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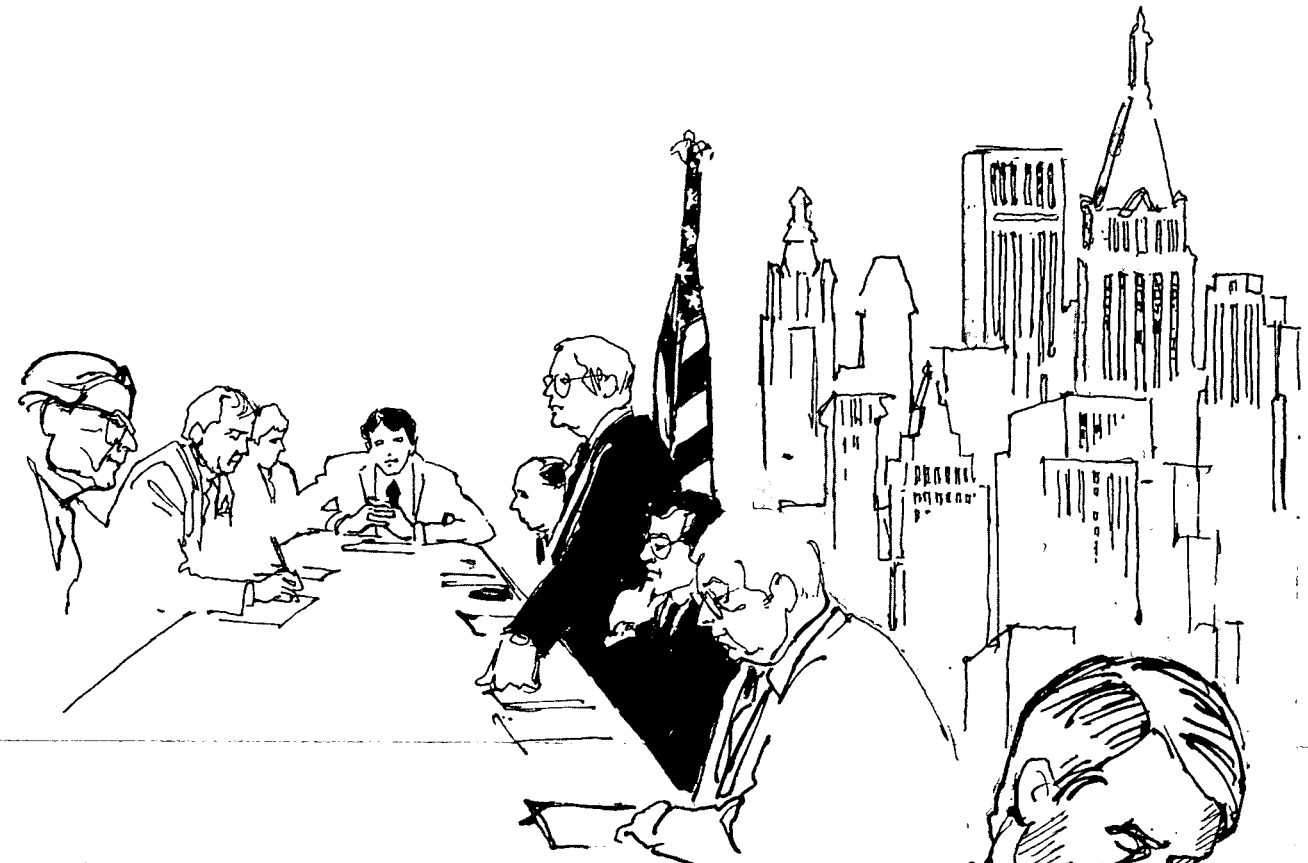
An Identity Crisis for the Corporate Lawyer

Roberta S. Karmel



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whom are they owed? To effectively carry out his responsibilities, the corporate lawyer must have clearly in mind the answers to both questions.

As noted, Ethical Consideration 5-18 is viewed by some critics as unsatisfactory in identifying the corporate client. Section 1.13 of the ABA Commission's Draft Rules speaks directly to this point when the need for client identity is greatest, *i.e.*, when a corporate manager has taken or will take action which counsel believes is improper or illegal. The proposed section specifies that a lawyer should use "reasonable efforts to prevent the harm" threatened by any corporate officer who "is engaged in or intends action, or a refusal to act, that is a violation of law and is likely to result in significant harm" to the corporation.

Those reasonable efforts include seeking reconsideration, or referring the matter to a higher authority, including, if necessary, the board of directors. The section advises that the lawyer's actions should be "designed to minimize disruption and the risk of disclosing confidences." However, if even the board persists in what the lawyer views as "clearly a violation of law . . . likely to result in substantial injury to the organization," the lawyer may go outside the corporation and disclose confidences to thwart the action.

This raises the very difficult issue of "whistle blowing." Should the lawyer be encouraged to circumvent a corporation's board of directors when it persists in a course of action he believes harmful and illegal, when the action is not the subject of legal process? In addition to the question of the lawyer's liability, there is always the question of which alternative injury is really worse from the corporation's perspective. Action by counsel to circumvent a board of directors entails disclosure of confidences which may bring great harm to the corporation. On the other hand, the eventual injury, if accurately predicted and not disclosed, may cause more harm.

Lawyers have always had two basic duties of loyalty: one to the client and one, as a professional, to the legal system. In a few traditional instances, the duty to the client has, by necessity, been deemed secondary to the professional duty. The most notably is when the client divulges he is about to commit a serious crime.

The ABA's Draft Rules would appear to expand the scope of this professional duty considerably, especially as to corporate lawyers. If adopted, the rules would require corporate counsel to consider a number of interests, only some of which will be those of the persons normally dealt with as the "client." In ways that cannot fully be appreciated now, the lawyer-client relationship and the confidences attendant to it, would probably have to give way to new ethical standards.

The Kutak Commission's push for new duties and obligations for lawyers has been given teeth by the rhetoric and actions of public officials. SEC Chairman Harold Williams has time and again stated he thinks corporate counsel is a "critical contributor" to the corporate accountability process who has societal responsibilities.[5] He has called for corporate counsel with an element of independence who will advise against conduct that is technically legal but nevertheless unethical. He believes that the advice of in-house counsel in particular "should be textured to include the social purposes the law is intended to serve and the societal expectations flowing therefrom."[6] Further, Chairman Williams has criticized the proposals of the Kutak Commission for not going far enough in the imposition of affirmative duties on counsel.

The SEC was leading the charge in efforts to change standards of professional conduct before Harold Williams became its chairman. The Commission has, in a number of enforcement cases, articulated new duties for lawyers under the securities laws, which, if breached, would constitute aiding and abetting a client's violation. In some cases these duties do not run to the identified client, but to investors generally. The *National Student Marketing* case[7] and the pending Rule 2(e) proceeding *In the Matter of William Carter and Charles Johnson*[8] are two examples of Commission initiatives to discipline corporate counsel for conduct which, in the Commission's view, did not satisfy a lawyer's duties under the federal securities laws.

The SEC's decision to formulate professional standards for securities lawyers is reflected in the liberal use it has made of Rule 2(e)[9] to discipline attorneys for unethical conduct in the past decade. I should note that the IRS is contemplating whether to exercise its administrative authority to discipline tax lawyers who do not meet certain professional standards in rendering tax opinions.[10] Presumably, the IRS would formulate those standards.

Beyond enforcement cases, there are also rule-making proposals which have been made to the SEC which, if adopted, would significantly alter the relationship of counsel to the corporation. Last summer, the SEC granted the request of a public interest group and published for public comment the so-called "Georgetown Petitions."[11] In general, the petitions propose rules which would require companies to certify to stockholders each year that all employed or retained attorneys were instructed to report to the board of directors any corporate activities that "violate or may violate the law." In addition, the rules would require companies to disclose to shareholders written agreements between a corporation and its outside attorney that specify, among other things, the frequency and nature of the counsel's contacts with the board and his obligations regarding any illegal conduct he might discover. The Commission was swamped with negative comment, and declined to act on the proposals. However, the Commission indicated that if the private sector does not take action to change the role of corporate counsel the SEC may reconsider the matter.[12]

As you may know, I was a Commissioner at the time the Georgetown Petitions were published, and I dissented from the Commission's decision to publish them. I expressed my belief that the SEC does not have any substantive authority to regulate attorneys or the practice of law in this manner. In my opinion, the proposed rules would improperly infringe upon or interfere with the right to counsel, or would regulate matters which are governed by state law and not the federal securities law.[13]

However, my objections to the Georgetown Petitions go to public policy considerations as well as legal questions about the extent of the Commission's jurisdiction. Further, my

policy problems with the Georgetown Petitions extend to the Kutak Commission's and other similar proposals. I am concerned that the adoption of these new standards for professional ethics will result in an identity crisis for the corporate lawyer which in turn will result in impaired legal service for the corporate client without any public interest being effectively served. In the effort to promote professional accountability for lawyers, we may be losing sight of the importance of the advisor and advocate roles which the corporate counsel has traditionally played. Moreover, we may be overlooking the increasing powers of the regulators, at the expense of the private sector, to dictate the future role of the corporate lawyer.

In my mind, there is not a clear line between expansion of the societal responsibilities of corporate counsel and government conscription of corporate counsel as a "civil policeman" to disclose confidences and enforce the law. Because that line is blurred in concept, it will no doubt be blurred in practice. When a corporate lawyer finds himself on a tightrope, balancing both corporate and public interests, his role becomes too confused to be of real value to his client. The attorney-client relationship under those circumstances will necessarily change. It is difficult for me to understand how a client would continue to value a lawyer as his advisor and representative in many instances. I doubt a lawyer would be consulted on matters of significance for fear that confidences may be disclosed in the name of the lawyer's professional duty.

I am also disturbed that the proposed alterations to the counsel-corporation relationship may lead to a compromise of the corporate client's civil liberties. The business community is entitled to be represented by effective counsel, and to be protected from self-incrimination. Moreover, the client's privilege as to confidentiality has been well established in the law and cannot be waived except by the client.

I have another problem which concerns the effect lawyers have on business decisions. The cautionary advice of lawyers frequently puts a chill on business judgment and risk taking. However, such advice is increasingly requested to protect against liabilities which may flow from a corporation's mistaken regulatory strategies. Of course, this is the intention behind the SEC's professional responsibility program—to use private lawyers to enforce regulatory policies.

In the abstract this sounds like a fine idea. In practice, however, it makes lawyers and their corporate clients risk adverse instead of risk takers. This dampening of the entrepreneurial spirit is bad for the economy at any tim, but especially today. I am concerned that successful imposition of the new professional obligations would make lawyers even more conservative in their advice to corporate clients, and have a detrimental effect on the exercise of business judgment by corporations.

In my opinion, if the role of corporate lawyer is cast too far beyond that of advocate and advisor, counsel will suffer an identity crisis. The role of agent, representative or confidant, as a practical matter, cannot normally be reconciled with that of independent watchdog. Overseeing management's conduct and scrutinizing business judgments are not within a lawyer's expertise and can conflict with the traditional functions of corporate counsel. When a lawyer is asked to serve two masters whose interests do not necessarily coincide, confusion arises and breeds ineffective performance to both masters.

In addition, the constant balancing of the client's private interests against the perceived interests of the public will render the lawyer perhaps uncertain as to his own advice and concerned about his own liability. He will become a less valued corporate advisor, especially when there is the risk that confidential information could be disclosed. Requiring the lawyer to become the architect for corporate accountability or the civilian policeman who aids enforcement of the federal laws will redound to the long-run detriment of the corporation in running its affairs and the public whose expectations will not be met. I am disturbed that the corporate lawyer's role is being restructured in the name of ethical or corporate accountability in such a fashion as to impair the lawyer's traditional role of advocate and advisor. As advocate and advisor the lawyer likewise serves valued public interests.

The burden of corporate accountability should be shouldered by those directly responsible—a corporation's board of directors and the public authorities charged with resolving the tough political issues involving government and business relations. Making counsel the marshall for corporate governance is a measure designed to avoid those political issues. In my opinion, the SEC has made a serious mistake in attempting to regulate the practice of law and to promote corporate accountability by claiming that lawyers have far-reaching duties to the public under the federal securities laws. At the same time, it is the heretofore unmet obligation of our elected public authorities, not corporate America or corporate counsel, to define the public interest and obtain a consensus for regulatory policies. ■

Footnotes:

[1] Address by Harold M. Williams to the Annual Meeting of The New York State Bar Association, New York, N.Y., "Freedom, Free Enterprise and the Accountability Process," January 24, 1980, p. 20.

[2] "Pro & Con: Who Merits First Loyalty of Firm's Lawyer?" *Chicago Tribune*, Section 5, December 16, 1979.

[3] "Model Rules of Professional Conduct," American Bar Association Commission on Evaluation of Professional Standards, January 30, 1980 ("ABA Model Rules").

[4] *See*, Kutak, "Coming: The New Model Rules of Professional Conduct," 66 A.B.A.J. 47, 49 (January 1980); ABA Model Rules at 1-3.

[5] Address by Harold M. Williams to the 18th Annual Corporate Counsel Institute, Chicago, Illinois, "The Role of Inside Counsel in Corporate Accountability," October 4, 1979, pp. 2, 6-8. *See also* Address by Harold M. Williams to Section of Corporation, Banking and Business Law, American Bar Association, New York, N.Y., August 8, 1978.

[6] Address by Harold M. Williams to the Annual Meeting of the New York State Bar Association, New York, N.Y., "Freedom, Free Enterprise and the Accountability Process," January 24, 1980, pp. 30-31.

[7] *SEC* v. *National Student Marketing Corp., et al.*, 457 F. Supp. 682 (D.D.C. 1978), cross appeals pending (D.C. Cir. Nos. 78-1051, 1052 and 1053).

[8] Administrative Proceeding No. 3-5464.

[9] 17 CFR 201.2(e).

[10] Remarks by Robert H. Mundheim, Treasury Department General Counsel, "Developing Standards for Tax Attorneys," delivered at Securities Regulation Institute, San Diego, California, January 18, 1980.

[11] Securities Exchange Act Release No. 16045 (July 25, 1979).

[12] "SEC Rejects Bid to Force Firms' Lawyers to Tell Boards of Employee Wrongdoing," Wall Street Journal, May 1, 1980, p. 4, col. 2.

[13] Securities Exchange Act Release No. 16045 (July 25, 1979).

ROBERTA S. KARMEL *is a partner, Rogers & Wells, New York City. Mrs. Karmel was a commissioner of the Securities and Exchange Commission from September 1977 to February 1980. This article is based on a speech which was delivered to the 2nd Annual Corporate Counsel Seminar for in-house counsel in Baltimore, Maryland on March 6, 1980.*