

## GOING NATIVE: INCENTIVE, IDENTITY AND THE INHERENT ETHICAL PROBLEM OF IN-HOUSE COUNSEL

Pam Jenoff<sup>1</sup>

### *Abstract:*

*Corporate legal departments have undergone a significant transformation over the past three decades, growing in size and influence, as well as the scope and complexity of their duties. This trend has highlighted the fact that in-house counsel are, by their very nature, unable to exercise the independent judgment that is the hallmark of the legal profession and a fundamental ethical requirement for all attorneys. This tension is omnipresent in the myriad roles which in-house counsel play as advisor, advocate and gatekeeper.*

*Scholarship examining the independence dilemma for the in-house attorney has generally attributed the problem to one of two broad causes: incentive or identity. First, the structure within which in-house counsel are employed, compensated, assessed and rewarded creates incentives for attorneys to comply with corporate objectives, rather exercise independent legal judgment. Second, through years of working solely within one corporation, in-house counsel develops an identity that is more closely aligned with the organization than with his profession. This results in cognitive biases which impair the attorney's independent judgment.*

*This article seeks to build on the earlier scholarship, which addressed either the causative influence of incentive or that of identity, by examining the complex interplay between the two and the intractable ethical conflict that results. Concluding that the independence problem of is likely not resolvable under the current corporate legal department model, the article proposes broad reforms that would effectively eliminate the role of in-house counsel by: a) utilizing instead firm attorneys who would be seconded to the company for a finite period of time; and b) creating business legal advisory positions within companies that would not be subject to the same ethical rules as practicing attorneys and would not enjoy the protection of attorney-client privilege in their communications. Such a solution would help to ensure that corporations receive the objective advice they require and that the most fundamental of attorney ethical obligations – that of independence – is preserved.*

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<sup>1</sup> Clinical Assistant Professor, Rutgers School of Law – Camden. I would like to thank Mike Carrier, Jay Feinman, Joanne Gottesman, Arthur Laby and Russ Pearce for their thoughtful comments.

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## INTRODUCTION

“Going native” is the perhaps politically-incorrect term used in international circles to describe the situation in which a diplomat, having spent too much time in a foreign country, begins to identify more with the local culture than with his own state.”<sup>2</sup> This provides a fitting analogy to the attorney who works as in-house counsel for a company for many years, operating in the corporate environment, surrounded by co-workers who are all part of the organization.

This “cultural immersion” has serious implications for the attorney’s ability to fulfill his ethical obligations. The hallmark of the legal profession is independence – the duty to render advice and to meet the requirements placed upon attorneys with respect to clients, adversaries,

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<sup>2</sup> James Joyner, “Going Native” [http://www.outsidethebeltway.com/going\\_native/](http://www.outsidethebeltway.com/going_native/) January 14, 2008.

tribunals and society-at-large without interference from external or personal concerns.<sup>3</sup>

However, as with the diplomat stationed abroad, an attorney who works within a particular organization for an extended period time may begin to identify more closely with the host entity and its constituents than his own professional organization.

The conundrum of corporate counsel's independence is further exacerbated by a second problem not present in the diplomatic analogy: incentive. The current structure of the corporate legal department, under which the in-house attorney is financially dependent upon a lone client, and is assessed, compensated, and rewarded based on his ability to satisfy that client's business objectives, creates an inducement for the attorney to provide advice that is amenable to the company's goals, regardless of whether that is the most legally salient advice.

These pressures on in-house counsel are pervasive and unrelenting, and result in a lack of autonomy and in ethical conflicts that are impossible to resolve under the current model of the corporate legal department. Moreover, the Model Rules of Professional Conduct, which purport to provide ethical guidance for all attorneys, make no meaningful attempt to address these conflicts or to address the tensions which are unique to or more problematic for in-house counsel.

Previous scholarship on the independence dilemma of in-house counsel has generally focused upon either incentive or that of identity, attempting to attribute one or the other as the sole cause and proposing modest reforms. This article seeks to add to the discussion by examining the complex interplay between incentive and identity and offering a more comprehensive solution to holistically address the problem. Part I examines the historical role of in-house counsel and ways in which this has changed in the past several decades to create a

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<sup>3</sup> E. Norman Veasey & Christine T. DiGugliemo, *The Tensions, Stresses and Professional Responsibilities of the Lawyer for the Corporation*, 62 Bus. L. 1, 9 (2006).

position of unprecedented scope and influence. Part II investigates the fundamental dilemma of in-house counsel – that of independence. Part III considers the dual sources of the conflict, incentive and identity, the intersection between the two, and the ways in which these combined factors manifest themselves in counsel’s work.

Finally, Part IV sets forth a new framework, given the intractable conflict of corporate counsel, for the provision of legal services to corporations. Recognizing that the tensions faced by in-house attorneys cannot be resolved under the existing structure, the proposal draws upon various foreign legal and non-legal models to propose reforms whereby: a) legal advice would be provided by firm attorneys seconded to corporations for a finite period of time; and b) any legal advisors who were permanently employed by the company would be designated by a status distinct from outside firm attorneys, with different rules of professional conduct and privilege.

## I. BACKGROUND

### A. EVOLUTION OF IN-HOUSE COUNSEL

The fortunes of in-house counsel over the last hundred years have been something of a rollercoaster ride. During the first third of 20<sup>th</sup> century, in-house attorneys were highly-respected and compensated players in the corporate world.<sup>4</sup> However, from the 1940’s onward, the role of corporate counsel was greatly diminished, principally as a result of two developments. First, law firms grew significantly in power and prestige during this period and attaining partnership became the ultimate goal, and those who chose to go in-house were often viewed as inferior attorneys failed to make partner at firms.<sup>5</sup> Second, the Masters in Business Administration or

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<sup>4</sup> Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 Fordham L. Rev. 955, 958 (2005); Carl D. Liggio, *The Changing Role of Corporate Counsel*, 46 Emory L. J. 1201, 1202 (1997)

<sup>5</sup> DeMott, *supra* note 4 at 959; Liggio, *supra* note 4 at 1202; Jan C. Nishizawa, *Ethical Conflicts Facing In-House Counsel: Dealing with Recent Trends and an Opportunity for Positive Change*, 20 Geo. J. Legal Ethics 849, 850 (2007).

“MBA” became the more valued business credential, and those who held it generally advanced more readily through the company ranks than those with law degrees.<sup>6</sup> Thus, corporate counsel acted principally as intermediaries during this period, handling only the most mundane of transactions and relaying more significant work to law firms.<sup>7</sup>

However, there has been a fundamental shift in the past three decades whereby corporate counsel have returned to prominence, increasing in their number<sup>8</sup> and influence, as well as the scope and complexity of their duties.<sup>9</sup> The growing importance of corporate counsel can be attributed to a number of factors. First, businesses operate in an increasingly demanding environment, one in which regulatory requirements are more onerous, transactions more complex and litigation more frequent.<sup>10</sup> As a result, companies need the continuous legal advice and support that in-house counsel can readily provide.<sup>11</sup>

Companies have also found a number of advantages to utilizing in-house counsel instead of law firms for many matters. As an initial matter, in-house legal departments can provide legal services at lower cost levels than outside counsel.<sup>12</sup> While in-house legal departments carry many of the expenses associated with employees, such as salary, benefits, office equipment, etc., they are still relatively inexpensive compared to the billable hourly rate charged by law firms.<sup>13</sup>

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<sup>6</sup> DeMott, *supra* note 4 at 959; Liggio, *supra* note 4 at 1202.

<sup>7</sup> DeMott, *supra* note 4 at 959; Liggio, *supra* note 4 at 1202; Abraham Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 Stan. L. Rev. 277 (1985); Mary C. Daly, *The Cultural, Ethical and Legal Challenges In Lawyering for a Global Organization: The Role of the General Counsel*, 46 Emory L. J. 1057 1060 (1997).

<sup>8</sup> The number of in-house counsel has grown to approximately 65,000 but has remained a relatively consistent 10% of the overall bar. Susan Hackett, *Inside Out: An Examination of Demographic Trends in the In-House Profession*, 44 Ariz. L. Rev. 609, 610 (2002).

<sup>9</sup> Nishizawa, *supra* note 5 at 851, 853.

<sup>10</sup> Liggio, *supra* note 4 at 1203-04.

<sup>11</sup> Geoffrey C. Hazard, Jr., *The Ethical Dilemmas of Corporate Counsel*, 46 Emory L. J. 1011, 1012 (1997); DeMott, *supra* note 4 at 960; Liggio, *supra* note 4 at 1203.

<sup>12</sup> Liggio, *supra* note 4 at 203.

<sup>13</sup> Daly, *supra* note 7 at 1060; DeMott, *supra* note 4 at 960; Steven L. Schwarcz, *To Make or To Buy: In-House Lawyering and Value Creation*, 33 J. Corp. L. 497, 508 (2008).

Additionally, an attorney who works for a particular company for an extended period of time comes to know that company's business practices and objectives.<sup>14</sup> This specialization eliminates or greatly reduces the time and expense that an outside attorney would require to familiarize himself upon being brought onto a matter.<sup>15</sup> In-house counsel may also achieve savings in terms of economies of scale by repeatedly performing routine transactions and tasks in large numbers.<sup>16</sup>

In addition to these cost savings, companies have found a qualitative advantage to utilizing in-house counsel. First, in-house attorneys are uniquely situated to gain information by virtue of their on-going presence in the organization.<sup>17</sup> Professor Geoffrey Hazard has analogized the nexus of information available to in-house counsel to the "water cooler":

...the places and occasions for informal information interchange that occur in all employment settings: the company cafeteria, the carpool, the informal exchanges preceding company committee meetings, the evening get-togethers during out of town trips, and even the company picnics. These are opportunities for exchange of back-channel information, office gossip, rumors and portents of future corporate undertakings that have not yet been announced officially.<sup>18</sup>

The in-house attorney's continuous presence, access to information and familiarity with business operations also enables him to engage in a more proactive rather than reactive model of lawyering by becoming involved in matters at an earlier stage and anticipating and detecting potential issues and disputes before they fully manifest themselves as problems.<sup>19</sup>

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<sup>14</sup> Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 Tenn. L. Rev. 179, 199 (2001).

<sup>15</sup> Schwarcz, *supra* note 13 at 508.

<sup>16</sup> *Id.* at 506.

<sup>17</sup> *Id.* at 504; *see also* Sally R. Weaver, *Ethical Dilemmas of Corporate Counsel: A Structural and Contextual Analysis*, 46 Emory L. J. 1023, 1027 (1997).

<sup>18</sup> Hazard, *supra* note 11 at 1012; *see also* Sung Hui Kim, *The Banality of Fraud: Resituating the Inside Counsel as Gatekeeper*, 74 Fordham L. Rev. 983, 997 (2005).

<sup>19</sup> Chayes, *supra* note 7 at 280 ("The very existence of a properly established inside counsel pushes back the involvement of lawyers to an earlier phase of a transaction and shifts the mode from reactive to proactive.");

The growth in the prominence of in-house counsel is evident in a number of ways. As an initial matter, the overall number of corporate counsel has quadrupled.<sup>20</sup> Attorneys have also gained in power and prestige within the corporate structure, with senior counsel directly advising, and in some cases being tapped as the successor to, the CEO.<sup>21</sup> Moreover, as explained in Section I.B. *infra*, in-house counsel have taken on a wider range of duties and roles, both within the legal department and externally.<sup>22</sup>

This shift has been accompanied by the recognition that corporate attorneys have a distinct professional identity, a development which can be seen most notably in the formation of the Association of Corporate Counsel of America (ACCA). Founded in 1982, ACCA grown to approximately 10,000 members.<sup>23</sup> The organization represents the interests of in-house counsel in a number of ways, including lobbying for their political interests, filing amicus briefs in relevant litigation, publishing articles and studies of interest to the in-house bar, and providing opportunities for education, interaction and exchange.<sup>24</sup>

As a result of these changes, which Robert Rosen has dubbed the “in-house counsel movement,”<sup>25</sup> in-house attorneys are now the dominant providers of legal services in corporate America.<sup>26</sup>

Despite the ascendancy of corporate counsel, the role remains a challenging one, particularly in light of the current economic downturn. Companies are downsizing and looking

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DeMott, *supra* note 4 at 960; Veasey, *supra* note 3 at 20; Kim, *supra* note 14 at 200; Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 St. Louis L.J., 941 (2007).

<sup>20</sup> Nishizawa, *supra* note 5 at 849; Daly, *supra* note 7 at 1059.

<sup>21</sup> Sung Kim, *supra* note 18 at 998; Hugh P. Gunz & Sally P. Gunz, *The Lawyer’s Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision Making of In-House Counsel*, 39 Am. Bus. L. J. 241, 242 (2002); Kim, *supra* note 14 at 206.

<sup>22</sup> Kim, *supra* note 14 at 200; Sung Kim, *supra* note 18 at 998; Gunz, *supra* note 21 at 243.

<sup>23</sup> Hazard, *supra* note 11 at 1012 (1997); *see also* Liggio, *supra* note 4 at 1211; Daly, *supra* note 7 at 1063.

<sup>24</sup> *See generally* www.acca.com.

<sup>25</sup> Robert Eli Rosen, *The Inside Counsel Movement: Professional Judgment and Organizational Representation*, 64 Indiana L. J. 479 (1989)

<sup>26</sup> Sung Kim, *supra* note 18 at 999; Milton C. Regan, Jr. & Jeffrey D. Bauman, *Legal Ethics and Corporate Practice* 212 (Thompson West 2005).

to reduce back-office expenditures. As a result, corporate legal departments, which with their high salaries and costs such as electronic research and legal education are expensive relative to other departments, are being slimmed.<sup>27</sup> Therefore there is increased pressure on in-counsel to justify his value to the company.<sup>28</sup> Additionally, companies are also seeking to reduce outside legal costs by having in-house counsel do more hands-on work with respect to litigation and transactions. Thus, counsel are required to juggle more roles than ever before.

## B. ROLES AND DUTIES

The role of in-house counsel has expanded greatly over the past several decades. Where corporate counsel once served primarily an intermediary between outside law firms and the company, they now perform a wide array of important duties. These can be broadly grouped into three categories: representation, counseling and compliance.<sup>29</sup>

First, in-house counsel now routinely represent the company in litigation and administrative proceedings, either independently or in tandem with outside counsel.<sup>30</sup> In the context of litigation, they are typically involved in many activities, preparing pleadings, prepping and conducting depositions, arguing motions in court, negotiating settlements and even acting as trial counsel in some cases.<sup>31</sup> On the transactional side, counsel may themselves handle significant deals for the company, negotiating and drafting agreements.<sup>32</sup>

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<sup>27</sup> Barbara Rose, *In-House is No Haven*, ABA Journal (June 1, 2009).

<sup>28</sup> For example 31% of attorneys responded that the need to market law the business affected the way they give legal advice. Robert L. Nelson & Laura Beth Nelson, *Cops, Counsel and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 Law & Society Rev. 457 (2000).

<sup>29</sup> Daly, *supra* note 7 at 1062.

<sup>30</sup> Liggio, *supra* note 4 at 1205.

<sup>31</sup> *Id.* at 1210.

<sup>32</sup> *Id.* at 1205.

Second, in-house attorneys take primary responsibility for counseling the company on various legal issues.<sup>33</sup> Corporate counsel provides guidance not only regarding legal conflicts or issues that have already arisen, but may also advise proactively, holding training on legal issues, drafting policies and procedures and offering recommendations as to best practices to avoid legal liability.<sup>34</sup>

Corporate counsel are also often play a prominent role with respect to regulatory matters.<sup>35</sup> This function, which is sometimes referred to as gatekeeping, involves ensuring compliance with laws and regulations at an *ex ante* stage, as well as investigating potential violations.<sup>36</sup> The in-house attorney's role as gatekeeper has taken on exponentially greater significance following scandals such as Enron and Tyco, in which corporate attorneys were found to have been negligent or in some cases complicit in fraud.<sup>37</sup> Moreover, the passage of Sarbanes-Oxley in response to these scandals has placed a greater level of responsibility upon corporate counsel for detecting and reporting suspected violations.<sup>38</sup>

In the wake of Enron and Tyco, much has been written about the role of the attorney as gatekeeper. Though a fulsome discussion of the topic is beyond the scope of this paper, it is worth offering a few observations. First, the role of the attorney gatekeeper varies widely from company to company – in-house counsel may be the primary gatekeeper in a small business, or the organization may have an entire department dedicated to compliance with whom the attorney

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<sup>33</sup> Veasey, *supra* note 3 at 6.

<sup>34</sup> Liggio, *supra* note 4 at 1205; Daly, *supra* note 7 at 1068.

<sup>35</sup> Chayes, *supra* note 7 at 284-85.

<sup>36</sup> Arthur B. Laby, *Differentiating Gatekeepers*, 1 Brooklyn J. Corporate, Financial & Commercial Law, 121, 123 (2006).

<sup>37</sup> Kim, *supra* note 14 at 984; Z. Jill Barclift, *Corporate Responsibility: Ensuring Independent Judgment of The General Counsel – A Look At Stock Options*, 81 N. Dakota L. Rev. 1, 2 (2005); Cassandra Burke Robertson, *Judgment, Identity & Independence*, 42 Conn. L. Rev. 1, 3 (2009).

<sup>38</sup> William E. Matthews, Robert M. Hoffman, & Daniel C. Scott, *Conflicting Loyalties Facing In-House Counsel: Ethical Care and Feeding of the Ravenous Multi-headed Client*, 37 St. Mary's L. J. 901, 905 (2006). *See also* Sung Kim, *supra* note 18 at 985 (noting that Sarbanes Oxley singles out inside counsel for the first time for special treatment in fight against fraud).

works. Indeed, various individuals in an organization in addition to counsel may play a gatekeeping function including internal entities or external auditors.<sup>39</sup> Gatekeeping functions may also be shared without outside attorneys who may have the advantage of greater independence with respect to reporting violations but are hobbled by the lack of access to inside information enjoyed by inside counsel which enables them to more readily detect misconduct.<sup>40</sup>

Regardless of these organizational variables, it is clear that in-house counsel generally has some role in preventing and detecting wrongdoing and is in some sense a gatekeeper. As Tanina Rostain noted, “Corporate counsel may wield great power in this respect, as they translate and operationalize legal mandates, influencing how a corporation will internalize its compliance duties.”<sup>41</sup>

Beyond these three principal areas of responsibility, in-house attorneys still maintain their traditional role of selecting and liaising with the outside lawyers.<sup>42</sup> They decide whether a matter should be handled internally or externally, and where matters are to be handled jointly by inside counsel and firm attorneys they determine the division of labor.<sup>43</sup> They also supervise the work of outside counsel.<sup>44</sup>

Significantly, the role of an in-house attorney may go well beyond the legal department, with counsel frequently participating in the business functions or decision-making processes of a

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<sup>39</sup> John C. Coffee, Jr. *Gatekeepers: The Professions and Corporate Governance* (Oxford Univ. Press. 2006)

<sup>40</sup> As Sung Hui Kim has noted, there are four quadrants to gatekeeping: 1) capability to monitor; 2) capability to interdict; 3) willingness to monitor; and 4) willingness to interdict. While in-house counsel has the advantage in the ability to monitor and interdict, willingness can be problematic because of the alignment pressures discussed in this article. Sung Hui Kim, *Gatekeepers Inside Out*, 21 *Geo. J. Legal Ethics*, 411 (2007).

<sup>41</sup> Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New research Questions*, 21 *Georgetown J. L. Ethics*, 465, 466 (2008).

<sup>42</sup> Kim, *supra* note 14 at 203.

<sup>43</sup> Chayes, *supra* note 7 at 278.

<sup>44</sup> *Id.* at 290 (“Although in the past the general counsel may have been little more than a switchboard, today with respect to outside law firms...legal services are managed with as much detailed control as other corporate services.”)

company.<sup>45</sup> Attorneys may undertake business roles as part of their duties in a legal department or may rotate out to occupy non-legal positions.<sup>46</sup> Additionally, some counsel positions may be situated in parts of the company external to the legal department, in what are known as “imbedded” attorney roles.<sup>47</sup>

Thus, at any given time, corporate counsel may be wearing numerous hats, including those of advocate, legal advisor, investigator, mediator, compliance officer, business team member, and external liaison with outside counsel.<sup>48</sup>

### C. INSIDE AND OUTSIDE COUNSEL CONTRASTED

In-house counsel often claim that their roles mirror that of their counterparts at firms.<sup>49</sup> The tendency of corporate counsel to engage in what Sally Weaver has dubbed “a public incantation of sameness...”<sup>50</sup> may be an attempt to remain on equal footing with firm counterparts and avoid the return to the perceived inferior status associated with the role in an earlier era. Alternatively, corporate counsel may feel pressure to accentuate their legal capabilities in order to be seen as valuable and non-redundant of outside attorneys in a climate of leaner budgets and constrained resources.

Notwithstanding these claims, and despite the fact that many of the duties of corporate counsel mirror those of their colleagues at firms, the two positions differ significantly.<sup>51</sup> First, while an attorney at a firm generally works for a number of different clients, in-house counsel

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<sup>45</sup> Veasey *supra* note 3 at 6, 26; Weaver, *supra* note 17 at 1028.

<sup>46</sup> Daly, *supra* note 7 at 1072 (“...some lawyers find the business side of their job so satisfying that they ultimately forsake the legal department entirely and join the ranks of senior management.”)

<sup>47</sup> DeMott, *supra* note 4 at 978; Veasey, *supra* note 3 at 35.

<sup>48</sup> DeMott, *supra* note 4 at 957; *see also* Barclift, *supra* note 37 at 5-7.

<sup>49</sup> Weaver, *supra* note 17 at 1031.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* (“Corporate counsel actually do practice law in an environment that differs dramatically from that of their colleagues in private practice.”)

has just one – the company which employs him.<sup>52</sup> He has been hired by and owes his job security to that client.<sup>53</sup> This creates much greater dependence upon the satisfaction of the client.<sup>54</sup>

In-house counsel also plays a different role on the food chain than the firm attorney. Whereas in a firm the lawyers are the rainmakers or fee generators who bring in the revenue, in a company the attorneys are back office expense and arguably more expendable.<sup>55</sup> They are therefore under pressure to make themselves relevant and useful.<sup>56</sup> Thus, an in-house attorney needs to be seen as one who facilitates and enables client objectives in order to have merit to the organization which employs him.<sup>57</sup>

While duties of the outside attorney and corporate counsel may overlap, their positions and points of view are entirely different. In-house counsel wear business as well as legal hats and participate in decision-making as officers of the company.<sup>58</sup> This model, under which the attorney participates in formulating business objectives, deviates significantly from the traditional firm-client model whereby the client determines the objectives and the attorney determines the means. As Milton Regan has noted, “if in-house counsel do indeed become integrally involved in the formulating company goals and structuring company operations, it may be unrealistic to insist that they nonetheless remain legal technicians morally unaccountable for the consequences of those activities.”<sup>59</sup>

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<sup>52</sup> *Id.* at 1027; Nishizawa, *supra* note 5 at 849; Kim, *supra* note 14 at 203.

<sup>53</sup> Kim, *supra* note 14 at 203; Sarah Helene Duggin, *The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 St. Louis L. J. 989 (2007).

<sup>54</sup> Kim, *supra* note 14 at 204.

<sup>55</sup> Liggio, *supra* note 4 at 1219.

<sup>56</sup> Sung Kim, *supra* note 18 at 1008.

<sup>57</sup> *Id.* at 1004.

<sup>58</sup> Veasey, *supra* note 3 at 6, 26.

<sup>59</sup> Regan, *supra* note 26 at 203.

None of this is to suggest that firm attorneys do not face similar conflicts. Rather, as explained in Section II *infra*, in-house counsel faces these conflicts with greater frequency and severity than outside attorneys, and the guidance and remedies available to them are scant or non-existent.

## II. ETHICAL OBLIGATIONS AND CONFLICTS

### A. DUTY OF INDEPENDENCE

An attorney's ethical obligations are generally guided by the Model Rules of Professional Conduct, which are promulgated by the American Bar Association and have been adopted by 39 states.<sup>60</sup> The Rules purport to govern all aspects of attorney conduct and are organized around the different aspects of practices such as the client-lawyer relationship, counselor, advocate, transactions with non-clients, public service, etc.<sup>61</sup> Although the Rules do include some provisions that are specific to law firms<sup>62</sup>, they are intended to cover all attorneys, regardless of where they practice. There is not a separate code of conduct for in-house attorneys.

One of an attorney's most fundamental obligations is that of professional independence.<sup>63</sup> As the preamble to the Model Rules of Professional Conduct note, "A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice."<sup>64</sup> Thus, although an attorney may work for a client, he or she has ethical duties not only to his client but to the larger legal system, including third parties and tribunals.<sup>65</sup>

The duty of independence manifests itself in a number of different ways throughout the Rules. First, when acting in an advisory capacity, an attorney must offer independent advice to

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<sup>60</sup> Randolph C. Park, *Ethical Challenges: The Dual Role of Attorney Employee as Inside Corporate Counsel*, 22 Hamline L. Rev. 783 (1999).

<sup>61</sup> See generally Model Rules of Prof'l Conduct.

<sup>62</sup> See e.g., Model Rules of Prof'l Conduct. R. 7.1-7.5 (addressing firm business matters such as advertising and communicating with prospective clients.)

<sup>63</sup> Park, *supra* note 60 at 784

<sup>64</sup> Model Rules of Prof'l Conduct. Preamble at xv.

<sup>65</sup> Park, *supra* note 60 at 783.

his client. Rule 2.1 provides that, “In representing a client, lawyer shall exercise independent professional judgment and render candid advice...”<sup>66</sup> As the comments to this rule note, “Even though the advice may be unpleasant and contrary to what the client wishes to hear, the lawyer must give a candid opinion.”<sup>67</sup> Thus an attorney must be prepared to tell a client “the good, the bad and the ugly” without fear of the consequences it will have. This may often times involve advice that is unpalatable to a client or which may slow, frustrate or stand in the way of the company’s business objectives or the desired means of achieving them.<sup>68</sup>

The Rules further reinforce the importance of attorney independence by prohibiting attorney self-interest. Rule 1.7 provides that, “A lawyer shall not represent a client if the representation of that client may be materially limited by...the lawyer’s own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation...”<sup>69</sup> The rule does not offer strict prohibitions on specific conduct but rather highlights situations in which an attorney’s independence is likely to be compromised. For example, the comment to the rule advises against equity ownership in a client by an attorney, noting that it may be “difficult or impossible” for an attorney to give independent advice when he or she has a personal interest in a transaction.<sup>70</sup>

The Rules also require attorneys to exercise independent judgment in his dealings with the legal system. For example, an attorney may only bring a claim on behalf of a client which he or she believes is meritorious.<sup>71</sup> Also, an attorney has certain duties of candor toward the tribunal with respect to the disclosure of factual and legal information that may be adverse to his

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<sup>66</sup> Model Rules of Prof’l Conduct.R. 2.1

<sup>67</sup> *Id.*

<sup>68</sup> 25 No. 8 ACC Docket 38.

<sup>69</sup> Model Rules of Prof’l Conduct.R. 1.7.

<sup>70</sup> Barclift, *supra* note 37 at 16.

<sup>71</sup> Model Rules of Prof’l Conduct.R. 3.1 (“A lawyer shall not bring or defend a proceeding, or assert or controversy an issuer therein, unless there is a basis for doing so that is not frivolous...”)

client's position.<sup>72</sup> Finally, counsel also has duties toward his adversaries which require independent judgment, such as the disclosure of discoverable evidence.<sup>73</sup>

The Rules also require an attorney to exercise independent judgment in determining when to withdraw from representing a client. For example, Rule 1.16 provides that an attorney may withdraw where representation would result in a violation of the rules of professional conduct or the law. Rule 1.16 further provides that a lawyer may withdraw where the client persists in a course of action involving the lawyer's services that the lawyer reasonable believes is criminal or fraudulent, where the client has used the lawyer's services to perpetrate a crime or fraud or where a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.

An attorney's duty of independence may be derived from sources other than the Rules of Professional Conduct. For example, a related form of independence is required by the gatekeeper or compliance duties which Sarbanes Oxley and other laws impose upon attorneys to monitor and report upon possible legal violations.<sup>74</sup> Sarbanes-Oxley requires an attorney to report credible evidence of a material violation to a higher authority within the company, such as the audit committee or the board. of directors<sup>75</sup> This requirement further intensifies the ethical dilemma of the internal attorney between his professional duties and allegiance to the organization which employs him and of which he is a member.<sup>76</sup>

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<sup>72</sup> Rule 3.3 provides that a lawyer shall not knowingly make a false statement of fact or law or fail to disclose a material fact or controlling authority or offer false evidence to the tribunal. Model Rules of Prof'l Conduct. R. 3.3.

<sup>73</sup> Model Rules of Prof'l Conduct.R. 3.4

<sup>74</sup> Veasey, *supra* note 3 at 19-20.

<sup>75</sup> 15 U.S.C. § 7201 (2002).

<sup>76</sup> Nishizawa, *supra* note 5 at 857.

## B. SITUATIONAL CONFLICTS

In addition to the obligation to exercise independent judgment in the various circumstances described above, the in-house attorney is prone to a wide range of other ethical dilemmas which may arise as a result of his lack of autonomy.<sup>77</sup> Most prevalent is the confusion over who is the client.<sup>78</sup> Rule 1.13 provides that, “A lawyer employed or retained by an organization represents the organization acting through its duly organized constituents.” The rule, which embodies what is known as entity theory, clarifies that the attorney represents the corporation and must act in its best interests.<sup>79</sup> However, the attorney interacts with the corporation through its agents, the employees, who may behave in ways which are anemic to the best interests of the corporate client.

Rule 1.13 provides that if an officer or other employee is engaged in legal violations which might be imputed to the organization the lawyer should proceed in the best interests of the organization and take steps such as referring the matter to a higher entity within the company.<sup>80</sup> In 2003, Rule 1.13 was modified to strengthen an attorney’s duty to report. Whereas before reporting was a permissive step that an attorney could take, Rule 1.13 now provides that when an attorney believes someone is acting not at the best interests of the organization he must report to the highest authority in the corporation who can act on its behalf.<sup>81</sup>

The problem arises when counsel becomes aware that the CEO or any individual with whom the attorney interacts is behaving in ways that are in conflict with the interests of the

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<sup>77</sup> Veasey, *supra* note 3 at 9 (noting that many conflicts are context-specific).

<sup>78</sup> Nancy J. Moore, *Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding Role of the Attorney-Employee*, 39 So. Tex. L. Rev 497, 538 (1998) (discussing representing multiple clients and the need to provide a corporate “Miranda” warning about the fact that the attorney represents the organization, not the individual, prior to engaging in any conversations.); *see also* Weaver, *supra* note 17 at 1028.

<sup>79</sup> Matthews, *supra* note 38 at 905; Kim, *supra* note 14 at 191.

<sup>80</sup> Model Rules of Prof’l Conduct.R. 1.13.

<sup>81</sup> *Id.*

organization, triggering the attorney's duty to report the conduct.<sup>82</sup> While outside attorneys might also encounter this scenario, it is clearly more prevalent and complicated for in-house counsel, who work alongside and in some cases for, the individual who may be engaging in misconduct. Maintaining the requisite independence to take the steps required by Rule 1.13 and reporting potentially wrongful conduct may be problematic in light of these close working, and in some cases subordinate, relationships. Additionally individual employees of the company, accustomed to receiving legal advice from in-house counsel with respect to various business matters, may be confused as to whom the attorney represents.

Another potential, albeit less likely, conflict in-house counsel may face is the situation where the attorney becomes a witness in a matter that he or she is handling.<sup>83</sup> Rule 3.7 provides that, "A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness..."<sup>84</sup> The problem arises in a variety of scenarios such as where counsel undertakes an internal investigation and then seeks to represent the company in a matter where the sufficiency of the investigation is at issue, or where the attorney participates in an underlying business decision such as a layoff which is later challenged in litigation.<sup>85</sup> Although it is certainly possible for outside counsel to find himself as a witness in litigation regarding a transaction or case that he handled, in-house attorneys are more likely to face this dilemma because of the many legal and business hats that they wear. As a consequence of having worked on the underlying matter, counsel may be precluded from handling the litigation or proceeding.

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<sup>82</sup> Park, *supra* note 60 at 791; Kim, *supra* note 14 at 205.

<sup>83</sup> In determining whether counsel should be required to testify, courts generally consider whether: 1) there are other ways to get the information needed; 2) the underlying communications at issue are privileged and/or not relevant; or 3) the testimony is crucial to the defense or prosecution of other party's case. *Shelton v. Am. Motors Corp.*, 805 F.2d 1323 (8<sup>th</sup> Cir. 1987).

<sup>84</sup> There are limited exceptions to the rule where the testimony relates to an uncontested matter, to legal services or where disqualification would work substantial hardship on the client. Model Rules of Prof'l Conduct. R. 3.7.

<sup>85</sup> Veasey, *supra* note 3 at 32.

Moreover, even where counsel is not disqualified, he may have difficulty handling objectively a case which challenges a transaction of which he was a part.

Additionally, myriad issues may arise with in-house counsel regarding attorney-client privilege and attorney work product. Generally, the communications between counsel and client in which the attorney provides legal advice are considered privileged and are not discoverable in litigation. Similarly, notes and other materials containing the attorney's legal analysis may be withheld under the work product doctrine. However, an attorney who works within a company may at various times be giving legal advice, in which case attorney-client privilege would apply or acting in a business role, in which case it would not.<sup>86</sup> Where the attorney's role becomes blurred, it may be difficult to assert the applicability of the privilege.<sup>87</sup>

### III. INDEPENDENCE PROBLEM OF IN-HOUSE COUNSEL

The Rules and other ethical obligations described in Section II, *supra*, apply with equal force to attorneys in private practice as well as in-house counsel, and the potential conflicts highlighted are present in their work as well. The question then is how, if at all, are the ethical conflicts of in-house counsel any different or more problematic? In-house counsel, by virtue of their unique placement and point of view, face an independence problem that is without parallel in the firm context in its pervasiveness and scope. In understanding the magnitude of the issue, it is necessary to examine the causes of the problem and the ways in which those causes manifest themselves in counsel's thoughts and actions.

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<sup>86</sup> Matthews, *supra* note 38 at 913; Veasey, *supra* note 3 at 27; Nishizawa, *supra* note 5 at 958-59.

<sup>87</sup> *Rossi v. Blue Cross and Blue Shield of Greater New York*, 540 N.E.2d 703 (N.Y. 1989) (stating in dicta that communications between in-house counsel and their constituents may blur the line between legal and business advice); see also John Gergacz, *Privileged Communications with In-house Counsel under Untied States and European Community Law: A Proposed Re-evaluation of the Akzo Nobel Decision*, 42 Creighton L. Rev. 323 (2009) (noting that courts may take a closer look at the applicability of attorney-client privilege when communications involve in-house counsel rather than outside attorneys.)

Scholars examining this issue have generally tried to attribute it to one of two factors: incentive or identity. The first body of scholarship casts the independence problem of in-house counsel as originating from economic incentives -- the tangible factors inherent to working for a single client, which may subtly or overtly coerce an attorney into acting in ways which otherwise would not in hopes of personal recognition and reward. The second group attempts to explain the issue in terms of social science, examining the way in which counsel perceives his identity and role, as well as the environmental factors and pressures which affect counsel's subconscious filters and decision-making processes and result in cognitive bias.

This paper posits that the problem lies not with identity or incentive but a complex intersection of the two. Counsel are subject to both the tangible incentives for compliance and the more subtle psychological biases present in the organizational setting. Taken together, these make it virtually impossible for even the most well-intentioned corporate attorneys to exercise the independent judgment required of members of the legal profession.

#### A. SOURCES OF THE CONFLICT

##### 1. INCENTIVE

Historically the scholarship addressing the independence problem of in-house counsel has focused on the issue of incentive. This emphasis is not entirely misplaced, as the structure under which in-house counsel is employed, assessed and rewarded creates innumerable pressures. Imagine a firm that only has one client, is entirely paid by that client, and whose compensation is solely determined by the performance and satisfaction of that client.<sup>88</sup> This is the role of corporate counsel. Unlike attorneys in private practice who may receive fees from numerous clients, in-house counsel is compensated solely by the company and is dependent upon the client

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<sup>88</sup> Veasey, *supra* note 3 at 11; Sung Kim, *supra* note 18 at 1001.

which employs him for salary and benefits.<sup>89</sup> Thus corporate counsel is thus beholden to the company for his financial well-being.<sup>90</sup>

Corporate counsel are often compensated with other financial incentives based upon performance and value to the corporation, such as bonuses, which can reflect a significant portion of counsel's total compensation.<sup>91</sup> Unlike at a firm, where attorneys may in large part be assessed by the number of hours they bill or the amount of business they bring in (*i.e.*, "rainmaking") the in-house attorney is evaluated by how well he helps the company achieve desired objectives.<sup>92</sup> Thus, being team player or "playing ball" often results in larger bonuses, merit increases or other compensation.<sup>93</sup>

Another major piece in the in-house counsel incentive puzzle is stock options.<sup>94</sup> Stock options are granted as incentive for management performance and are intended to align the interests of executive management with those of shareholders for a common goal of maximizing profits.<sup>95</sup> However, this model is problematic with respect to corporate counsel. First, as explained in Section II, *supra*, the Rules of Professional Conduct make clear that the attorney should be acting without regard for personal interests.<sup>96</sup> Moreover, the attorney's mandate goes beyond that of short-term profit maximization. Counsel needs to give advice about legal liability and long-term legal issues, even where the best course of action for those objectives may be

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<sup>89</sup> Sung Kim, *supra* note 18 at 1006; *see also* Veasey, *supra* note 3 at 10 ("The CEO often controls the selection, hiring, firing and compensation of the general counsel, and the general counsel generally reports to the CEO within the management hierarchy.")

<sup>90</sup> Veasey, *supra* note 3 at 11 ("In-house counsel's inability to spread employment risk over multiple clients may result in a temptation at times to "go along with" perhaps rationalizing decisions – the courses of actions sought by the managers who hold the power to hire, promote, compensate and fire them.")

<sup>91</sup> Park, *supra* note 60 at 783.

<sup>92</sup> Sung Kim, *supra* note 18 at 1003. ("Management defines objectives, identifies specific responsibilities for inside lawyers, and determines whether an inside lawyer's performance is acceptable.")

<sup>93</sup> *Id.* at 1006.

<sup>94</sup> Nancy J. Moore, *Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding Role of the Attorney-Employee*, 39 So. Tex. L. Rev 497, 538 (1998) (noting that according to one study close to 70 percent of senior in-house lawyers receive some form of stock options.)

<sup>95</sup> Barclift, *supra* note 37 at 8-9; Veasey, *supra* note 3 at 12; Sung Kim, *supra* note 18 at 1006.

<sup>96</sup> Model Rules of Prof'l Conduct.R. 1.7.

inconsistent with maximizing stock price. The attorney may also, in his capacity as gatekeeper, need to interdict with respect to plans that would increase profits but may be potentially fraudulent or violate the law. Scandals such as Enron highlighted the problem: corporate misconduct was attributed to emphasis by executives to maximize personal profits and attorneys were among those who stood to gain.<sup>97</sup>

Beyond the financial incentives of the in-house attorney's job, there is the inducement of the very job itself. With counsel employed by his lone client, all advice given is under the dangling sword of being fired and losing one's financial security.<sup>98</sup> Even for an attorney who is willing to risk losing his job, there are more significant long term consequences. As Professor Hazard noted, "The ultimate risk is not only being fired, with loss of employment, fringe benefits and pension rights, but the possibility of being professionally blacklisted.... Many [corporate officers] will not hesitate in firing a lawyer who gives them a hard time and then bad-mouthing the lawyer afterward."<sup>99</sup>

## 2. IDENTITY

Recognition of incentive as a cause of the independence problem of in-house counsel is important, but tells only half of the story. By focusing on pecuniary security and wealth maximization as the principal influences on corporate counsel, earlier analysis has failed to take into account the effect that self-perception and organizational dynamics have on the psyche of counsel.<sup>100</sup> More recent scholarship has attempted to explain the independence problem of in-counsel by utilizing social science, arguing that it is the intangible elements, the environment in

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<sup>97</sup> Barclift, *supra* note 37 at 10-11.

<sup>98</sup> Nishizawa, *supra* note 5 at 856 ("The in-house counsel therefore faces a difficult choice between not reporting and violating his ethical obligations—thus potentially losing his license—and reporting the violations and potentially losing his job.").

<sup>99</sup> Hazard, *supra* note 11 at 1015.

<sup>100</sup> Laby, *supra* note 36 at 135.

which counsel works and the pressures to which he or she is subjected, that subconsciously alter the lens through which he views his work and his decision-making processes. These articles focus on what has been dubbed the “identity” problem of in-house counsel.<sup>101</sup>

Identity is essentially the way in which an individual views himself and his role in relation to the organization and others internal and external to it.<sup>102</sup> Identity is multifaceted and, broadly conceived, may be broken down into three subsections: organizational identity, interpersonal identity and actor identity.

Organizational identity pertains to the group or body of which an individual considers himself a member. In the case of in-house counsel, the attorney is situated in the client entity rather than a law firm. Additionally, where an outside attorney generally works for numerous organizations, in-house counsel works for just one.<sup>103</sup> Moreover, he or she is likely to work for this one entity for several years, perhaps even an entire career. Thus an attorney may come to identify himself closely as a member of the organization.<sup>104</sup>

The second identity problem is interpersonal, arising from the relationships which counsel forms with others within the corporation. While in-house counsel may work with a limited number of other attorneys, most of his colleagues will be non-lawyer members of the company.<sup>105</sup> Counsel is likely to form long-term working relationships, and perhaps even friendships, with these peer employees. Additionally, the in-house attorney is likely to have very limited contact with other members of the legal profession who are not part of the company,

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<sup>101</sup> Robertson, *supra* note 37 at 14.

<sup>102</sup> *Id.*

<sup>103</sup> Kim, *supra* note 14 at 204.

<sup>104</sup> *Id.* at 206-07.

<sup>105</sup> Hackett, *supra* note 8 at 610 (noting that in-house attorneys work primarily in smaller legal departments or as solo practitioners).

unless he voluntarily seeks out bar or other professional training or activities.<sup>106</sup> Thus, the overwhelming majority of counsel's workplace interactions will be with non-lawyer members of the corporate entity.

The third aspect of identity is the actor problem: in-house counsel acts on behalf of the company and participates in business and strategic decision-making. Thus, the attorney is often asked to defend or opine upon his own decisions, removing objectivity.<sup>107</sup> As Tim Terrell noted, by acting in legal and business capacities for the company, "...counsel is often in the uncomfortable position of, in effect, rendering legal advice to himself or herself."<sup>108</sup>

Cumulatively, the effects of organizational, interpersonal and actor identity that evolve as a result of long-term membership in a sole client entity have powerful effects on counsel's subconscious.<sup>109</sup> As Cassandra Robertson observed, "When people internalize the meanings and expectations associated with these categories, these roles and ground memberships are termed identities and become a set of standards that guide behavior."<sup>110</sup> In-house attorneys who identify more readily with organizational goals than the mandates of the legal profession may be more likely to go along with business objectives rather than counsel against from a legal perspective.<sup>111</sup> These attorneys are likely to seek a certain conclusion and engage in post hoc reasoning to reach the desired end.<sup>112</sup>

The desire to reach certain conclusions may create cognitive biases in counsel's decision-making processes. First, individuals who are predisposed to certain goals may be subject to

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<sup>106</sup> Timothy P. Terrell, *Professionalism as Trust: The Unique Internal Legal Role of the Corporate General Counsel*, 46 Emory L. J. 1005, 1006-1007 (1997).

<sup>107</sup> *Id.* at 1006-07.

<sup>108</sup> *Id.*

<sup>109</sup> Robertson, *supra* note 37 at 13.

<sup>110</sup> *Id.*

<sup>111</sup> DeMott, *supra* note 4 at 977. ("Solidarity between a general counsel and other members of senior management can compromise counsel's service as a legal advisor...")

<sup>112</sup> Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 St. Louis L.J., 941 (2007).

cognitive filtering, or selective attention and interpretation.<sup>113</sup> Thus, in an effort to satisfy the organizational objectives which he has internalized, counsel may engage in motivated reasoning, justifying a directional goal by searching for and interpreting information in a way that is consistent with the sought outcome.<sup>114</sup>

These cognitive biases are heightened by heuristics, or mental shortcuts individuals employ with respect to decision-making to avoid complex analysis.<sup>115</sup> These may be particularly potent with respect to smaller, more routine decisions counsel makes on a day-to day basis with little or no reflection.<sup>116</sup> Moreover, counsel may also have bias blind spots that make it difficult to recognize and avoid their own cognitive biases.<sup>117</sup> Thus, even where one is aware of the inherent biases, they can persist.<sup>118</sup>

The fact that in-house attorneys have participated in underlying decisions further heightens the potential for bias. This phenomenon, known in the social sciences as commitment bias, demonstrates that actors tend to stick by decisions they have made even where proven wrong. They do so by focusing on information that supports the decision, also known as retrospective rationality or defensive bolstering.<sup>119</sup>

Empirical studies examining the effect of identity on in-house counsel bear out the significance of the cognitive biases created by self-association of counsel with the corporate entity. For example, a study by Hugh Gunz and Sally Gunz examining the effect of the relative salience of organizational and professional identities on counsel's decision-making concluded that those who identified more closely with the company were more likely to choose deferential

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<sup>113</sup> *Id.*, at 8-9.

<sup>114</sup> Sung Kim, *supra* note 18 at 1030.

<sup>115</sup> Cass R. Sunstein, *Moral Heuristics and Moral Framing*, 88 Minn. L. Rev. 1556 (2003).

<sup>116</sup> Laby, *supra* note 36 at 137.

<sup>117</sup> *Id.* at 11.

<sup>118</sup> Regan, *supra* note 19 at 944.

<sup>119</sup> Laby, *supra* note 36 at 144.

course.<sup>120</sup> Similarly, the work of Robert Nelson and Laura Beth Nielsen also identified a strong trend among in-house counsel to perceive themselves as business partners and render advice in a way that is amenable to corporate objectives.<sup>121</sup> Thus, the goals that counsel adopts as a result of his identity results in cognitive biases which influences his reasoning, the ways in which he processes information and the judgments he makes.

The relative intensity of the identity pressures may vary depending upon the working environment. For example, attorneys who work in smaller legal departments with fewer professional peers or who are imbedded directly within a business unit surrounded entirely by non-legal co-workers may face more intense psychological pressures than those situated in larger legal departments.<sup>122</sup> Similarly, the reporting structures of some companies, whereby the legal department reports to the chief financial officer or other non-legal executive can also increase the conformity pressures on the law department. Identity pressures may also differ depending on the seniority of an attorney's position, *e.g.*, the general counsel may have more autonomy by virtue of his position within the company and his access to the board of directors than a lower level attorney.<sup>123</sup>

## B. THE INTERSECTION OF INCENTIVE AND IDENTITY

Previous scholarship examining the independence problem of in-house counsel has focused on either incentive or identity as the cause. However, incentive and identity are not mutually exclusive factors. Rather, they overlap in ways that have a powerful effect upon counsel.

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<sup>120</sup> Hugh Gunz & Sally Gunz, *Hired Professional to Hired Gun: An Identity Theory Approach to Understanding the Ethical Behaviour of Professionals in Non-Professional Organizations*, 60 Hum. Rel. 851, 859 (2007).

<sup>121</sup> Nelson, *supra* note 28 at 477-78.

<sup>122</sup> DeMott, *supra* note 4 at 978; Veasey, *supra* note 3 at 35.

<sup>123</sup> Further empirical studies are required to understand the impact of these various environmental factors on counsel's identity.

First, it is clear that both the elements of incentive and identity are present in the in-house counsel's world. A corporate attorney is permanently situated within his sole client's organization and is subject to all of the identity factors described above. At the same time, he is dependent upon that client for financial and professional well-being. Thus, in-house counsel's thoughts, decisions and actions are affected by both the need to prosper financially and the more subconscious pressures brought on by the dynamics of the organization. These influences may affect counsel to varying degrees depending upon the situation – for example, corporate counsel may consider his own position and remuneration with respect to major decisions and transactions, but may be affected in his day-to-day role by more subtle, subconscious influences.

In addition to being co-present, the problems of incentive and identity in the workplace may also serve to reinforce and strengthen one another. One such example is the relationship between counsel and those in higher positions within the company.<sup>124</sup> Counsel may feel the “vertical pressure” of obedience and alignment, based on his subordinate position within the organizational hierarchy.<sup>125</sup> As Sung Hui Kim noted, “Unlike outside lawyers, inside lawyers have a psychological contract with management that is more relational than transactional because of the continuing nature of their role as long-term or indefinite-term employees or subordinates.”<sup>126</sup> However, this pressure is undeniably compounded by tangible incentives, and the conscious recognition that those who he seeks to please directly control his financial and professional security and well-being. Thus, the hierarchical relationship of a company lawyer to senior management may affect both the attorney's identity and desire to render business advice

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<sup>124</sup> Vertical pressures may also vary depending upon counsel's relative seniority within the legal department and business organization (e.g., general counsel versus rank-and-file attorney) but are present to some extent at all levels.

<sup>125</sup> Sung Kim, *supra* note 18 at 1001.

<sup>126</sup> *Id.* at 1004.

that is helpful rather an obstructive. At the same, this reporting relationship creates powerful incentives in the way an attorney is assessed and compensated.

The dual pressures of incentive and identity exist not only with respect to the superior-subordinate relationship but also in regard to counsel's co-workers and constituents. Studies reveal that counsel experiences formidable "horizontal" pressure to be a team player and get the deal done.<sup>127</sup> Additionally, because attorneys in companies are not revenue generators but are back office expense there is a need to be seen as relevant and bringing value to the business.<sup>128</sup> Implicit in this is the mandate to make advice palatable to the business in order to build trust with their clients. In-house attorneys fear that if they are too obstructionist clients will seek out a different attorney who is more amenable or perhaps forego legal advice altogether, which will cause either the individual attorney or the legal department as a whole to be seen as expendable.<sup>129</sup> Thus, there is pressure to work as a business partner and to reach the objectives that they seek sometimes at the expense of legal issues.<sup>130</sup> Such tension comes as a result of both the subconscious need to achieve the organizational objectives as well as the recognition of the need for compliance to protect one's own position and interests.

The working relationships counsel forms with his peers can also produce formidable social pressures which implicate both identity and incentive. An attorney who works in an organization for a long time becomes psychologically intertwined with co-workers. At the same time he may be called upon to render advice which affects not only his own well-being but that of his co-workers. The attorney may consciously or subconsciously choose courses of action

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<sup>127</sup> *Id.* at 1019; Nelson, *supra* note 28 at 471 ("Staff functions such as the law are under pressure to reduce costs and reduce the drag on the velocity of business transactions."); Kim, *supra* note 14 at 207 ("Inside lawyers are often reminded that they are part of the corporate team and rewarded when they act as team players.")

<sup>128</sup> Sung Kim, *supra* note 18 at 1008.

<sup>129</sup> Nelson, *supra* note 28 at 477; Sung Kim, *supra* note 18 at 1006 ("...inside counsel feels unremitting pressure to justify herself and her department as a corporate cost center."); Regan, *supra* note 111 at 213.

<sup>130</sup>No. 2 ACC Docket 23 at \*27.

that will be most beneficial to his peers, such as approving a deal that will maximize employee profits or avoid a layoff.

The compounded problem of identity and incentive is exemplified in a process known as the employee satisfaction survey. Companies periodically survey their employees on a wide range of subjects, including morale and concerns. These surveys frequently contain questions regarding how well the employee perceives various departments to perform, including the legal department, information technology, human resources, etc. As a result, the legal department is assessed by its internal constituents on how well it has met their business needs. The score which the department receives may determine part of the lawyer's compensation. This type of assessment incorporates both notions of identity (that co-workers are somehow clients to be pleased) and a strong financial incentive to satisfy business objectives at the expense of independent judgment.

### C. INCENTIVE AND IDENTITY MANIFESTED

Recognizing that the dual pressures of incentive and identity are present in corporate counsel's work environment, it is necessary to revisiting the various in-house attorney roles discussed in Section I *supra* to understand how they combine to affect counsel's judgment and actions.

First, with respect to counsel's role as advisor, an attorney is expected to render independent advice, even where it may be unappealing to the client or may frustrate or thwart business objectives.<sup>131</sup> Both identity and incentive are implicated in such a scenario. As a result

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<sup>131</sup> Nelson, *supra* note 28. This study assessed the self-perception of corporate counsels' role as "cops" (gatekeepers), counselors or entrepreneurs (business partners) found that lawyers were very reluctant to assert themselves in the gatekeeping roles which have now become so important. Rather, in-house counsel viewed their role increasingly as that of entrepreneur, bringing a mix of business and legal advice to further organizational objectives; *see also* Sung Kim, *supra* note 18 at 1017 ("These empirical findings suggest that the agnostic view of the law (with the focus on adding value) has become the dominant role ideology for inside counsel in the twenty-first century.")

of the cognitive biases which result from counsel's organizational identity, he may fail to perceive the risk or may minimize the risk in order to achieve business objectives.<sup>132</sup> Second, with respect to incentive, counsel may be reluctant to advise against a course of action which may be potentially beneficial to him. He may also hesitate to fully apprise the company of the negative consequences of a desired course of action out of fear of repercussions for his job.<sup>133</sup>

The conflict presented by the dual pressures of identity and incentive is also readily apparent when counsel is acting in a gatekeeper capacity. An attorney who is part of an organization and more focused on business objectives than legal mandates may have a hard time recognizing conduct which is potential fraudulent or unlawful.<sup>134</sup> Moreover, the relationships an attorney has developed may make it even more difficult to report on potential wrongdoing. Similarly, as to the incentive problem, an attorney may fear personal and professional backlash from reporting those with whom he works. As the American Bar Association's Task Force on Corporate Responsibility noted, "...the desire to advance within the corporate executive structure, may induce lawyers to seek to please the corporate officials with whom they deal rather than to focus on the long-term interest of their client, the corporation."<sup>135</sup> Thus, the lawyer acting as gatekeeper faces a perpetual dilemma: police mildly and preserve the relationship but risk ones professional standing, or monitor robustly as required by professional obligation but risk alienating the client.<sup>136</sup>

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<sup>132</sup> Robertson, *supra* note 37 at 14.

<sup>133</sup> Veasey, *supra* note 3 at 11 ("In-house counsel may be tempted to refrain from challenging courses of action sought by management for fear of placing his or her livelihood at risk.")

<sup>134</sup> Nishizawa, *supra* note 5 at 856 ("The fact that management can be very involved in the selection of in-house counsel may be a negative incentive for the in-house counsel to independently investigate potential violations of the law."); Laby, *supra* note 36 at 137 ("Dependent gatekeepers, far more than independent ones, perform their responsibilities under the yoke of unconscious bias that affects the rigor they bring to the gatekeeping task and the accuracy of their judgments.")

<sup>135</sup> Report of the American Bar Association's Task Force on Corporate Responsibility (March 31, 2003).

<sup>136</sup> Laby, *supra* note 36 at 135.

For these same reasons of identity and incentive, the in-house attorney may be unable to exercise the requisite duty to meet his obligations to the tribunal or third parties. Counsel, viewing matters through the corporate lens, may fail to clearly recognize these external obligations. Or where counsel is aware of a duty owed to a third party, he or she may have disincentive to act in an independent manner because of the risk and rewards attendant to going along with corporate culture.

These various influence affect the choices made by counsel in their daily work in powerful ways as they engage in a subconscious process that weighs the tangible and intangible risks and rewards of their actions.<sup>137</sup>

#### IV. PROPOSAL

##### A. THE NEED FOR REFORM

The pressures of both incentive and identity are present in the current structure of the corporate legal department and combine to infringe upon the independent judgment of in-house counsel with a number of problematic effects. First, weaknesses in the ethical code leave room for the law to be broken. As one scholar observed, “Behavioral origins of lawyer acquiescence in corporate fraud are found in commonplace workplace interactions.”<sup>138</sup> Indeed, the complicity of attorneys in high profile cases such as Tyco and Enron has prompted judges to ask, “Where were the lawyers?” with the troubling answer that the attorneys were there at the heart of the scandal, either refusing to see the crime that was being committed or in some cases facilitating it in the name of zealous advocacy.<sup>139</sup> Beyond these high-profile cases, there has been on a more

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<sup>137</sup> Regan, *supra* note 19 at 942.

<sup>138</sup> Sung Kim, *supra* note 18 at 997.

<sup>139</sup> Robertson, *supra* note 37 at 14.

granular level a rise in the number of charges and investigations involving misconduct by in-house attorneys.<sup>140</sup>

Even separated from any actual or potential misconduct, lack of independence on the part of in-house counsel is troubling because it results in a perpetual ethical conflict. The obligations set forth in the Rules of Professional Conduct go to the heart of the legal profession, the notion that attorneys owe a duty to society and the legal system, a standard regardless of specialization or where or how they practice. This standard is a promise and it is part of what allows society to place special trust in the lawyers. By allowing one type of lawyer to deviate from the rules, that standard is lowered, the trust compromised.

Yet a relatively low number of in-house attorneys are willing to acknowledge openly the inherent conflicts they face on a day-to-day basis.<sup>141</sup> ACCA has been seemingly reluctant to discuss the issue, and a review of the organization's website archives finds only a few articles that discuss the ethical conflicts faced by in-house counsel.<sup>142</sup> Those pieces generally acknowledge the tension in-house counsel faces: "But clearly, to be effective, you have to be a partner to the CEO as well as a guardian to the corporation."<sup>143</sup> But rather than addressing the conflict holistically, the authors focus on limited situational conflicts, such as the risk that corporate officers may misperceive who the attorney represents, and advocate for practical safeguards such as the corporate Miranda warning.<sup>144</sup> They also spend much time discussing how to couch advice in a way that is palatable to the corporate constituency, thereby

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<sup>140</sup> For example during the period 2002-2005 the SEC initiated 30 enforcement proceedings against predominantly in-house attorneys. DeMott, *supra* note 4 at 956.

<sup>141</sup> Gunz, *supra* note 21 at 276 (examining the relatively low level of organizational-professional conflict reported by in-house counsel).

<sup>142</sup> ACCA Docket 38; ACCA Docket 23.

<sup>143</sup> ACCA Docket 38.

<sup>144</sup> ACCA Docket 23

underscoring the pressures which in-house counsel face and the impossibility of rendering independent legal judgment in that role.<sup>145</sup>

Nor is there helpful guidance available elsewhere to in-house counsel in dealing with these ethical issues.<sup>146</sup> The Rules of Professional Conduct do not provide separate advice for situations which are unique to or more prevalent in the role of in-house counsel. Indeed, in-house attorneys are likely to have less resources available to them when addressing ethical issues than their firm counterparts. For example, firm attorneys spend a great deal of time checking to ensure that there is no conflict before taking on a new representation and firms may have individuals or entire departments dedicated to ensuring that conflicts are avoided.<sup>147</sup> But in-house lawyers generally do not have the same experience with or resources for dealing with this issue.<sup>148</sup>

#### B. EXISTING SCHOLARSHIP

As explained in Section III, *supra*, a limited number of scholars have attempted over the past few decades to address the ethical issues confronting corporate counsel. Their work may roughly be characterized in two groups: the first developed in the mid-1990s as a result of the growing role and influence of in-house counsel. These articles tended to address some of the situational conflicts that in-house counsel face, such as the tensions that arise when representing both the corporate entity and its agents, or the implications of attorneys wearing multiple hats for the attorney-client privilege.<sup>149</sup>

The second wave of scholarship on ethical issues confronting corporate counsel has emerged in the past decade followed the Enron and Tyco scandals and the enactment of Sarbanes

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<sup>145</sup> ACCA Docket 38 (discussing the form, place and style of giving bad advice.)

<sup>146</sup> Moore, *supra* note 78 at 498.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Park, *supra* note 60 at 792; Matthews, *supra* note 38 at 913.

Oxley in 2002. These articles focused on the new and enhanced compliance obligations placed upon corporate attorneys, including the efficacy of counsel as gatekeeper and the conflicts that inevitably arise in trying to police an organization of which one is a part.<sup>150</sup>

With respect to both scholarly epochs, there is widespread consensus throughout the literature that in-house counsel face significant and widespread ethical conflicts, and that the rules as presently written do not sufficiently address these issues.<sup>151</sup> However, the articles suggest limited, piecemeal fixes that neither holistically address nor offer a comprehensive solution to the larger independence problem of in-house counsel.

Proposals by these scholars to address the ethical conflicts faced by in-house counsel fall into two general categories. The first body of work claims that the conflicts can be ameliorated through attorney judgment, leadership and self-awareness.<sup>152</sup> These solutions are generally put forth by those who see the problem of in-house counsel as one of identity and offer ways in which an attorney or in-house counsel can overcome the cognitive biases through self-regulation.<sup>153</sup> For example, some commentators tout the importance of attorneys maintaining their professional identities through continuing legal education and bar membership.<sup>154</sup> Another has noted that a strong leadership role by the general counsel protecting junior lawyers from business pressures may abate many conflicts.<sup>155</sup> These articles generally share the theme that the

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<sup>150</sup> Sung Kim, *supra* note 18 at 1008; Laby, *supra* note 36 at 127.

<sup>151</sup> Nelson, *supra* note 28 at 457 (“Inside lawyers limit their gatekeeping functions, emphasize their dedication to managerial objectives, and defer to management’s judgments about legal risk.”); *see also* Weaver, *supra* note 17 at 1050.

<sup>152</sup> Terrell, *supra* note 106 at 1009 (“...the position of general counsel carries with it an inherently higher set of lawyering values that, when exhibited, merit special acclaim.”)

<sup>153</sup> Hazard, *supra* note 11 at 1021; Terrell, *supra* note 105 at 1009; Liggio, *supra* note 4 at 1212.

<sup>154</sup> Liggio, *supra* note 4 at 1212; Robertson, *supra* note 37 at 45.

<sup>155</sup> Hazard, *supra* note 11 at 1021.

ethical dilemmas corporate attorneys face are outweighed by the benefit counsel may have in affecting positive corporate values and change.<sup>156</sup>

There are several problems with this self-regulating, or “man of honor” approach. As an initial matter, such solutions require corporate counsel to police their own actions, recognize potential conflicts and avoid them. This is not different from the general obligation, imposed by the Model Rules of Professional Conduct, that attorneys detect and avoid conflicts of interest. But it ignores at least two fundamental differences between inside and outside attorneys. First, in-house counsel, by virtue of being part of the organization, are subject to much stronger cognitive biases and bias blindspots, which can impede their ability to recognize conflicts. Additionally, while counsel may be able to spot and avoid conflicts in major business decisions, he is unlikely to be able to account for and reconcile the biases affecting dozens of smaller actions undertaken every day with little or no conscious thought.

Second, even where in-house counsel is able to identify a conflict, he does not have the same remedies available to him. Rule 1.16 provides the means by which an attorney may withdraw from a representation where a conflict exists. Thus, in the firm context, an attorney may cease to handle a particular matter or work for a client altogether. This is far more difficult, if not impossible, for in-house counsel, where withdrawing from representation is tantamount to resigning and losing one’s livelihood.

Additionally, the proposals of legal education and professional affiliations as a means of resolving the independence issue are simply inadequate. Counsel operates daily within the client organization and the identity pressures are omnipresent. The limited nature of these external

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<sup>156</sup> Nishizawa, *supra* note 5 at 861 (touting the general counsel as a champion of cultural transformation who “shapes how the corporation addresses its relationships with law and regulation.”)

professional affiliations is hardly an effective counterbalance. The ability to reduce bias through awareness education is similarly limited.<sup>157</sup>

Moreover, reliance upon the self-awareness of individuals to attempt to reconcile the independence problem is conceptually misplaced. While perhaps the majority of corporate counsel who walk the tightrope in an attempt to avoid ethical conflicts, and some who succeed, this does not eliminate the conflict inherent in their roles. Further, it misconstrues the purpose of the rules – they do not exist simply because certain individuals are more or less likely to engage in ethical violations but rather to establish the standard for the profession. To allow exceptions and a de facto state of violation based on the presumption that in-house counsel are somehow better able to handle the conflict is not consistent with that purpose.

The second body of scholarship proposes limited structural reforms primarily aimed at ameliorating some of the direct incentive pressures counsel face. For example, some scholars recommend that counsel should clearly delineate their roles in terms of who they represent, and some suggest a written agreement noting the attorney's duties and his professional independence.<sup>158</sup> Proponents of this approach claim that the potential conflicts can be obviated by having “full, free and frank” discussions with the board and executives about the potential pitfalls of serving in multiple roles.<sup>159</sup>

In the same vein, others suggest structural limitations, such as limiting counsel to legal roles and not permitting them to serve on the board of the company by which they are employed.<sup>160</sup> Proposed reforms also include regulating or eliminating attorney stock options or

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<sup>157</sup> Robertson, *supra* note 37 at 34-5 (noting that debiasing through education cannot resolve the identity dilemma).

<sup>158</sup> Matthews, *supra* note 38 at 912; Park, *supra* note 60 at 794.

<sup>159</sup> Matthews, *supra* note 38 at 912; Park, *supra* note 60 at 794.

<sup>160</sup> Kim, *supra* note 14 at 260; Weaver, *supra* note 17 at 1034; DeMott, *supra* note 4 at 956; Barclift, *supra* note 37 at 31.

having counsel reporting directly to the board rather than within the corporate structure.<sup>161</sup>

Finally, some have suggested that corporate attorneys retain outside counsel where there is a possible conflict of interest or appearance of impropriety.<sup>162</sup>

These suggested reforms are also problematic. First, to the extent that they attempt to separate the attorney's conduct from financial incentives such as bonuses and compensation, they miss the point that the ultimate financial incentive – retention of one's job, remains omnipresent in the mind of corporate counsel.

Perhaps more importantly, these proposals are largely premised on the assumption that the independence problem of in-house counsel is rooted conscious choice and that it can be prevented.<sup>163</sup> By addressing only the incentive component of the in-house counsel problem, these purported solutions ignore the identity dilemma – that in-house counsel will still be subject to the same cognitive issues arising from being situated in the company and interacting with co-workers over the long term. This again disregards the cognitive bias that may hamper the attorney and does not take into account the day-to-day ways in which these biases may affect attorney judgment.

### C. TOWARD A NEW MODEL

A review of the scholarship makes clear that no one has yet offered a solution that takes into account the problems of identity and incentive, perhaps because the proposals all contemplate solutions within the corporate legal department as it now exists. This article posits that it is simply not possible to operate within the corporate organization and meet the existing ethical obligations of the legal profession. The role of in-house counsel, one in which the

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<sup>161</sup> Veasey, *supra* note 3 at 13; Kim, *supra* note 14 at 1053.

<sup>162</sup> Weaver, *supra* note 17 at 1045-46.

<sup>163</sup> Robertson, *supra* note 37 at 34.

attorney is part of the client organization and wholly dependent upon that entity for his livelihood, cannot be reconciled with the fundamental duty of independence. This leaves the in-house attorney in a state of perpetual violation of the Rules of Professional Conduct one that is not resolvable by modest tweaks to the existing status quo.

How then can this violation be remedied? In contemplating a solution, it is necessary to look beyond the conventional firm-client model to non-traditional, and perhaps even non-legal, models. First, it is helpful to return to the notion of “going native” – that when an individual remains too long in a foreign environment, he or she is likely to begin to identify more closely with the values and objectives of the host entity. The State Department and its counterparts in other countries address what is essentially an identity issue by not letting diplomats remain at a single foreign post for more than three or four years and also in some cases requiring that diplomats return to their home countries periodically for service at the domestic unit.<sup>164</sup>

Contemplating such a model for corporate counsel would require the abolishment of permanent employment of attorneys within a company. Instead attorneys would be seconded to a corporation for a finite period of time then return to the firm. This proposal would largely resolve the independence problem of in-house counsel. First, with respect to incentive, counsel’s long-term professional security would derive from the firm rather than the corporation, and counsel could therefore act and advise without the scepter of financial consequences. Second, while counsel would still have long-term relationships with individuals within the company, he would derive his principal professional identity from the firm and have a significant portion of his professional interactions there.

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<sup>164</sup> Another example can be seen with respect to auditors, who are required to rotate off the audit of a particular client periodically in order to maintain autonomy. Laby, *supra* note 36 at 154.

Despite these advantages, the proposal to extricate counsel from the corporation is highly controversial and would likely meet with opposition on a number of fronts. An initial criticism may attack the source of the model, arguing that the analogy between diplomats and in-house counsel is misplaced in that a diplomat is assigned to a foreign country as an agent of his own government whereby in-house counsel is actually an agent of the organization within which he or she is located. Certainly, it is not the intent of this article to overstate the comparison, as there are significant differences between the two roles. However, the fundamental point remains that by being placed in a foreign setting for a long period of time one may begin to identify with the host entity at the expense of allegiance to the body from which he or she hails. Moreover, the independence problem is perhaps even more critical where the attorney is an actual member of the host organization and is compensated by that body. Therefore the need to rotate out is even more pronounced.

Beyond this conceptual challenge, the proposal is likely to meet with significant resistance from those presently employed as corporate counsel. Even where they acknowledge the independence problem, in-house attorneys generally consider themselves professionals with unique expertise distinct from firm attorneys, not interchangeable actors. It is also doubtful that corporate attorneys, having made a career and lifestyle choice to go in-house, would want to return to firm life. Moreover, corporate counsel are a well-organized professional bar and not likely to respond well to a proposal that calls for their demise.

The notion of excising the legal department would likely be unpopular with corporate management as well. The position of counsel has been entrenched in the corporate structure for decades and companies have become accustomed to and recognized the value of maintaining

expertise in-house, and they are likely to balk at the significantly higher costs of getting their legal advice from firm and not in-house.

Finally, there may be an argument that seconding attorneys from firms to companies may create new conflicts even while abating existing ones. For example, an individual who goes from a firm to a client organization may show favoritism toward his firm with respect to business, knowing that he or she will ultimately return to the firm.

In order to address these concerns, the proposal contemplates a second option based on the European model of corporate counsel. Significantly, the role of in-house counsel in Europe is conceived very differently from in the United States. In Europe, corporate counsel are a distinct entity, with different training requirements in that they do not serve apprenticeships like lawyers who practice before tribunals.<sup>165</sup> They also are not perceived as having the same independence as outside attorneys.<sup>166</sup>

While the European legal system has long been recognized that in-house counsel do not have the same status and privilege as firm attorneys,<sup>167</sup> this principle was brought to the forefront and codified recently in the decision of the European Commission in the Akzo Nobel case.<sup>168</sup> In that case, the company tried to assert attorney-client privilege for e-mails sent by in-house counsel during a government investigation into alleged anti-competitive practices by a chemical company.<sup>169</sup> Counsel for the government argued that the privilege should not apply with respect to communications by in-house counsel:

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<sup>165</sup> Daly, *supra* note 7 at 1060.

<sup>166</sup> U.S. courts have also noted problems with the independence of corporate counsel. For example, in derivative shareholder litigation, the court held that it was insufficient to have the company's interests represented by corporate counsel, noting "...in-house attorneys are inevitably subservient to the interests of the defendant directors and officers whom they serve." *In Re Oracle Securities Litigation*, 829 F. Supp. 1176 (N.D. Cal. 1993).

<sup>167</sup> Case 155/79, *AM & S Europe Ltd. v. Comm'n of the European Cmtys.*, 1982 E.C.R. 1575.

<sup>168</sup> Case 550-07, *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd.*,

<sup>169</sup> Gergacz, *supra* note 87 at 325.

Mitigating against the proposition that an enrolled in-house lawyer is sufficiently independent is, first, the fact that, as an employee, such a lawyer is often required to follow work-related instructions issued by his employer and is in any event part and parcel of the structures of the company or group by which he is employed. In the words of the General Court, an enrolled in-house lawyer is ‘structurally, hierarchically and functionally’ depend on his employer...<sup>170</sup>

Akzo Nobel attempted to counter by asserting that in-house counsel does in fact operate independently, pointing to external legal protects which prohibited a company from taking action against counsel based on differences of opinion. The court rejected this argument, noting “...this does not guarantee that the relationship between an enrolled in-house lawyer and his employer will be genuinely free from direct or indirect pressure and influence in the course of day-to-day business..”<sup>171</sup>

In explaining the lack of independence afforded to in-house counsel, the court touched upon issues of incentive and identity:

In addition to their economic dependence on their employer, enrolled in-house lawyers usually exhibit a considerably stronger personal identification with the undertaking for which they work, as well as with its corporate policy and corporate strategy... There is also a real danger that, in eagerness to show obedience to their employer, enrolled in-house lawyers will ‘choose’ to give legal advice the substance of which will be acceptable to that employer.<sup>172</sup>

Court also noted that in-house lawyers are economically dependent and cannot easily withdraw.<sup>173</sup>

Thus, under the European model, corporate counsel are afforded a separate and distinct status that, as a result of their diminished independence, does not carry with it the attorney-client privilege. The European model may serve as a useful example for the United States legal system

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<sup>170</sup> *Akzo Nobel*, *supra* note 164 at.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

for the creation of a business legal advisory role within companies that differs from that of the attorney. Unlike the attorney who under the proposed model would be required to return to the firm periodically, the business advisor could remain permanently employed in the company. In this role, a person could manage outside counsel and work in tandem with outside counsel on a day-to-day basis with the understanding that attorney-client privilege and work product doctrine would not apply.

This proposal has a number of benefits. First, it would allow attorneys who wished to remain in the corporation permanently to do so. Similarly it would enable companies to retain the expertise developed by in-house counsel. But the most important benefit to creating this different class of advisor would be the understanding that such individuals cannot maintain the independence required by the Rules of Professional Conduct and the elimination of the expectation that they do so, thereby ending the de facto violations of the rules which have been the norm for decades.

To effect these changes, the Rules of Professional Conduct should be amended. Specifically they should state that an attorney may not practice law while employed wholly by a corporation, but that such attorneys may act in a business legal advisory capacity in tandem with outside counsel.

The notion of creating a differing business legal advisory role is also likely to have its detractors. The proposal of a role which differentiates corporate advisors from outside attorneys may not be readily welcomed by the U.S. legal community, which unlike its European counterparts, has long embraced the concept of a unified bar. The idea is likely to be particularly unpopular with those presently working as corporate counsel. As Sally Weaver noted, “[Corporate counsel] clearly remember, however, a time in the not-so-distant past when many of

their colleagues in private practice relegated them to the status of second-class citizens. They also fear that the development of different ethical rules for, or the different application of existing ethical rules to, corporate counsel could relegate them again to that second-class status.”<sup>174</sup> However, this differentiation carries with it many benefits, including the opportunity to engage in the business side of the company and enjoy the lifestyle of in-house counsel without fear of violating the ethical rules and calling ones credibility into question. Additionally, by removing the restrictions placed on individuals who choose to work in a company they can more actively participate in decision-making and strategy.

Companies may also perceive this alternative as less desirable because retaining counsel as well as in-house advisors may result in some duplication of costs. However, there are long-term benefits to the company in obtaining objective advice that will help to ensure strategies which are consistent with the law and which avoid potential liability. There may also be concern that removing the privileged status of in-house attorney communications may have a chilling effect and more research into this potential complication would be useful before implementing the contemplated rule changes.

Properly applied, a different status for in-house legal advice would need not be lesser but would be a proper recognition of the distinct role and function of the corporate legal advisor, one that would enhance the reputation and integrity of both in-house and outside lawyers and the profession as a whole.

## CONCLUSION

The current structure of the corporate legal department subjects in-house counsel to unremitting pressures of incentive and identity which render the attorney unable to exercise the

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<sup>174</sup> Weaver, *supra* note 17 at 1030.

independent judgment which is a hallmark of the legal profession. This complex problem requires a comprehensive solution which goes beyond modest structural safeguards and attorney self-awareness. The Rules of Professional Conduct should be amended to prohibit the practice of law by those who are permanently situated within the corporation. Rather, attorneys from firms should be seconded to corporations for finite periods of time. Those who wish to remain permanently employed by the corporation should be designated in business legal advisory roles that carry neither the obligation of independence nor the benefits of attorney client-privilege. This solution, which would require a reimagining of the corporate legal department, is the most effective means of ensuring that corporations receive the objective advice they require and that the most fundamental of attorney ethical obligations – that of independence – is preserved.