel in dealing with such issues.

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[128] 319 Wis. 2d at 338, 768 N.W.2d at 645, 2009 WI 77 ¶ 10.

[129] *Id.*

[130] 319 Wis. 2d at 345, 768 N.W.2d at 649, 2009 WI 77 ¶ 26.

[131] 319 Wis. 2d at 361, 768 N.W.2d at 656, 2009 WI 77 ¶ 63 (citing Strid v. Converse, 111 Wis. 2d 428, 331 N.W.2d 350 (1983)).

[132] 319 Wis. 2d at 361, 768 N.W.2d at 657, 2009 WI 77 ¶ 64.

[133] Available at http://www.nycbar.org/pdf/report/CORPORATE_GOVERNANCE 06.pdf.

MR. GROSS

Irwin, you indicated that your firm employs some protocols for inquiry into client motive. Do you want to review those briefly?

MR. WARREN

We try to give specific examples. It is a part of the sensitivity training that I had mentioned: what sorts of situations should people be sensitive to as calling for senior review people to become involved. One of the examples we give is where it appears that the primary purpose of a transaction is to affect accounting or financial reporting treatment and there is no meaningful economic purpose to what is going on. It is not that lawyers always need to do an internal investigation on a transaction that otherwise appears perfectly good. But if an attorney is looking at a transaction and there is no particular reason to do this other than to affect the accounting or financial statements, he is supposed to go to the senior review committee and find out what exactly is going on.

Similarly, I would suggest to any general counsel of a law firm that if a client comes to your firm because that client wants to do a transaction that is going to require an opinion of counsel because its former counsel would not give that opinion, that does not mean that you could not do it – but you would want to have some fairly senior eyes looking at that kind of a situation. From the perspective of the general counsel, you would want to sensitize people to those kinds of situations.

Barbara's point is a great one. If somebody wants advice on how to get around a court decree, it probably would not hurt to have some internal policies that say that is one of the issues that senior attorneys ought to be taking a second look at.

If your firm is working on a disclosure document, a useful process – depending on the nature of the document and client – might be to have somebody who is not on the deal, or not regularly doing work for that client, look at it. It would not hurt to have a second pair of eyes looking at it from a different perspective.

MR. NEUHAUS

Barbara, between the first two joint venture cases, do you see a distinction?

MS. GILLERS

I do see a distinction. The Oregon Supreme Court (in *Schrock*) recognized a privilege for what appears to be routine and legitimate legal advice. The lawyer told his client that, in his legal opinion, she had a right to breach the agreement by selling the lodge property. Then he assisted her in doing so. By contrast, in *Thornwood*, it was alleged that the law firm advised and assisted a client in conduct that was itself fraudulent – deceiving his partner with regard to investments in their joint venture, and then (it was further alleged) the law firm itself engaged in fraud and deceit when it negotiated directly with Thornwood on Follensbee's behalf.

MR. NEUHAUS

It sounds as if the lawyer [in *Schrock*] had an arguable defense.

MS. GILLERS

Yes, in *Schrock* the law firm appears to have provided legitimate and routine legal advice, whereas, according to the allegations in *Thornwood*, the law firm itself participated in the fraud, which is not, of course, within the permissible scope of an attorney-client relationship.[134]

MR. GROSS

Joe, is there any affirmative duty to inquire under the model rules?

MR. NEUHAUS

Duty to inquire into the client's or the lawyer's misconduct? The answer to that is probably "no." In each case, the lawyer has to know of the misconduct, and "know" is a defined term in the rules.[135] It "denotes actual knowledge of the fact in question."[136] There is also a "reasonably should know" definition which, "when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question."[137] However, the relevant rules (the client misconduct and lawyer misconduct rules) don't use "reasonably should know"; they use "know,"[138] so I don't think there is a duty of inquiry. From the point of view of risk management and worrying about aiding and abetting claims and so forth, the lawyer might very well be well-advised to follow up on indications that a lawyer has lied on the stand.

MR. WARREN

It suggests an interesting comparison to Sarbanes, which goes back to this sort of metaphysical "once it is reasonably likely that a violation has occurred." The premise of Sarbanes is that if you are getting to the point where something smells more than just a little bit, you are supposed to pursue the matter a little bit further. It may just be cheese, and not

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134 *See* note 94 *supra*.

135 *See* Rule 1.0(k).

136 *Id*.

137 Rule 1.0(s).

138 *See* Rules 1.13(b), 3.3(a)-(b), and 8.3(a).

something rotten: and then you can proceed on your way.

MS. GILLERS

The standard under the model rules is "actual knowledge," but knowledge "may be inferred from the circumstances."[139] A lawyer cannot ignore the obvious.[140] So, in some cases, I think inquiry might be required – certainly it would be the prudent thing to do.

MR. GROSS

Does anybody in the audience have any questions? Yes, sir.

COMMENT FROM THE AUDIENCE

I would like to go back to something that Barbara said about trustees in bankruptcy making third-party claims. Sometimes the only asset is the insurance policy. In those cases, the law firm may have failed to bring in bankruptcy counsel soon enough. Corporate departments need to watch over the client, but from a risk management point of view, corporate lawyers are not necessarily in the best position to determine when their clients need bankruptcy counsel.

A second point is that, in many cases, the *in pari delicto* defense is available. The trustee cannot bring a claim if the corporation acted wrongfully.

Finally, these types of cases often go to trial.

MR. GROSS

Any other questions? On behalf of the Institute, I want to thank everybody for attending and, particularly, our wonderful presenters. It has been a great presentation on a critically important emerging topic. So, on behalf of Stephen and myself and the other representatives of the Institute, thank you.

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[139] *See, e.g.*, M.R. 1.0(f); N.Y.R.P.C. 1.0(k).

[140] *See, e.g.*, M.R. 1.13 Comment [3].