Chapter 6

A House Divided Against Itself: Practical Ethics for the General Counsel When Corporate Conflicts Arise

William W. Horton

I. INTRODUCTION

II. FROM CONCEPT TO REALITY: PRACTICAL ETHICS IN CONTEXT

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I. INTRODUCTION

§ 6:1 Introduction

As everyone knows, the joys of being a general counsel are manifold: the control over one's schedule and priorities, free of concern for the billable hour; the gratification that comes from being a trusted advisor to senior management and the board, finally receiving the deference that one's wisdom commands; the obsequious fawning bestowed upon one by the senior partners of law firms that scorned one's summer associate application; and, most of all, the luxury of focusing on the unified goals of a single unified client without the need to juggle competing demands and inconsistent directions. It is that last thing that really makes it all rewarding (well, that and the bonuses)—the opportunity at last to be free of the conflicts and stress attendant on a law firm practice with its multiple clients and multiple bosses. The general counsel enjoys the privilege of managing one set of priorities determined by one hierarchical management structure in which his or her role is clearly defined and widely respected.

Or so it would seem, right? Let us test that hypothesis by checking the in-box of one typical general counsel of one typical healthcare organization.

§ 6:2 The morning [e-]mail

As our story opens, we look in upon Patience N. Wisdom, Executive Vice President and General Counsel of Megalithic Healthcare, Inc., a diversified healthcare services organization with operations in 25 states around the country. Ms. Wisdom, having returned from a leisurely Thanksgiving holiday weekend that began last Monday—she does work in-house, after all—is scrolling through her incoming e-mail as she enjoys her first cup of half-caff latte. Let us read over her shoulder:

From: Priscilla Teene [Megalithic's Chief Compliance Officer]

Patience—This is just an FYI. We got an anonymous call on the hotline last night from someone who says she used to work in Accounts Payable. According to her, Dr. Welby—you know, the Medical Director at our Wichita hospital—has been falsifying his timesheets for the last five years. We've been paying him to do nothing, at the same time he's been responsible for 40% of the inpatient census at that hospital. We've opened up a compliance investigation, but the numbers on this one are so big I knew we had to do something right away, especially since we're under a Corporate Integrity Agreement. I've given all this information to the OIG, so it's in their hands now. I'll catch you up when we meet later this week.—Pris

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From: Capshaw B. Gaines [Megalithic's CEO]

Patience—I need to meet with you as soon as you get in Monday. You know how Stan Upguy's been all over me about the numbers ever since the Board made him chair of the Audit and Compliance Committee. Well, I've got some hot information about how he's been meeting with some hedge fund guys about putting a deal together to sell the company. We've just got to connect the dots. You're going to get a private detective on this right away so we can find out who he's been calling and when. See me ASAP!—Cap

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From: Stanford Upguy [Chair of Megalithic's Audit and Compliance Committee]

Patience—The independent members of the Board of Directors will be meeting in executive session on Wednesday to review several matters relating to Cap Gaines and his performance as CEO. Please provide me with complete copies of all documents relating to his employment by Megalithic, including his employment agreement, all of his stock option agreements, and the provisions of the stock option plan relating to termination for cause. As a reminder, your obligations are to the Board of Directors. Accordingly, you are instructed not to discuss this matter with Mr. Gaines or anyone else.—Stan Upguy

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From: J. Hamilton Sikorsky [senior partner of Upright & Sikorsky, a large, multi-city law firm that accepts only the most challenging and highly lucrative assignments]

Dear Ms. Wisdom:

As you know, the Compliance Committee of Megalithic's Board of Directors has engaged our firm to conduct an independent internal investigation of certain allegations concerning Megalithic's contractual relationships with physicians

around the country. As part of its investigation, our firm has reviewed a significant volume of e-mail correspondence between you and other Megalithic personnel, and has also retrieved certain documents from the hard drive of your computer. (As you are aware, Megalithic's computers and e-mail servers are company property and are subject to inspection by the company or its authorized agents at any time, without notice.)

We request that you meet with us at 9:00 a.m. Wednesday morning to discuss certain questions we have about aspects of relevant transactions that you appear to have approved. While your compliance with this request is purely voluntary, you should be aware that the Compliance Committee views cooperation with its investigation as an integral duty of each employee, and any failure to comply with this request may subject an employee to discipline up to and including termination of employment.

Very truly yours,

J. Hamilton Sikorsky

For the Firm

§ 6:3 The new compliance world order

Now, the above correspondence is clearly fictional. All of these messages would never be in Patience's in-box at the same time on the morning after Thanksgiving, in large part because CEOs and outside directors tend to take the full week of Thanksgiving off as well and are unlikely to do so in places with good e-mail coverage. However, they are illustrative of the range of legal, ethical, and practical conflicts that may face a general counsel within today's high-pressure corporate organizations.[1] While the idyllic view of the general counsel's life set forth in the introductory paragraph above was never a fully accurate one, the events of the post-Enron decade have made that life more stressful, and more professionally dangerous, than ever.

Why is this so? Several factors spring to mind:

[Section 6:3]

[1]This chapter speaks largely about, and to some degree from, the perspective of the internal general counsel. The issues, analyses, and strategies discussed may also be applicable to external general counsel, especially those lawyers who serve as external general counsel to an organization that has no internal general counsel. However, they are most acutely relevant, or at least most clearly described, in the internal counsel setting.

- Scrutiny on business organizations of all kinds has increased tremendously in the wake of the high-profile corporate scandals of the early part of the decade (Enron, Worldcom, HealthSouth, Tyco, etc.) and the implosion of the financial services industry and the attendant failure, collapse, or bankruptcy of numerous major financial institutions and financial services companies (Lehman Brothers, Bear Stearns, Wachovia, and seemingly the vast majority of other places that one might have had money stashed away).
- "Corporate compliance" has been elevated from a technical, back-room function to a major criterion on which business organizations are, in a variety of contexts ranging from investor relations to criminal sentencing, judged.[2]
- At the same time, the scope, volume, and complexity of those laws and regulations with which business organizations must (corporately) comply have multiplied exponentially.[3]
- Public and regulatory expectations concerning the independence of corporate directors and their role in

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[2]For a provocative perspective on the elevation of compliance as a priority for corporate boards of directors, *see* Perkins, The Compliance Board, Wall St. J., March 2, 2007, *available at* http://online.wsj.com/article/SB117280725006124469.html.

[3]The Banking Act of 1933, Pub. L. No. 73-66, which (among other things) established the Federal Deposit Insurance Corporation, prints out at 34 pages in a reasonable font with reasonable margins. *See* http://en.wikisource.org/wiki/Banking_Act_of_1933. The official text of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, prints out at 848 pages. *See* http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf. The official text of the Social Security Amendments of 1965, Pub. L. No. 89-97, which established the Medicare and Medicaid programs, prints out at 136 pages. *See* http://healthcarereform.procon.org/sourcefiles/Social_Security_Amendments_1965.pdf. The consolidated print of the Patient Protection and Affordable Care Act, Pub. L. No. 111-48, and the Healthcare and Reconciliation Act of 2010, Pub. L. No. 11-52, prints out at 907 pages. *See* http://www.ncsl.org/documents/health/ppaca-consolidated.pdf. One can draw one's own conclusions.

corporate oversight, especially in the area of corporate compliance, have increased significantly.[4]

- Similarly, public and regulatory expectations concerning the accountability of the general counsel for corporate compliance have likewise increased.[5]
- Correlative to the immediately preceding points, there has been a growing emphasis on the utilization of independent outside counsel to perform tasks that might traditionally have been under the control (or at least the substantial influence) of the general counsel, ranging from the conduct of internal investigations[6] to the provision of general guidance and counsel to the board of directors and its committees.[7]
- And, to top it off, civil and criminal enforcement authorities have shown an increasing willingness to focus their attentions upon lawyers, either as alleged primary wrongdoers or as alleged aiders, abettors, and obstructers of justice.[8]

These phenomena may have particular significance for

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[4]*See generally, e.g.,* Am. Bar Ass'n Task Force on Corporate Responsibility, Report of the American Bar Association Task Force on Corporate Accountability, 59 Bus. Law. 145, 160–162 (Mar. 2003) ("Recommended Policies of Corporate Governance"); Off. of Inspector Gen., U.S. Dep't of Health & Human Services and Am. Health Law. Ass'n, Corporate Responsibility and Corporate Compliance: A Resource for Healthcare Boards of Directors (Apr. 2003); Off. of Inspector Gen., U.S. Dep't of Health & Human Services and Am. Health Law. Ass'n, An Integrated Approach to Corporate Compliance: A Resource for Healthcare Boards of Directors (July 2004) ("An Integrated Approach"); Off. of Inspector Gen., U.S. Dep't of Health & Human Services and Am. Health Law. Ass'n, Corporate Responsibility and Healthcare Quality: A Resource for Healthcare Boards of Directors (Sept. 2007).

[5]*See, e.g.,* Assoc. of the Bar of the City of N.Y., Report of the Task Force on the Lawyer's Role in Corporate Governance (Nov. 2006), *passim*; An Integrated Approach, *passim*.

[6]*See, e.g.,* Dunne, Foxes and henhouses: The importance of independent counsel, Compliance & Ethics Professional at 44–49 (Aug. 2011).

[7]*See, e.g.,* Hazard, Jr. and Rock, A New Player in the Boardroom: The Emergence of Independent Directors' Counsel, 59 Bus. Law. 1389–1412 (Aug. 2004); *cf.* Veasey, Separate and Continuing Counsel for Independent Directors: An Idea Whose Time Has Not Come as a General Practice, 59 Bus. Law. 1413 (Aug. 2004).

[8]*See generally, e.g.,* Horton, Target-at-Law: Instructive Moral Lessons from the New Lawyer Wars, in Gosfield, Health Law Handbook §§ 13:1 et seq. (2009 ed.).

general counsel of healthcare organizations because of the peculiar dynamics that tend to accompany that role. Healthcare organizations are, in general, subject to greater public interest and regulatory scrutiny than are many other types of organizations. This is true because of the importance of healthcare to both individuals and to the national economy, because of the multiple and overlapping regulatory regimes at both the federal and state levels, and because healthcare organizations are often perceived as arcane institutions on which people depend but which they cannot understand, and which thus present unique opportunities for misbehavior.

Superimposed upon this environment is the relative disparity in information that may exist among directors of healthcare organizations, members of management, and the clinical and professional employees and contractors who actually provide (or pay for) healthcare services. Many directors of healthcare organizations may have only a very high-level understanding of either the clinical and scientific aspects of an organization's business or the intricacies of the third-party reimbursement system. This may tend to exacerbate conflicts and suspicion when troubles arise, simply because directors may believe that they are not being provided with information sufficient to allow them to exercise appropriate oversight activities after taking into account their lack of clinical or technical knowledge and thus that they are vulnerable to being led down the garden path.

Further complicating matters are the complex, and often arbitrary, regulatory schemes that govern healthcare organizations and the large element of prosecutorial and quasi-prosecutorial discretion involved in the implementation and enforcement of those scheme.[9] In the legal analysis of almost any issue relating to the business of healthcare organizations, there is a range of positions that could be taken by reasonable and responsible lawyers. This in turn means that there are many opportunities for good-faith differences of interpretation and analysis between inside and outside counsel, senior and subordinate counsel, general counsel and counsel for a board committee, general counsel and compliance officers, and so on and so forth.

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[9]*See generally, e.g,.* Blumstein, The Fraud and Abuse Statute in an Evolving Healthcare Marketplace: Life in the Healthcare Speakeasy, 22 Am. J.L. & Med. 205 (1996).

These differences of interpretation can lead to interesting conversation over a cup of coffee or on an e-mail listserv. In addition, they can lead to indictments, job terminations, False Claims Act suits, corporate coups, and other quite disruptive events. For the general counsel, who often tends to be at the eye of the storm, they can also pose significant ethical and practical issues, as well as a significant risk to job security. Finally, they may raise complex governance issues for the organization that employs that general counsel.

This chapter will explore a selection of those issues through a theme-and-variations approach derived from a (quasi-)hypothetical fact pattern with particular focus on the ethical obligations of the general counsel and the practical aspects of integrating those ethical duties into the less idealized world in which most general counsel live. In order to commence that exploration, however, it is first necessary to consider the ground rules a bit.

§ 6:4 Ethical duties? What ethical duties? And owed to whom?[1]

In facing situations like those described in this chapter—in fact, in determining the professionally appropriate course of action in any situation—a lawyer representing an organization must start from the first principle of organizational representation as expressed in the American Bar Association's Model Rules of Professional Conduct Rule 1.13(a): "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[2] For the general counsel, this brief sentence is both a

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[Section 6:4]

[1]A preliminary version of some of the material in this section appeared in Horton & Goldstone, Shuttle Diplomacy: The "Other" In-House Counsel Job, contained in the program materials for the American Health Lawyers Association 2011 In-House Counsel Program, June 2011.

[2]Model Rules of Prof'l Conduct R. 1.13(a) (2011). All references to the Model Rules of Professional Conduct in this chapter are to the 2011 edition unless otherwise indicated. The reader should note that the Model Rules, as such, do not govern the professional responsibility of lawyers; rather, those rules that are specifically in effect in the jurisdiction(s) where such lawyers are licensed govern the professional responsibility of lawyers, which rules may differ in greater or lesser ways from the Model Rules. *Caveat lector*.

fundamental touchstone and, for reasons that will become apparent, a millstone as well. In less than 20 words, it encapsulates two major concepts that constitute the basic dichotomy of the general counsel's existence (and indeed, the existence of any lawyer whose client is an organization):

- The lawyer owes his or her duties to the organization as an entity, not to any individual officer, director, trustee, owner, employee, or other constituent of the organization; but—
- The organization, being itself an inanimate legal construct, can act (and direct its lawyers, and seek legal advice from its lawyers, and determine the professional advancement of its lawyers, at least insofar as they are employees) only through such constituents.

Therein lies the problem: if the lawyer becomes concerned that such constituents are acting in a manner inconsistent with the law and/or the best interests of the organization, the lawyer may find himself or herself caught between the artificial enterprise to which his or her professional duties are owed and the living, breathing, and sometimes highly emotional persons who actually have the ability to heed or ignore the lawyer's advice and even control the lawyer's continued employment. What exactly, then, is the lawyer supposed to do in such a circumstance? The next section of Model Rule 1.13 addresses that:

> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
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> (c) Except as provided in paragraph (d), if
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> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 [the general rule requiring a lawyer to maintain in confidence information about a client obtained in the course of representing that client] permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
>
> (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.
>
> (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.[3]

So, it is all very simple. If the lawyer becomes convinced that some field administrator or junior vice president has jumped the tracks in one way or another, all he or she has to do is go up the ladder to higher authority until someone nips the offending activity in the bud and thanks the lawyer profusely for exposing the rascal. Also, if, perish the thought, the lawyer finds that rascals are at the top of the ladder as well, he or she may blow the whistle to the appropriate authorities notwithstanding the attorney-client privilege and the ethical duty of confidentiality.

Once again, though, superficial simplicity obscures practi-

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[3]Model Rules of Prof'l Conduct R. 1.13(b) to (e). At almost exactly the same time, the ABA House of Delegates amended Model Rule 1.13 to add these provisions, the Securities and Exchange Commission adopted rules under the Sarbanes-Oxley Act requiring lawyers representing publicly traded companies to report suspected wrongdoing "up the ladder" within the client organization and authorized (but did not require) disclosures outside the organization in certain circumstances. The SEC proposed, but did not adopt, rules requiring "noisy withdrawal" by the lawyer in certain circumstances where the client had not taken appropriate action to respond to an up-the-ladder report by the lawyer. *See generally* Horton, Representing the Healthcare Organization in a Post-Sarbanes-Oxley World: New Rules, New Paradigms, New Perils, 37 J. Health L. 335, 339–360 (2004).

cal complexity. Model Rule 1.13 does provide for mandatory up-the-ladder reporting within the organization in certain circumstances and even for permissive disclosure outside the organization in more extreme circumstances. However, the implementation of such principles in practice places a significant burden on the lawyer's judgment. "Violations of law" are not always clear, "violations of legal obligations" even less so, and then there are all those predictions that must be made about "substantial injury to the organization," "reasonable certainty," and so on and so forth. Further, in applying those principles, the lawyer is bound by other rules of professional responsibility dealing with the allocation of authority between lawyer and client.

For present purposes, among the most important of these is Model Rule 1.2, which provides in pertinent part as follows:

> (a) Subject to paragraphs (c) and (d) [which are not particularly relevant to the current discussion], a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued . . . .
>
> . . .
>
> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[4]

Model Rule 1.2(a) sets forth the rule of "the boss is always the boss"; when the lawyer has advised his or her client of the legal analysis of the client's proposed course of action, the client gets to decide what to do, and the lawyer is obligated to defer to that decision. This is limited by the prohibition on a lawyer's involvement in conduct that he or she knows to be criminal or fraudulent, but the line between activity that is in fact criminal or fraudulent and activity that the lawyer merely deems to be inadvisable as a practical, or even moral, matter may be difficult to define. Where the lawyer draws that line in the wrong place, he or she may be exposed to personal criminal liability or professional

[4]Model Rules of Prof'l Conduct R. 1.2(a), (d).

discipline. On the other hand, drawing the line in a different wrong place may result in a failure to provide professionally appropriate legal services to the client and may likewise expose the lawyer to charges of professional misconduct.[5]

What then do these ethical standards mean, taken together? Perhaps it is something like this:

- A lawyer representing an organization owes his or her professional duties to the organization as an entity, not to any individual constituents of the organization; but
- The lawyer is entitled to, and indeed obliged to, defer to the decisions of the authorized constituents of the organization after rendering his or her legal advice unless and until the lawyer reasonably believes that one or more of those constituents "is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization," in which case
- The lawyer is obligated to report the matter up the ladder within the organization, if necessary to the highest authority that can act on behalf of the organization (unless the lawyer believes that such up-the-ladder reporting is not in the best interests of the organization, which seems like a decision that there is likely to be no premium on making), and
- If the highest authority refuses to act with regard to a "clear violation of law," then the lawyer may (but is not required to) disclose relevant information outside the organization, but "only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization" that the lawyer believes is reasonably certain to result in the absence of such disclosure, but

[5]*See, e.g.,* Prudential Ins. Co. of America v. Massaro, 2000 WL 1176541 (D.N.J. 2000), aff'd, 47 Fed. Appx. 618 (3d Cir. 2002) (finding that in-house attorney had breached his professional obligations by disclosing confidential and privileged information to, among others, plaintiffs' lawyers, reporters, and the Florida Attorney General under the erroneous impression that such disclosures were permitted under the crime-fraud exception to the attorney-client privilege).

- Under no circumstances may the lawyer counsel the client to engage in, or assist the client in engaging in, activity that the lawyer knows to be criminal or fraudulent.

Again, though, that concise distillation does not convey the difficulty of applying these principles in practice—a difficulty that may be especially acute for the general counsel, who must live with the consequences of his or her decisions and actions (including the disruption of relationships within the organization) in a way that outside counsel does not. Not to put too fine a point on it, an in-house lawyer who constantly invokes his or her ethical scruples to dispute any business decision with which he or she disagrees is, at a minimum, not likely to be consulted very much; indeed, such a lawyer is likely to have some difficulty with job retention. At the same time, a lawyer who acquiesces in activity that he or she believes to be wrongful—even if he or she is not directly involved in it or only becomes aware of it after the fact—may be exposed to significant third-party scrutiny and even to civil or criminal liability.

II. FROM CONCEPT TO REALITY: PRACTICAL ETHICS IN CONTEXT

§ 6:5 A (quasi-)hypothetical fact pattern; or, you can't make this stuff up

Of course, even after professional responsibility rules are recast, as above, into a relatively straightforward sequence, they remain rather abstract. In order to fully understand them, it is necessary to apply them to particular facts.

In the ordinary course, an author seeking to illustrate such an application must either co-opt the publicly available information about a real-life case or else construct the equivalent of a law school hypothetical, spiking it with salacious facts designed to make the professional responsibility issues jump out at the reader. Sometimes, however, one gets lucky.

In early December 2011, a posting appeared on a number of e-mail listservs maintained by the American Health

Lawyers Association, posing a series of questions based upon substantially the following statement of facts:[1]

> A non-profit organization plans to terminate its Compliance Officer for cause. The organization can establish a prima facie case for the dismissal based on certain actions of the Compliance Officer. However, the Compliance Officer has raised a number of compliance issues in the past six months concerning corporate officers, the director of Human Resources, and the General Counsel. The General Counsel and Director of HR are recommending an immediate termination and lock-out without an exit interview.
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> The theory is they want to minimize risk exposure. Specifically, they do not want the Compliance Officer to raise issues that could open the door to a claim of retaliatory discharge. Also, the General Counsel does not want to open up a can of worms and discover things that the corporation would need to investigate. General Counsel indicated that (i) a detailed review of the Compliance Officer's email indicated that he was compiling "secret folders" of research on various compliance issues and (ii) recent Google searches indicated that he was looking for law firms that represent "whistle blowers."
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> The General Counsel has provided some specific information on certain issues, but has stated that other issues should not be discussed in detail, or at all, to minimize the personal liability of the Board of Directors if such information were known by the Directors.[2]

This listserv post on its face provides fertile ground for exploring a variety of professional responsibility issues and conflicts among an organization's board, its management, and its legal and compliance functions. With the addition of some factual variations, it provides even more to work with. Accordingly, the next few subsections will use this basic fact

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[Section 6:5]

[1]The inquiry was posted on December 5, 2011, to multiple AHLA listservs, including In-House Counsel, Business Law & Governance and Compliance, under the subject line "Duty of Care—Investigate or Not." Although the poster was identified by name and e-mail address, neither her organization nor her role with respect to the inquiry was disclosed. Even though the poster's name—or at least the name associated with the poster's e-mail address—was publicly disclosed, there does not seem to be any purpose to be served by repeating it here.

[2]This passage has been slightly revised from the text of the original e-mail to correct typographical errors and to clarify the syntax a bit where the original text may have been a bit unclear. The revisions (believe it or not) do not change in any respect the substance of the alleged facts.

pattern to explore various dimensions of the challenges facing someone like our hypothetical general counsel, Patience Wisdom, who is joined in the following scenarios by some of her colleagues at Megalithic Healthcare.

§ 6:6 Variations on a troublesome theme: Burn before reading

As originally presented, the facts in the listserv post present almost a textbook example of how a general counsel can create the maximum legal exposure for the greatest number of people with the smallest amount of effort. Faced with a compliance officer who apparently believes, with or without foundation, that management personnel, including the general counsel, have engaged in compliance violations, the general counsel's reaction may be summarized as follows:

- Let's terminate the compliance officer before he really starts talking about potential issues, so we can avoid any claim that we are firing him in retaliation for whistle-blowing activities in violation of applicable laws (and, in all likelihood, the organization's compliance program).[1]
- Let's get the compliance officer off the premises and change the locks immediately so that he does not tell us anything we do not already know that we might have to investigate.
- Let's persuade the board that the compliance officer

[Section 6:6]

[1]Antiretaliation laws are multiplying. For example, in one of the few provisions of the Sarbanes-Oxley Act of 2002 that is not limited to publicly traded companies, it was made a federal criminal offense to "knowingly, with the intent to retaliate, [take] any action harmful to any person, including interference with the lawful employment or livelihood of any person, for [that person's] providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense." 18 U.S.C.A. § 1513(e). Additionally, Section 1558 of the Patient Protection and Affordable Care Act added a new provision to the Fair Labor Standards Act that prohibits an employer from retaliating against an employee who "provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of" the act, which includes certain provisions relating to healthcare services. 29 U.S.C.A. § 218c(a)(2).

was a double agent, working to feather his own nest as a qui tam relator by keeping "secret files" relating to (gasp!) "compliance issues" (as opposed to the open files relating to compliance issues that a compliance officer might normally keep, one supposes), and, by implication, that the compliance officer's complaints about management and the general counsel were fabrications to strengthen his case.

- Let's also persuade the board that, for their own protection, they need to be sheltered from the facts because they might be exposed to personal liability if they actually knew something, whereas they are protected by the "pure heart, empty head" doctrine if they simply rely on management to address any issues.

This strategy, as described, is both inconsistent with the general counsel's professional obligations and with any practical sense of self-preservation. First, the general counsel is affirmatively misleading the board about its fiduciary duties. Corporate directors are charged with a duty of care—the duty to exercise their business judgment through a rational process, designed to ensure that they have taken steps to inform themselves about factors relevant to a course of action consistent with those that a reasonably prudent person would have taken in a similar circumstance. One particular manifestation of the duty of care is what has come to be known as a director's "*Caremark* duties": that is, the duty of corporate directors to

> . . . [assure] themselves that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance.[2]

Here, the general counsel is apparently attempting to lead the board in the diametrically opposite direction. Rather than assisting the board in satisfying its members' Caremark obligations, the general counsel (in concert with the HR director, it should be noted) is advocating an "ostrich" approach, suggesting to the directors that they and manage-

[2]In re Caremark Intern. Inc. Derivative Litigation, 698 A.2d 959, 970 (Del. Ch. 1996).

ment will be insulated from liability as long as they do not in fact seek out "timely, accurate information" but instead affirmatively avoid obtaining it.

From a professional liability standpoint, the general counsel also appears to be ignoring—indeed, actively running away from—duties implied by Model Rule 1.13. As noted above, that rule would require the general counsel, if he or she "knew" that corporate agents were engaged in a violation of law or of their legal duties to the organization, to report such violation up the ladder if necessary to the board level. On the facts presented, it is possible to split hairs on the direct applicability of Model Rule 1.13; if the general counsel's assessment of the "compliance issues" previously raised by the compliance officer were that such issues were based on mistaken understandings of law or fact, the general counsel may not "know" of a violation within the meaning of the rule. On the other hand, if the general counsel believed that the compliance officer were making reports that were knowingly false (or with reckless disregard for their truth or falsehood), that would suggest that the compliance officer did "know" that the compliance officer was violating a duty to the organization, which itself would arguably trigger a reporting-up obligation. It is not unreasonable to suggest that the spirit of Model Rule 1.13 would require the general counsel to do more to ensure that the board were in a position to make an informed decision about both the decision to terminate the compliance officer and the decision whether or not to conduct a further investigation of any allegations previously made by the compliance officer. At a minimum, it would seem both appropriate and advisable for the general counsel to provide the board with some sort of report demonstrating that the concerns raised by the compliance officer had been investigated and appropriately addressed.

That, however, raises the further question of whether the general counsel has any business in this mess at all at this juncture. From the assumed facts, we do not know whether the issues raised by the compliance officer concerning the general counsel, the HR director, or any other members of management are frivolous or credible (or even dead-on accurate). What we do know is that in the eyes of the government or any other third party that might someday take an interest in those issues, the general counsel's analysis of his

or her own compliance will likely be viewed as, shall we say, a bit biased, and the board's decision to rely on that analysis will likely not be given any deference or respect.

Here again, there are professional responsibility implications for the general counsel. Model Rule 1.7(a) provides, in pertinent part, that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer."[3] The commentary to that rule notes that "[f]or example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice."[4]

That strikes at the heart of the issue raised by this fact pattern. Rightly or wrongly, with or without justification, the general counsel's own acts (or omissions) have apparently been called into question by the compliance officer. Under those circumstances, even if the compliance officer were totally mistaken, it is simply unreasonable to expect the general counsel to give objective advice to the board or management as to whether and how to investigate the compliance officer's allegations. Regardless of the general counsel's integrity, there will always be an obvious question as to whether concern for his or her own position and exposure colored the advice rendered. If the government is or may become involved, that question may even play out as allegations that the general counsel obstructed a government investigation.[5] If the general counsel is insufficiently attentive to his or her own duties—and to his or her own

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[3]Model Rules of Prof'l Conduct R. 1.7(a).

[4]Model Rules of Prof'l Conduct R. 1.7, cmt. [10].

[5]Additionally, note that since the Sarbanes-Oxley Act added 18 U.S.C.A. § 1519 to the federal criminal law, obstruction does not even require that the government have commenced an investigation. That section makes it a federal crime to knowingly take various actions with regard to writings and tangible evidence "with the intent to impede, obstruct or influence the investigation or proper administration of any matter with the jurisdiction of [federal authorities], or in relation to or contemplation of any such case." This statute effectively allows the government to prosecute acts taken with the intent of obstructing any investigation that may occur, not a specific investigation already known to the alleged obstructer. *See generally, e.g.,* Funk, "Honey Laundering," a Toilet

personal exposure—to step aside, the board must take action on its own.

What, then, should the board do in this fact pattern? First, and as soon as possible after becoming aware of the general picture, the board should engage special counsel to undertake a prompt but comprehensive review of the entire situation. In the best case, these facts suggest that the organization does not have competent personnel in a number of key positions (general counsel, compliance officer, and probably human resources director). From the volume of smoke here, it seems more likely that there is some level of active malfeasance by some participant in the process. In the exercise of its Caremark duties, the board must commission an appropriate investigation by untainted agents, whether inside or outside the organization,[6] to determine just what is going on and develop an appropriate response (including, if justified on the facts, termination of the compliance officer, the general counsel, or both). Situations like these are difficult and painful, but the board cannot yield to any suggestion that they are best insulated by being uninformed. Indeed, that approach is liable to lead to the most damaging results for all concerned.

Some variations: thickening the plot

The original fact pattern set up above (and recall that it is a fact pattern purporting to exist in real life) has a shooting-fish-in-a-barrel quality to it. Indeed, it reads almost like a law school examination question, so overburdened with unfortunate circumstances and poor decisions that the reader finds it difficult to believe that they could all simulta-

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Flush, and a Governor's Yahoo Account: The New Age of Anticipatory Obstruction of Justice, The Champion (May 2011) 22–26.

[6]Increasingly, the default advice to directors seems to be that outside counsel, and ideally independent counsel without prior relationships with the organization, are a sine qua non for this type of investigation. That may not necessarily be the case in all circumstances. However, if the board determines that it is possible for internal personnel to direct the investigation, the board must be sensitive to the likely perception that such internal personnel may be reluctant to thoroughly and objectively evaluate allegations of misconduct involving their superiors or peers, whether because of intimidation, personal loyalty, or lack of qualifications and/or resources. Independence can be overvalued, but who-watches-the-watchmen allegations of the type raised here must be perceived as being absolutely objective if they are to be credible and useful.

neously exist.[7] In order to illustrate some of the more subtle challenges facing the Patience Wisdoms of the world, it is useful to tinker with the facts a bit. Accordingly, the next few sections introduce some variations on our original scenario, which in turn more precisely hone in on particular issues.

§ 6:7 Variation one: One compliance officer to rule them all

One major result of the heightened focus on corporate compliance and ethics has been the rise (in prominence, in compensation, in visibility, and on the organizational chart) of the compliance officer. What was once a back-room function has now become a corner-office kingdom.[1]

This is, in many respects, a good thing. It is difficult, if not impossible, for an organization's compliance program to be taken seriously if the compliance officer is not given a sufficiently prominent and visible role in the hierarchy. However, this elevation of the compliance officer's status also carries with it a potentially pernicious temptation: the temptation for the compliance officer to believe that he or she is a creature totally outside the hierarchy with the unilateral power to act on behalf of the organization and/or to veto the acts of others.

Suppose, for example, we change our listserv fact pattern a bit. Instead of creating secret files and Googling "whistleblower big bucks," our compliance officer—Pris Teene—reports to the Compliance Committee of Megalithic's board that she has reviewed a series of transactions that have been developed by the Cap Gaines, the CEO; approved by the board; and implemented at the direction of Patience Wisdom, the general counsel. Pris (who has a law degree but

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[7]Of course, Mrs. Palsgraf doubtless felt much the same way on the day of her unfortunate attempt to get to Rockaway Beach. Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (1928). Such concatenations of events do happen, unrealistic though they may seem.

[Section 6:7]

[1]*See, e.g.,* Costa, The Rise of Compliance Man, slate.com, May 26, 2004, *available at* http://www.slate.com/articles/business/moneybox/2004/05/the__rise__of__compliance__man.html; Krebsbach, The Compliance Officer Rises to the C-Suite, americanbanker.com, Jan. 1, 2005, *available at* http://www.americanbanker.com/magazine/115__1/-238316-1.html.

has worked only in in-house compliance settings) says that she has determined that such transactions violated the Stark Law and the Anti-Kickback Statute. She further says that she has confirmed this by selecting and engaging outside counsel who have opined that the transactions "raise red flags." Accordingly, she is now advising the Audit and Compliance Committee that they must authorize her to report the "violations" that she has discovered to the U.S. Attorney's Office and suspend the CEO, the general counsel, and other involved personnel immediately in order to show "cooperation" with the (presumably forthcoming) investigation. When the Committee suggests that it would be appropriate to slow down a bit and let the organization's regular outside regulatory counsel review the facts before making potentially premature self-disclosures, Pris ominously warns that any delay could jeopardize the interests of the organization and that, in her view, she has the duty to make reports to any law-enforcement or regulatory agencies that she believes necessary to prevent or remediate wrongdoing by corporate agents, including officers and directors.

This obviously has the makings of a serious meltdown. Worse, it has reached a stage of critical mass in which the organization's practical options may be significantly limited, in that the compliance officer has apparently committed herself, psychologically and at least to some extent practically, to a course of action from which she is unlikely to be dissuaded. At this point, the Committee's basic choice is either to go down the road that Pris has built and try to manage that process or else take action to prevent Pris from proceeding—action that may be perceived as a cover-up if Pris's "facts" turn out to be true and that may give rise to a new set of claims from her concerning obstruction, retaliation, board-level complicity in fraud, etc.

(This revised fact pattern also illustrates, in passing, the difficulties that may face an organization that obtains legal advice from multiple quarters on the same facts. In this case, the assumed facts suggest that the counsel obtained by the compliance officer reached a different legal conclusion on particular transactions than did the general counsel and, perhaps, regular outside counsel. That conclusion may be right or wrong—or more likely, more defensible or less defensible—but it is now part of the mix of legal analysis

available to the organization, and the organization must somehow take it into account in assessing its position.)[2]

How could the organization have avoided this meltdown? Several steps can minimize the risk of getting to this point:

- Establishing regular, scheduled meetings between the general counsel and the compliance officer should help to flush out potential issues before they become insurmountable. Of course, the fact of such meetings does not mean that the two parties cannot or should not interact more frequently as needed; however, the establishment of a regularly scheduled periodic meeting (on a reasonably frequent schedule) reduces both the risk that one of the players will store up concerns until it is too late to act on them and the risk that factual misunderstandings or miscommunications may polarize their respective physicians. In addition, the existence of a regularly scheduled meeting reinforces the notion that communication between the two officers is a regular and expected thing and thus reduces the perception that one party's request for a meeting signifies a perceived crisis or conflict.
- Similarly, although this has become standard operating procedure for many organizations, it is worth noting that regularly scheduled meetings between the compliance officer and the board-level Compliance Committee (or any similar board committee) are essential both to successful board oversight of the compliance program and to ensuring that the compliance officer has an appropriate place to raise high-level internal concerns (e.g., concerns about systemic problems or compliance issues involving senior management).[3]
- Adopting a clear written policy concerning the engagement of outside counsel, including who has the authority to engage outside counsel, helps to ensure that the

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[2]*See, e.g.,* In the Eye of the Beholder: Physician Transactions, Professional Responsibility, and the Winding Road from *Anderson* to *Tuomey*, Gosfield, Health Law Handbook § 7:7 (2011 ed.).

[3]Where the legal and compliance functions are separated, it is probably also worthwhile to schedule similar meetings between the Compliance Committee and the general counsel to ensure that the Committee has access to all relevant information and that potential counsel-compliance officer conflicts are surfaced before they become dangerous.

organization does not lose control over the source, quality, and quantity of legal advice that it obtains. Requiring that the general counsel approve the retention of counsel in advance (with, perhaps, a procedure for obtaining board committee-level approval for extraordinary circumstances where the general counsel has a conflict) should be standard. Note, however, that the purpose of this process is not to avoid "open[ing] up a can of worms and discover[ing] things that the corporation would need to investigate"; rather, it is to ensure that the organization does not have a surfeit of lawyers taking orders from different constituencies and perhaps rendering inconsistent advice.

- Correlatively, the general counsel must be prepared to recognize when he or she has a perceived actual or potential conflict (or a real actual or potential conflict, for that matter) and to turn over handling of the matter to internal or external counsel without such a conflict. The board or an appropriate committee should ensure that the general counsel is aware that he or she is expected to be sensitive to such situations and take appropriate recusal steps where necessary.
- Finally, as part of the ongoing interaction described above, the board should ensure that all participants in the process recognize that the compliance program—and the compliance officer—is a component of the organization's overall mission and structure. Although the compliance officer may, to some degree, have a "dotted-line" relationship to the rest of the organization chart, the compliance officer still functions under the general authority of the board of directors to manage the business and affairs of the organization.[4] While the compliance officer is a valued resource whose view should be given significant deference, the compliance officer does not, as a matter of law or sound policy, have a veto over the organizational decision-making process, and a compliance officer who believes that he or she

[4]*See, e.g.,* Am. Bar Ass'n, Model Bus. Corp. Act § 8.01(b) (3d ed. 2002) ("All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed by or under the direction of, its board of directors.").

does runs the risk of creating problems as substantial as those that he or she helps resolve.[5]

Thus, in our first variation, the most important lesson is to establish in advance policies, procedures, and processes that are designed to ensure that all relevant corporate players are in active and frequent communication regarding compliance issues before they arise. Failing that, the organization may find itself with a substantial mess to clean up, and at least some of the players may find themselves in need of new employment.

§ 6:8 Variation two: Caught in the crossfire, part I

Returning to our original fact pattern, let us adjust the situation a bit. Assume this time that Pris Teene's concerns do not include the general counsel but that she has become convinced that Cap Gaines, the CEO, has been engaged in inappropriate actions that have exposed the organization to potential civil, and perhaps even criminal, liability for healthcare fraud. She shows her evidence—or at least, what she believes to be evidence—to Stan Upguy, chair of the board's Audit and Compliance Committee. Stan finds the evidence credible but acknowledges that he does not understand the "technical healthcare stuff" that underlies Pris's allegations.

Stan then summons Patience Wisdom to meet with him. According to Stan, the outside directors have been concerned for some time that Cap Gaines has been "pushing the envelope" in an effort to produce numbers that will justify his ever-increasing compensation. The information from Pris Teene supports, in Stan's view, the concerns that the other directors have already expressed. He tells Patience that, as chair of the Audit and Compliance Committee, he is directing her to commence an internal investigation of Cap Gaines. In particular, he is directing her to have the organization's IT Department "ghost" the hard drive on the CEO's company computer, create an electronic file of all of his e-mail through the corporate server for the last 12 months, and provide the Committee with phone logs for his desk phone and his

[5]For additional, and sometimes opposing, thoughts on how general counsel and compliance officers can and should live together, *see* Peregrine & Buchman, Managing the General Counsel/Compliance Officer Relationship, AHLA Connections (Oct. 2011) at 34–39.

company-issued cell phones. "And keep this all to yourself, Patience. If we have a bunch of outside lawyers running around here, everyone is sure to get suspicious."

When Patience summons up her courage and asks Stan to see the "evidence" provided to him by Pris Teene, she finds much of it to be vague and nonspecific—e-mails to the organization's director of reimbursement complaining that she must be doing something wrong because the outlier payments are too low; e-mails to the head of corporate development complaining that "we can't let the lawyers run this company; we've got to find a way to reward these doctors for their loyalty"; e-mails to the chief operating officer directing him to "find some way to get our cardiac surgery volume up, or find yourself another job"; and so on and so forth. When Patience suggests that perhaps it might be premature to undertake electronic surveillance on the CEO in light of the arguably ambiguous nature of these types of messages, Stan snaps, "You work for the board, don't you? Just take care of it!"

This situation presents obvious difficulties for Patience. Stan Upguy is correct, of course: Patience does indeed "work for the board," which is the anthropomorphic manifestation of the "organization" referred to in Model Rule 1.13. However, as a practical matter, although a general counsel works for the organization's board, he or she is responsive to the CEO or some person to whom the CEO has delegated authority. This raises at least two problems:[1]

- First, there is again a Model Rule 1.7 "personal interest" conflict potentially at work here. If the general counsel is dependent upon the CEO for advancement, for compensation, or even for continued employment—all of which will normally be the case—the general

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[1]There is actually a third problem as well, which is that the CEO and the general counsel will ordinarily be perceived by outsiders as part of a conjoined "management team." If the general counsel's investigation exonerates the CEO, and the CEO is later found out to be a scoundrel anyway, the general counsel may well be vulnerable to the accusation that he or she conspired with the CEO in a cover-up. This in turn probably means that the general counsel is out of a job with severely tarnished prospects of future employment; it may mean that he or she is subject to civil or criminal liability as well.

counsel will be vulnerable to at least the appearance of divided loyalties, which will cause the results of any investigation conducted by the general counsel to be suspect. Further, the general counsel is exposed to the personal-interest problem famously encapsulated by Ralph Waldo Emerson: "When you strike at a king, you must kill him."[2] A general counsel who commences a clandestine investigation of his or her CEO had best hope to find incontestable evidence of wrongdoing because if the CEO retains his or her job, the general counsel most probably will not. This phenomenon again undercuts the credibility of the investigation.

- Beyond that, there is the difference between the board and its members to be considered. If the general counsel acts in accordance with a board resolution duly authorized and approved, he or she is "representing the organization" as contemplated by Model Rule 1.13 at least if the board action is not substantively unlawful.[3] However, a single director—even a committee chair or the chair of the full board—is just another "constituent" for purposes of the rule. In a case like this, the general counsel cannot safely assume that the instructions given by that director in fact have the imprimatur of the board.

Realistically, assuming that Patience does not (a) believe that the allegations are so frivolous as to safely be ignored and (b) believe that she can persuade Stan of that, she must find a way to bring in outside counsel to handle the matter. There is simply no other way for Patience either to fulfill her duties to the organization or be comfortable that she is not committing an act of self-immolation.

This in turn entails the need to somehow persuade Stan that she is not being disloyal or insubordinate, since he may be right about Cap after all. Simply declining to take on the

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[2]As with many famous quotes, what exactly Emerson said and where exactly he said it remain the subject of some dispute. For a concise summary of some of the history and variations, *see* http://www.barrypopik.com/index.php/new_york_city/entry/if_youre_going_to_shoot_the_king_dont_miss/.

[3]Recall Model Rule 1.2, discussed above: a lawyer representing the organization is generally both entitled and required to accept the lawful directions of his or her client (or withdraw from the representation) even if he or she disagrees with their wisdom.

assignment is not likely to be well received. Instead, the best course of action—delicate dance though it may be—will likely be to bring to Stan's attention some of the arguments made above and explain to Stan why he and the board would benefit by having external counsel evaluate the situation and conduct any necessary investigation because whatever action the board ultimately took would be free from any concern that it was tainted by the influence of a general counsel who might be perceived to have a conflict.

§ 6:9 Variation three: Caught in the crossfire, part II

Now, let us turn the tables. This time, assume that Cap Gaines summons Patience Wisdom to his expansive office. Drawing her close to his desk, Cap explains in hushed tones that he has become aware that Pris Teene, knowing that Cap was prepared to fire her for incompetence, had decided to protect herself by fabricating documents suggesting that Cap was engaged in some sort of malfeasance and conveying them to Stan Upguy. In turn, Cap says, Stan was aware that the board's Nominating Committee viewed Stan as a lightweight and did not plan to let him stand for reelection as a director, and he believes that Stan will seize on this opportunity to establish himself as a "white knight" by accusing Cap of wrongdoing before the full board and attempting to have him suspended "pending investigation." While Cap is confident that he can defend himself, this anticipated boardroom strife will embarrass Megalithic greatly and derail a large acquisition that is to be announced soon.

In light of this dire situation, Cap tells Patience, he needs her to immediately hire private detectives to gather evidence to expose this collusion between Pris and Stan and to prepare a report for the board exposing their perfidy. When Patience cautiously suggests that in order to fully understand the situation, she needs to know more about the allegations that Pris has made and about the source of Cap's knowledge of the putative conspiracy between Pris and Stan, Cap replies, "Look, who signs your paycheck? I've told you what to do, and if you don't want to help me save this company, I'll get someone in here who will!" Patience sheepishly promises to commence an investigation immediately.

This scenario presents many of the same issues and concerns as the prior one and requires handling in much the

same way as far as that goes. Again, Patience most probably has a personal-interest conflict, as well as a significant Model Rule 1.13 problem. Again, as a practical matter, her goal should be to persuade Cap that she cannot effectively handle the matter alone—because her objectivity will be called into question and discredit Cap's whole effort to expose the conspiracy, or such should probably be her talking point—and that it is in his and Megalithic's best interest for competent outside counsel to be brought in. If that effort is not successful, Patience must consider taking the matter to the full board. This is a crisis that could have a material adverse effect on Megalithic at the highest level, and as a matter of professional responsibility, she cannot make the necessary decisions without consulting her "real" client, the board.

Leaving aside the nuclear-option concerns, though, this scenario also introduces another prickly issue: the lawyer's role in advising the client and its appropriate constituents about business or reputational risk that may arise even where the underlying action is arguably legal. In this case, the whole "private detectives" approach advocated by Cap has a significant risk of blowing up even if the activities carried out by such private detectives were (as they should be) within the law. For example, although the "pretexting" activities carried out by private detectives engaged by, or with the knowledge of, Hewlett-Packard's lawyers resulted in felony charges and the demise of several prominent careers,[1] it is probably fair to say that the public indignation at the revelation of such activities was more-or-less independent of their actual legality. Instead, the damage seemed to have been done as much as anything else by the notion that whether such activities were legal or not, they simply were not right, and corporate executives (and lawyers) who sanctioned them were not worth of shareholders' respect.

More specifically, in the healthcare context, lawyers are frequently in the position of counseling their clients about the advisability of an action that is arguably legal, or at least arguably not illegal: the contract that meets the letter but not the spirit of a safe harbor, the executive compensa-

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[Section 6:9]

[1]*See generally, e.g.,* Baer, Corporate Policing and Corporate Governance: What Can We Learn From Hewlett-Packard's Pretexting Scandal?, 77 U. Cin. L. Rev. 523 (2008).

tion decision that is arguably justified by performance but that may seem inconsistent with a charitable organization's purposes, and so on and so forth. In such cases, the lawyer may believe that an arrangement is defensible but that the reputational cost of an investigation or enforcement action outweighs the benefit of the arrangement even where it may pass technical muster.

In those situations, the lawyer must be aware that although he or she has an ethical duty to defer to the client's judgment regarding a lawful course of action, there is also a duty to render advice and counsel that may go beyond pure "legal" advice. As noted in the commentary to Model Rule 2.1:

> Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.[2]

In our hypothetical scenario, Patience should carefully consider advising Cap that his plan has potential practical consequences that are separate from the legal concerns, but no less important. Under our assumed facts, Cap seems more likely than not to tell Patience what she can do with that advice, but that does not change Patience's obligation to provide "adequate" advice under the standards of Model Rule 2.1.

§ 6:10 Variation four: "If you don't know who the patsy at the table is . . ."[1]

For our final variation, assume that Pris Teene takes her original concerns (i.e., that Cap, Patience, and most of senior management are engaged in skullduggery) to Stan Upguy. Duly concerned, Stan convenes a meeting of the Audit and

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[2]Model Rules of Prof'l Conduct R. 2.1, cmt. [10].

[Section 6:10]

[1]There are many variations on this poker aphorism, but the general form along the lines of "If you've been playing poker for half an hour and you don't know who the patsy at the table is, it's you."

Compliance Committee. The Committee hires Upright & Sikorsky, a prominent law firm, to conduct an independent internal investigation and notifies Patience that they expect her full cooperation. Patience, confident in her own virtue, welcomes the Upright team in, offers to let them use her office as their base of operations, and dutifully sends out a "document hold" letter to the corporate office.

After a time, Patience notices that the Upright lawyers seem a bit standoffish, but she attributes that to their desire to demonstrate their objectivity and independence. One day thereafter, one of the younger members of the Upright team tells Patience that they would like to meet with her the next morning. "Finally," she thinks, "they're ready to give me a final report."

When the group convenes the next morning, however, Patience notes that the same young lawyer is sitting at the end of the table with a rather large notepad and an unduly serious look. Hamilton Sikorsky, the senior member of the team, invites Patience to sit down. Before Patience can say anything, Sikorsky says, in a pleasant but firm tone, "As you know, the Audit and Compliance Committee has asked us to review the matters raised by Pris Teene and prepare a report. This interview is in furtherance of that report. When our work is completed, we expect the Committee will direct us to share our report with the Office of Inspector General. As I'm sure you understand, we have been engaged by the Committee to represent it in this matter, and thus we do not represent you or any other employee of Megalithic individually."

With a wry laugh, Patience says, "You almost sound like I should get my own lawyer here!" Not laughing at all, Sikorsky replies, "That, of course, would be your decision . . . ."

This scenario raises yet another challenging situation for general counsel in today's compliance/enforcement culture. Lawyers who once viewed themselves as professionals above the fray may find themselves as targets of internal (and external) investigations, alleged to be coconspirators—or even primary wrongdoers—in alleged corporate misconduct.[2] In such cases, the traditional relationship between inside

[2]*See generally, e.g.,* Horton, Target-at-Law, supra.

and outside counsel may be turned, if you will, "inside-out" as general counsel accustomed to giving orders to outside lawyers find themselves being interrogated by them instead.[3]

Obviously, such a situation poses a variety of ethical, legal, and practical issues for the general counsel, and a full discussion—or even a superficial one, really—is beyond the scope of this chapter. However, there are two critical takeaway points that may appropriately be made here:

- A lawyer who responds to allegations involving his or her own conduct in the way attributed to the general counsel in our original e-mail scenario above is quite likely to find himself or herself facing just this sort of conundrum. It is quite simply impossible for a general counsel—or any other lawyer—to take the lead or otherwise be materially involved in the client organization's response to such allegations. At best, such a lawyer is running a serious risk of committing ethical violations and exposing the client to potential liability arising from an inadequate, superficial, or otherwise noncredible investigation. At worst, the lawyer is running a serious risk of exposing himself or herself to charges of obstruction or conspiracy. In today's world, the lawyer simply cannot control the conduct of a review of his or her own work.
- Likewise, in today's world a lawyer who faces allegations of involvement in corporate misconduct that are even marginally credible must have his or her own counsel and ideally should have that counsel on board at a very early stage in the process. It is only natural for lawyers to assume that they do not need legal representation because after all, they are lawyers themselves.

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[3]A fascinating, example is the case of Kent H. Roberts, former general counsel of McAfee, Inc., who alleged that outside counsel conducting an internal investigation of stock option backdating not only set him up as a scapegoat to protect the company's chief executive but who did so as part of a conspiracy with the company's directors. The case is described at some length in Horton & Demetriou, Up the Ladder or Under the Bus? Legal Ethics Issues When Management and Counsel Become Adversaries, contained in the program materials for the American Health Lawyers Association's 2012 Institute on Medicure and Medicaid Payment Issues. The lawsuit brought by Roberts against McAfee was recently dismissed by the Ninth Circuit. Roberts v. McAfee, Inc., 660 F.3d 1156, 32 I.E.R. Cas. (BNA) 1761, 39 Media L. Rep. (BNA) 2601 (9th Cir. 2011).

They can spot the traps, and anyway, their fellow lawyers will understand the nature of the pressures and stresses that they face and the judgment calls that they have to make and will make allowances. However, a lawyer who still believes that in 2012 is sorely mistaken.

§ 6:11 Conclusion: Forewarned is forearmed?

The scenarios describe above provide a few examples—exaggerated for effect, perhaps, but not all that much—of the professional challenges that may arise for the general counsel when conflicts emerge within the corporate client, especially when those conflicts involve governance and compliance issues. Unfortunately, in the world in which we currently live, it is unrealistic to expect to avoid those conflicts. Further, it is unrealistic to expect to resolve them solely by reference to those (again) abstract rules of professional conduct that govern lawyers, including general counsel. A lawyer may confidently say, "Rule 1.13 says I have to do this, Rule 1.2 says I need not do that" and so on, but those living, breathing client constituents with whom the lawyer must interact probably do not care much about those rules.

However, it is critical that lawyers—especially those who take on the multifaceted task of serving as general counsel—have a firm grounding in those rules, not because of their persuasive force for others but because they provide at least some sort of anchor to which a lawyer may cling long enough to get his or her bearings. Knowing that Model Rule 1.13 says that the CEO is not one's client may not provide much comfort in the face of an outraged CEO (or board member, or other client agent). However, it may give the lawyer a polestar, a point of light that lets him or her find a way out of the darkness of the immediate crisis. Even when the right thing is hard to do, knowing what the right thing is may be the first step along that important path.