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Professional Tenure: Is It Really a Solution?

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Commentary

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Professional Tenure: Is it Really a Solution?

Professor Kalish's proposal to grant professional tenure to corporate staff attorneys to solve the conflict between professional and organizational obligations admittedly constitutes a provocative and unusual recommendation. Significantly, it calls into question the nature of corporate staff practice and the presumption that the professional and organizational environments of the corporate staff attorney jeopardize the attorney's ability to discharge his professional obligations. This essay will examine the underlying assumption that such a dilemma exists for the staff attorney, comment on the concept of tenure within the organizational framework of a profit-oriented corporation, and suggest that there are other factors which can sustain professional independence aside from a judicially enforced right of action for wrongful discharge.

I. IS THERE REALLY A DILEMMA? IF SO, WHAT IS IT?

The basis of Professor Kalish's proposal is that a possible, if not a probable, dilemma exists for the corporate staff attorney which is not present for the private practitioner. It is described in terms of management directives which require the staff attorney to violate canons of ethics, and of the potential infringement of management goals, policies and actions upon freedom of professional action, expression and dissent.

More specifically, the first assertion is that the corporate management will direct a particular mechanism of legal practice. Professor Kalish cites the hypothetical example of a manager directing a lawyer to negotiate with a client as distinguished from dealing with the client's counsel. There may be instances where individual managers would like to direct and, in fact, do attempt to direct corporate attorneys handling cases. However, in most cases,

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from a management point of view, bearing in mind the notion of organizational accountabilities, it is much more likely that the attorneys will be requested to produce desired results and will be given latitude in obtaining these results. In this particular example, therefore, it is probable that corporate management would be more concerned with the effect of negotiations and less with how they are actually carried out. More significantly, most responsible management would be reluctant to order an attorney to violate the canons of ethics once the attorney raised the point.

The second assertion is that organizational goals will tend to override professional responsibilities and the ability of the attorney to act in accordance with these responsibilities. This assertion raises more serious questions. For example, there is always the possibility of potential conflict between an attorney and a corporate organization where the attorney believes that proposed or actual corporate conduct constitutes a crime.[1] Here he may find himself in a position of rendering an opinion that the proposed corporate action would clearly violate the Securities Acts, the antitrust laws, the Foreign Corrupt Practices Act, or other comparable statutes which impose criminal penalties. The dilemma would arise if the corporate client failed to heed the advice of counsel to desist in its criminal conduct and the staff counsel were held responsible in some way for his client's action or had an obligation to report the activity to enforcement agencies.[2] For purposes of this discussion, the important question is whether the staff attorney is in any position different from the position of the retained or private counsel to the corporation. Or put another way, does the employment relationship between the client and the attorney affect the attorney's obligations to his client and the court?

In the context of retained or private counsel, an attorney may frequently provide advice to his client with respect to the legality of his actions. This advice is usually privileged, and the client may elect to disregard it. Ordinarily the counsel is not held liable for how the client acts on his advice unless he has some special re-

1. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS, No. 7, EC 7-8, DR 7-101 (B)(2), DR 7-102(A)(7) (1978).

2. *E.g.*, State v. Rogers, 226 Wis. 39, 275 N.W. 919 (1937) (per curiam). *See generally* Goldberg, *Policing Responsibilities of the Securities Bar: The Attorney-Client Relationship and the Code of Professional Responsibility—Considerations for Expertizing Securities Attorneys*, 19 N.Y.L.F. 221 (1973); Lipman, *The SEC's Reluctant Police Force: A New Role for Lawyers*, 49 N.Y.U. L. REV. 437 (1974); Shipman, *The Need for SEC Rules to Govern the Duties and Civil Liabilities of Attorneys Under the Federal Securities Statutes*, 34 OHIO ST. L. J. 231 (1973); Small, *An Attorney's Responsibilities Under Federal and State Securities Laws: Private Counselor or Public Servant?*, 61 CAL. L. REV. 1189 (1973).

sponsibility.[3] Generally these principles would also govern the relationship of the staff attorney to his corporate client. One possible distinction might arise if the staff attorney were requested by management to act, or assist the corporation in acting, to implement corporate conduct contrary to counsel's advice and criminal in nature. Here the attorney's role would be one of abettor rather than counselor.

A second potential problem area deals with conflicts of interest within the corporate organization. In corporate theory, the management is elected or appointed by the directors, who in turn are elected by the shareholders.[4] Consequently, the management owes a responsibility to the directors just as the directors owe a responsibility to the shareholders with respect to the preservation, utilization and deployment of the corporate assets.[5] In situations where management or director action is in conflict with or is inconsistent with the interests of the shareholders, the role of the corporate counsel becomes potentially difficult. Since he is hired by the management and may even be a part of management, he is customarily accountable to management for his actions. He is also responsible for advising the management with respect to its actions. As long as the actions of management are consistent with the interest of the shareholders there is no dilemma. However, where there is a potential diversion, corporate counsel must decide how to carry out his fiduciary responsibilities. If he decides that his duties actually run to the directors or shareholders, he may have a dilemma in discharging these duties without provoking a confrontation with management.

A third problem area is the situation where professional and organizational goals are at odds. If it is part of corporate objectives to comply with the requirements of law in the conduct of its business, then opinions of counsel which indicate and suggest how the corporation may comply should present no fundamental problems to management, assuming these opinions provide alternative means of compliance as distinguished from a rigid single-minded view. If, on the other hand, corporate management strategy is simply to capitalize on whatever individual opportunities present themselves without concern for legal compliance, then there is potential for conflict between the attorney and his corporate employer. This is a much more basic conflict, however, and one which should raise substantial questions in the attorney's mind as to whether he desires a continued affiliation with his employer.

In sum, where the corporate attorney must clarify his fiduciary

3. *See* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 60-61 (1975).
4. H. BALLANTINE, BALLANTINE ON CORPORATIONS 4 (1946).
5. *Id.* at 156, 165.

responsibility as between management directors and the shareholders, and where corporate attorneys may be called upon to participate in a criminal act, conflicts of interest may arise. Whether tenure is a reasonable response to these situations is another question.

II. ASSUMING THERE IS A DILEMMA, WHAT IS A REASONABLE SOLUTION?

For purposes of discussion, assume that there is some potential dilemma which a corporate staff attorney faces which is different from the relationship which he would have with the corporation were he in private or independent practice. From an organizational point of view, what are the options for resolving this dilemma?

In today's modern organization, there is a greater appreciation for the role of the staff attorney as a member of the management team.[6] The complexity of conducting business subject to multiple federal and state rules imposing social liability and economic constraints requires staff attorneys to participate with line management in the planning and conduct of day-to-day operations. Ultimately, the value of the attorney to the organization is based upon the attorney's credibility. This credibility not only goes to his professional competence but also to his integrity and to his practicality as a problem solver. To the extent that staff attorneys can effectively participate in problem definition and resolution, they become part of, as distinguished from being set aside from, management of the organization. In the one sense, they are potentially co-opted as becoming part of a client; in the other sense, they are able to preserve their independence because of their substantial over-all contribution.

The central issue is that of credibility. If, through their major contribution to the organization, staff attorneys obtain credibility with the balance of the organization, there will be much less inclination to subordinate them to short-term organizational objectives or attempt to override their professional responsibilities. Important considerations in this process include the tone of the law department function—how it perceives itself, its staffing and professional objectives, and its organizational relationship. Where a law department, as a staff function, reports through a vice-president to the chief executive officer, where the attorneys in that law department are recruited and trained from the highest professional ranks, and where their salaries are commensurate with their

6. *See* Gossett, *The Corporation Lawyer's Social Responsibility*, 60 A.B.A. J. 1517 (1974).

over-all contribution and responsibility and are competitive with private practice, there is much less likelihood that management will view the law department as subject to managerial directives and manipulation.

Admittedly, in a law department setting where attorneys are given routine responsibility, where they do not view themselves as problem-solvers but rather as critics of management philosophy and policy, where their conservatism leaves them simply in a negative position and offers no constructive alternatives to proposed corporate action, they will not enjoy this credibility. In those instances, there is a much greater likelihood that management will ignore their advice and thereby create potential dilemmas.

This last point is particularly significant because, as potential participants in problem definition and resolution and hence in policy formulation, in-house counsel have a unique opportunity for guiding management toward its own reorganizational goals which at the same time assure legal and ethical compliance. In fact, in this regard they enjoy a preferred status compared to outside counsel who do not necessarily share in the decision-making process.

As I have mentioned, the key to this effective participation is the credibility which the attorney brings to his client's problems. This credibility is a function of high professional standards, professional discipline, professional bearing and integrity, a practical application of the law, a thorough understanding of the client's business, and the ability of the professional to relate effectively and imaginatively to the nonprofessional client in a common problem resolution setting.

It must be recognized that professional and organizational conflicts which derive from inherent conflicts between management and shareholders may not necessarily be solved by attorney credibility. Here it may be both necessary and appropriate to retain independent counsel or to recommend that the board of directors retain independent counsel to assure that staff attorneys are freed from conflicting management pressures. However, in an environment where there is an effective working relationship between the staff attorneys and the line management, the prospect of conflicts envisioned by Professor Kalish would appear to be diminished.

III. TENURE AS A SOLUTION

Now, let's consider the concept of tenure as a solution to these organizational problems. If a lawyer was given tenure or a special employment right not afforded other employees in an organization, it would tend to set him aside from the other members of management. This segregation could be expected to affect his attitude to-

ward the organization as well as the organization's attitude toward the attorney. There is the very real likelihood that the special status afforded by tenure would tend to isolate the attorney, to make him more academic and less responsible, imaginative, creative and accountable as a member of the management team, and hence reduce his over-all effectiveness and credibility. A likely result of such an estrangement would be the isolation of the legal function from the day-to-day management of the organization. In turn, the result of this isolation would be the dilution of the potential positive impact of the staff attorney as a management participant. Put another way, it would mean that the law department would simply be referred to in order to defend the company against problems which might well have been prevented had the staff attorneys been given the effective opportunity to participate in the definition and resolution of the problems at the outset. Therefore, instead of fostering greater professionalism and reconciliation of corporate goals, tenure could well become a divisive technique which would limit the role of the staff attorney.

Tenure can also be expected to result in the dilution of the quality of professionalism within the organization. Currently in many modern corporations, professionals, like other members of management, are subject to objective performance review standards. These standards are customarily applied by professional counterparts, and specifically in the case of attorneys, by other attorney-managers. To isolate individual attorneys from this professional standard by providing the crutch or the weapon of illegal discharge will only tend to protect the incompetent, insecure and less effective attorneys from the rigors of the competitive corporate evaluative system. As a result, the more aggressive, effective attorneys can be expected to move on to other organizations or institutions where their performance can be measured on a more meritorious basis.

Finally, it is clear that Professor Kalish's recommendation for civil litigation to protect the rights of the wrongly discharged professional will only tend to foster litigation and create an adversary situation between disappointed corporate counsel and corporate employers.[7] This, in turn, can only adversely affect the image of the corporate law department within the organization as well as within the legal profession.

IV. CONCLUSION

While professional dilemmas of the type postulated by Profes-

7. *See, e.g.*, Kalish, *The Attorney's Role in the Private Organization*, 59 NEB. L. REV. 1, 8 (1980).

sor Kalish remain a distinct possibility, there is a real question of how significant they are or need be in corporate practice. In cases where potential problems arise when corporate staff attorneys are called upon to implement illegal activity of the company, the solution of tenure would probably not solve these problems and would only tend to isolate the attorney from these problems within the organization. More significantly, allowing attorneys to enjoy special privileges and relationships with their corporate employers would tend to reduce their credibility and hence their prospective role as part of the corporate management of the organization. Professionally establishing a tenure relationship will also tend to treat corporate attorneys as second-class citizens in comparison to independent practitioners.

The ultimate solution to potential conflicts of staff attorneys lies in a strong, independent, constructive and credible management of the legal function which, in turn, is viewed with respect by the management of the organization. It is this credibility which will preserve and enhance the professionalism of the staff attorney.