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Symposium Articles

More Preaching, Fewer Rules: A Process for the Corporate Lawyer's Maintenance of Corporate Ethics

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I. EXECUTIVE SUMMARY

The general failure of attorneys as ethics officers to install effective ethics programs arises from a lack of understanding of the inherent nature of corporations and corporate ethics. This lack is compounded by the legal profession's failure to come to grips with a basic question: should corporate counsel give moral advice?

An ethics officer (EO) must discard the concept of a corporation as an artificial person. A corporation is not itself a person capable of making a moral decision. There is no "corporate ethics;" there is no "business ethics." There is only "ethics:" individual moral values and moral decision-making.

A corporation is a social organization made up of patterns of communication among persons capable of making moral decisions. The patterns of communication form the world in which employees make their decisions. Employees generally make rational moral decisions based on the values in the corporate world in which they think they live.

The legal profession's concept of the morally neutral attorney is not appropriate for the advisory job of the corporate attorney, especially that of the attorney as ethics officer. When the choice of company action involves moral decisions, the advice of any corporate attorney, whether acting as ethics officer or not, should include moral comments.

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The public has created Neoethics, a new combination of public moral philosophy and legal rules. Neoethics is a corporate governance ideology, which demands both public values in business decisions and also that corporations bear a burden of preventing public immorality in business decisions. Neoethics will shape the goals the EO sets for the company's ethics program.

Although the EO's plan of action will have sundry details, and will be individual to the corporation involved, the nature of the plan itself can be simply expressed as: "More Preaching, Fewer Rules." That is to say, the EO should rely less on rules and more on open and earnest advocacy of moral values. Through the corporate patterns of communication, the effective ethics officer will place appropriate values within the world in which employees think they live.

II. FOUNDATIONS OF EFFECTIVE ACTION BY THE ETHICS OFFICER

A. The epistemology of corporate ethics.

We are discussing corporate ethics following recent financial wrongdoings that have downgraded scandals of accountant-enabled expense hiding, like WorldCom, and lawyer-enabled off-the-books partnerships like Enron, to a minor status. Intuitively, it seems obvious that there is something fundamentally wrong with corporate operations – an evil which contravenes common notions of decency and which causes ever worse catastrophes.

Regulatory rules are not doing the job of preventing wrongdoing. That seems obvious from the newspapers. In fact, "[c]orporate finance is one of the most heavily regulated areas in modern American society."[1] Yet weekly there are disclosures of financial wrongdoing. Morally unacceptable risks and hidden costs loaded into companies for the purpose of creating multi-million dollar management compensation have risen to be of such scope as to ruin entire industries and shake the American economy.[2] Bad behavior is not limited to financial wrongdoing. It may be a quality control manager hiding laboratory reports of salmonella in the day's production of peanut butter. It may be a factory manager fondling his secretary. It may be a bus driver

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1. ALEJO JOSE G. SISON, CORPORATE GOVERNANCE AND ETHICS: AN ARISTOTLEAN PERSPECTIVE 29-30 (Edward Elgar Publishing Ltd. 2008).

2. As I write this, the news media is reporting a fifty billion dollar fraud by Bernard Madoff, which he ran for years. Madoff, a former chairman of the NASDAQ stock market, ran the fraud through a Wall Street hedge fund company which hid the fraud in spite of rules from auditors and government regulators. However, the immorality and fraud of Madoff pales as larger losses to innocent individuals are thrust before us. The news media tells us that taxpayers must pay hundreds of billions of dollars of the corporate debts of AIG, a formerly respected insurer, because of executives who made decisions good for their personal benefit and bad for the company's asset position.

pocketing cash fares. It may be the floor supervisor of a meatpacking company taking bribes for jobs. Studies continue to show wrongdoing is more widespread that we care to think about. According to one well done study, fifty-six percent of employees have observed misconduct, including lying and abusive behavior.[3] Another study this last year found that an average company loses seven percent of its annual revenues to occupational fraud.[4] If *external* regulation of companies, and multiple written rules within companies, are not doing the job expected, we should look with renewed interest at internal corporate governance, which does not rely on the ineffective external regulations. That is to say, we should look at internal corporate governance which relies on ethics.

Historically, the catalyst for the enormous proliferation of ethics programs in corporate America was the requirement of the federal organizational sentencing guidelines that an organization "promote an organizational culture that encourages ethical conduct[.]"[5] [6] Because the requirement to have an "organizational culture that encourages ethical conduct" is a legal requirement, corporations (mistakenly) commonly have called on lawyers to devise the ethics codes and ethics culture. Likewise, the legal requirement in the Federal Sentencing Guidelines that the company should designate "Compliance and Ethics Officer(s)" made it natural not only for corporations to designate a lawyer to devise the ethics culture but also designate a lawyer as the required ethics officer. As this 21st century starts, the involvement of lawyers in the management of internal corporate ethics programs has become common.

Ethics management may become part of a lawyer's job because an existing corporate counsel is given the additional title of Ethics Officer, or because a lawyer is hired specifically to be the ethics officer. Alternatively, an in-house lawyer or an outside counsel might be directed specifically to install, improve, or maintain the company ethics program in a team relationship with a non-attorney who is titled as the company Ethics Officer. In another pattern involving attorneys, an attorney may be directed to give management an ethics program as part of a larger corporate program generally titled as "Governance," "Internal Audit," "Enterprise Risk" or "Compliance."

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3. Ethics Resource Center, 2007 National Business Ethics Survey, http://www.intercedeservices.com/downloads/07_survey.pdf, at 1, 8 (last visited July 8, 2009) [2007 Ethics Survey].

4. Association of Certified Fraud Examiners, 2008 Report to the Nation on Occupational Fraud and Abuse, at 4, http://www.acfe.com/documents/2008-rttn.pdf. The report includes as occupational fraud any intentional misuse of the company's resources or assets, including payroll and billing schemes, asset misappropriation, bribery and conflict of interest causing loss the company. *Id*. at 7.

5. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a)(2) (2009).

6. *Id.*

Still another common pattern for involvement of an attorney as an ethics officer is for a corporate counsel to be the supervising manager for a person doing day-to-day administration of the company ethics program, with the corporate counsel being titled "Legal Compliance and Ethics Officer." In such cases, the attorney is the one charged with directly advising top corporate management on ethics matters, and has the ultimate responsibility of designing and implementing the ethics programs of the company.

I use the term "attorney EO" to refer to corporate counsel who are in any of the relationships discussed above. That is to say, "attorney EO" means any attorney who has any responsibility for the implementation, operation, or supervision of a corporate ethics program. The title "Ethics Officer" may or may not be on the door. The important point of the definition is that the attorney EO is designated to be *not* just another corporate attorney, but rather he or she happens to be an attorney and the designated duties include an involvement with ethics within the company.

Unfortunately, appointment of lawyers to the management of internal corporate ethics programs seems to have been dismally unsuccessful in preventing corporate scandals. Corporate attorneys have been generally ineffective in designing, installing, or maintaining effective corporate ethics programs. Surely, lawyers could be more successful in corporate governance than they have in recent years. What has been central to the lack of success?

The general failure of ethics officers to administer effective ethics programs arises from a lack of understanding of the inherent nature of corporations and of corporate ethics. This lack is compounded by the legal profession's failure to come to grips with a basic question: should corporate counsel give moral advice? The failure of lawyers to administer effective ethics programs is because of a simple fact – Law schools do not teach lawyers the epistemology of corporate ethics.

- The central problem of corporate ethics is not corporate. It is epistemological. By "epistemology of corporate ethics," I mean to emphasize the study of the nature of corporate ethics, its presuppositions and foundations, its extent and validity, its fundamental conceptualized beliefs, and its reality and meaning in the world. Law schools continue to turn out graduates who have no realistic understanding of the nature of corporate ethics.[7]

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7. Like law schools, business schools assume, without much if any debate, that if lawyers and business persons know the law they do not need to understand ethics philosophy – except in the context that a company's benefice to the community can produce sales, reduce government intervention, or otherwise result in some other economic benefit to the company. Indeed, both American law and American accounting has only recently recognized a charitable contribution as a legitimate and tax-deductible business expense, and only then because of an economic theory of monetary gain through improved public relations. Law

> Hence lawyers do not well perform the job of implementing, maintaining, and enforcing corporate ethics. Lawyers also lack knowledge of the actual operative mechanisms of corporations. Lawyers are happy to ignore inquiry into that sociological subject, because they are schooled to think of a corporation as an artificial person who can be represented by a drawing showing the organizational chain of command. If we are to find a practical process for persons trained as lawyers to do the job of an EO, we must look at the reality of corporate ethics, which necessarily includes looking at the reality of a corporation.

An examination by lawyers of the epistemology of corporate ethics means a lawyer's viewpoint is being used. We need to be aware of it. For, as Arnold Toynbee observed in regard to historians looking at religion, "each walk of life has its peculiar experience, outlook, and approach,"[8] and what we see is shaped by our occupational experiences. Thus, theologians look at corporate ethics differently than utilitarian economists; economists look at ethics differently than legislators; legislators differently than sociologists: and all of them differently than lawyers. As lawyers, we have been shaped by education and experience to value ethical qualities like secrecy, legal compliance, documenting, consistency, and safety; and to minimize ethical qualities like open communication, excellence in morals, inconsistency to produce justice, generosity, and risk-taking by one for the benefit of the community. As lawyers, we have been shaped by education and court judgments to regard a corporation as an artificial person, and to regard ethics as nothing more than our profession's written code of minimal legal responsibility. Our occupation has shaped what we see.

We should examine three assumptions commonly included in a corporate lawyer's view of corporate ethics. The three assumptions critically affect the actions of an attorney EO. They each are detrimental to the job of an ethics officer in installing, maintaining, and promoting corporate ethics. I therefore suggest replacement assumptions that are better for the attorney EO to use.

Assumption #1
Bad: A corporation is a person that makes ethical choices.
Good: A corporation is communications patterns.

The idea of creating an artificial person and calling it a corporation is a medieval concept designed for a limited purpose.[9] The idea was articulated in

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schools and business schools shy from the words "corporate philosophy" as being a subject foreign to law and management.

8. ARNOLD TOYNBEE, AN HISTORIAN'S APPROACH TO RELIGION 1 (Oxford University Press 1956).

9. *See generally* J.P. Canning, *Law, Sovereignty, and Corporation Theory, in* THE CAMBRIDGE

England as early as the thirteenth century when churches and local governments needed a theory to allow rights or property granted to specified individuals (*e.g.,* the Pope or the local Abbot or the chief property owners in a walled town) to transfer to other persons in some automatic manner.[10] The concept of the corporation as being an artificial person filled that mediaeval need.[11] By the seventeenth century, the concept of the artificial person was associated with business corporations so that Blackstone could summarize the concept of corporations as follows:

> WE have hitherto considered persons in their natural capacities[] . . . it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality.
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> These artificial persons are called bodies politic, bodies corporate, (corpora corporata) or corporations: of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce[.]"[12]

The author of the first English treatise on corporate law was able to bring the "great variety" of Blackstone into a unified definition of "corporation" that took about a hundred words to express.[13] A hundred word definition, of course, was much too long for common repetition; it was a semantic burden for speech and thinking. By 1820, United States lawyers and Supreme Court judges happily fastened on the simple phrase "artificial person." The definition of a corporation that lawyers used in their work became: "a corporation is an artificial person that is immortal."[14] This shortcut definition

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HISTORY OF MEDIEVAL POLITICAL THOUGHT 454 (J.H. Burns ed., Cambridge University Press 1988).

10. *See, e.g.,* 1 SIR FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW 486-511 (Chap. 2, Corporations and Churches) (Legal Classics, Birmingham, Alabama 1982) (1899).

11. *See* ALEXANDER NEKAM, THE PERSONALITY CONCEPTION OF THE LEGAL ENTITY 117 (Harvard University Press 1938) ("In accordance with the emotional creed of a certain period, its theorists regard this phenomenon [a corporation being a person] as a necessary consequence of some natural metaphysical qualities inherent in man[.] The building they constructed still remains").

12. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 467 (Professional Books Ltd. 1982) (1809).

13. STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 13 (Garland Publishing, Inc. 1978) ("A collection of many individuals, united into one body, under a special denomination, having perpetual succession under an artificial form, and vested, by the policy of the law, with the capacity of acting, in several respects, as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation, or at any subsequent period of its existence." (italics omitted)).

14. *See* Trustees of Dartmouth Coll. v. Woodward*,* 17 U.S. 518, 636 (1819).

has allowed shortcuts to decisions, such as a judge intoning that in a Rule 30(b)(6) deposition, the offered corporate employee "must" testify to the corporation's "subjective beliefs and opinions,"[15] apparently under the assumption that the corporation has a brain and emotions sufficient for the corporation to believe based on faith. Other judges have determined corporate liability based on the corporation's "psyche," "its directing mind and will," or its "brain."[16]

Lawyers like the easy familiarity of allowing a statutory "person" to include both a corporation and a real live breathing person. It is a concept that works for the limited purpose of mentally tinkering with property rights granted by the state. But it does not work for thinking about corporate ethics. When we discuss corporate ethics, thinking of a corporation as a person gives us no advantage. Such thinking is only an accident of medieval need.[17] Indeed, thinking of a corporation as a person is contrary to how lawyers and philosophers ordinarily discuss the rules of action by individuals in legal

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> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country[.] *Id.*

See also BOUVIER'S LAW DICTIONARY 252 (6th ed. 1856) (ARTIFICIAL PERSON. In a figurative sense, a body of men or company are sometimes called an artificial person, because the law associates them as one, and gives them various powers possessed by natural persons. Corporations are such artificial persons (citation omitted)). *Id.*

15. A.I.A. Holdings, S.A. v. Lehman Bros., Inc., No. 97 Civ. 4978, 2002 U.S. Dist. LEXIS 9218, at *15-16 (S.D.N.Y. May 20, 2002). The result ordered by the judge may be correct, but a holding in those words escapes the job of defining for the litigants what worth the deposition will be when a corporate president appears at trial to testify to a different "subjective belief and opinion."

16. FREDERICK HALLIS, CORPORATE PERSONALITY: A STUDY IN JURISPRUDENCE ii (photo. reprint 1978) (1930).

17. Indeed, indeed for any purpose, using the theory of a corporation as a person is not a superior mode of legal thinking. This was recognized in 1899 by Pollock and Maitland, who stated: "Were we to digress to modern times, we might be able to show that the theory which speaks of the corporation's personality as fictitious, a theory which English lawyers borrowed from medieval canonists, has never suited our English law very well." Pollock and Maitland, *supra* note 10, at 489. Unfortunately, their observation went generally unheeded.

relationships. *E.g.,* we do not discuss the relationships of marriage[18] or bailment as being one indivisible and artificial person.[19] Referring to a set of ethics relationships among the persons (plural) inside and outside a corporation as being the ethics of an artificial "person" (singular) confuses and confounds rational judgment about corporate ethics.

Bluntly stated, you cannot pound ethics into the brain or emotions of an artificial person, so stop thinking of installing ethics into a corporation. The medieval concept of a corporation as a metaphysical artificial person does not help the EO install or maintain corporate ethics.

The concept of a corporation as an artificial person making ethical choices is worse than unhelpful. It leads to moral confusion. A corporation does not make moral choices.[20] People in the corporation make moral choices. The president makes moral choices. The janitor makes moral choices. Does terminating a single mother's job without notice and without severance pay become moral because it is done by an artificial person? The moral responsibility of the CEO in terminating the employment of ten people to balance a million dollar bonus to herself is the moral responsibility of the CEO, not that of an artificial person.

Sociology can lead us to more helpful assumptions about corporate ethics. Sociology classifies a corporation as an "organization," not as an artificial person. An organization is a social arrangement that pursues collective goals, which controls its own performance, and which has a boundary separating it from its environment.[21]

The sociologist views a corporation as a set of social arrangements. Sociologists advance several theoretical models to describe accurately those social arrangements used by persons interacting with others inside the company or by persons within the company interacting with others outside the company. Those models are needed to effectively predict actions and effect change. For those seeking to change behavior of corporate officers and

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18. At least we no longer do. We have escaped from the era of Blackstone who told us, "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage . . . . Upon this principle, of an union of person in husband and wife . . . a man cannot grant any thing to his wife, or enter into covenant with her, for the grant would be to suppose her separate existence." 1 BLACKSTONE, *supra* note 12, at 441-42.

19. I recognize there are exceptions, particularly in theology. *See Romans* 12:5 ("we, being many, are one body in Christ[.]").

20. *Cf.* ELIZABETH WOLGAST, ETHICS OF AN ARTIFICIAL PERSON: LOST RESPONSIBILITY IN PROFESSIONS AND ORGANIZATIONS 58-95 (Stanford University Press 1992).

21. Wikipedia, organization, http://en.wikipedia.org/wiki/Organization (last visited Dec. 10, 2008).

employees, the concepts enunciated by Marvin Brown[22] are especially powerful.

> Corporations, of course, are not biological. They are, however, constituted by language, or, we could say, by ongoing communication patterns. These patterns include both verbal and non-verbal communications. The verbal communication includes mission and policy statements as well as daily conversations. The non-verbal includes work design, daily schedules and practical skills. If we look at corporate systems as ongoing communications, then corporate integrity will depend on the character of these communications . . . .
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> The ongoing conversational patterns that constitute corporations as human organizations . . . are also multi-dimensional. For the stories to be told well, and for the telling to show what can and needs to be done, these different dimensions [of the ongoing conversations] must become available for analysis, evaluation, and change . . . .
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> Of course, you cannot directly observe relationships, but you can observe the patterns of communication in which they are embedded. So the method for improving integrity of relationships is to analyze, evaluate, and redesign communication patterns.[23]

If we follow Brown's theory of a corporation as patterns of communications, we understand that actions by employees are dominated by input communicated to them during the workday. We also see that the ethical values of the corporate world of the employee are held within those communications. Those ethical values describe minimum standards of behavior towards others with which employees (including top management) have some communicative action. For examples of behavioral values with those with whom there is communication, consider the values of "each day I will tell my division what production goals I expect," "doing unto others as I want to be treated by them," "telling the truth to employees with whom I work closely," "telling the truth to that S.O.B. CEO," "keeping promises with customers," and "correctly stating the expenses of my company to the external

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22. Marvin T. Brown, Ph.D., is one of the leading edge thinkers on corporate organization and ethics. His book, CORPORATE INTEGRITY: RETHINKING ORGANIZATIONAL ETHICS AND LEADERSHIP, has been translated into at least five languages, and his concepts of corporate ethics leadership for this century have been labeled the most innovative since Peter Drucker's classic works of the last century. I thankfully acknowledge the conversations with him during 2005 and 2006 that have influenced what I have to say today.

23. MARVIN T. BROWN, CORPORATE INTEGRITY: RETHINKING ORGANIZATIONAL ETHICS AND LEADERSHIP, x, 2, 4 (Cambridge University Press 2005).

auditors." Brown's theory of a corporation as patterns of communication[24] is a theory that works: it effectively gets results for an attorney EO. If we see all the patterns of communication in a specific corporation, we can see which communications need to be changed if we are to change the ethics of actions taken by individuals.

For example, suppose we want our sales force to always tell the customer any significant problem our product has in operating correctly. Even before the salesperson's contact with a customer, a sale involves a matrix of communications between the salesperson and his or her trainer, co-salespersons, support personnel, sales manager, and various levels and departments of the company. It is in those pre-sale communications that we first look for the instructions to the salesperson as to what he or she should say to customers. After that pre-sale matrix of communications, at the point of sale a salesperson has an ethical choice between either: (1) telling the customer of the operating problem of the product; or (2) maximizing the chance of making a sale which his or her supervisor apparently wants to be made. Understanding the patterns of communication involved allows us to perceive better what the EO should be doing to influence that ethical choice. The salesperson's ethical decision depends on communications to the salesperson telling him or her that one value (honesty) must always overcome other values (profit to the company; commissions profit to the salesperson). Where do those communications come from, and what is their content? The answers to those questions tells us how we must craft communications to cause the salesperson to understand it is "right" in his or her supervisor's eyes for honesty to prevail in spite of the supervisor's order to make the sale. Thus, we realize that as ethics officers, we must start with creating appropriate communicative actions by the supervisor, not by first sending a memo of an "honesty rule" to the salesperson.

Carrying this example further, we realize that if we truly mean to implement the policy of communicating (before sale) to the customer any problem the item has had in operating correctly, we have to examine the communications from customer service personnel (what instructions are they to have as to the ethics of defining what is a "significant" problem?) to salespersons. Not only that, but the patterns of communication show us that

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24. Stewart L. Levine has expressed a similar concept in his acclaimed books on business management and communications. The article *High Performance Organizations: Creating a Culture of Agreement by Stewart L. Levine* (Handbook of Business Strategy, 2006) develops the idea that the culture of a company is found in its organizational relationships, both internal and external, and that successful companies are those that change those relationships into express or implied agreements among those involved. Levine has said, "Brown is describing the ongoing process that a corporation is, and I am defining a relationship within it at a movement in time. Within my way of thinking the agreements continually evolve as new information is added." E-mail from Stewart L. Levine (Sept., 2008) (on file with author).

to effectively persuade the salesperson to disclose operational problems with the product, we must also look at what communications there are from the factory, in the product warnings and instructions to the customer, and what the salesperson perceives will be told to the customer after the sale.

In short, examining the patterns of communication is the method that shows us which communications will change the ethics choices by individuals. This examination, for purposes of improving ethics, has nothing to do with the legal concept of the corporation as a legal person. For the EO to be effective, he or she must give up the concept of the corporation as an artificial person; and focus instead on the concept of the corporation as patterns of communication. Those patterns of communication, their form and content, are the world in which employees (including top management)[25] make decisions. Those patterns of communication are the areas of concern of the ethics officer. The EO must spend most of his or her time examining and improving communications to the end of showing correct values between the communicants.

That having been said I must interrupt what I am writing to give my lawyer readership a warning about those patterns of communication which involve personally the attorney EO herself. In analyzing legal property right relationships (as opposed to analyzing ethical relationships), the artificial construct of a corporation as an entity, even as an artificial person, is helpful. For example, the law regulating litigation procedures demands the corporate lawyer to have a "client" (and the law will assume that the client is the artificial construct labeled "corporation"). The law assumes that the client of the corporate attorney is neither the corporate president nor the senior executive who may seek legal advice on what the company should do.[26] A corporate attorney designated as an ethics officer is still a lawyer and still has a client, and the client is not usually the person being advised by the attorney. Both the corporate employee seeking the ethics officer's counsel (the advisee), and the corporate counsel as ethics officer (the advisor) should understand that the EO's duty is to give the advisee the ethics advice that will benefit the company. The law condemns the lawyer for forgetting the client during communications to the advisee. The law condemns the lawyer for not telling the advisee that an artificial person is the client of the lawyer. Therefore, a lawyer designated as a corporate EO may need to give an explicit corporate

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25. I use the linguistic device "employees (including top management)" deliberately several times in this article. Our stereotypes and our habit of mono-cultural communication sometimes make us think that "employees" refer only to those not in the top management tier or in the legal department. We therefore subconsciously ignore some realities. I intend the interruption caused by the parenthetical to remind you that what I am saying applies to all tiers within the corporation, including the tier of the reader.

26. *In re* Grand Jury Subpoena, 274 F.3d 563, 571 (1st Cir. 2001) ("The default assumption is that the attorney only represents the corporate entity, not the individuals within the corporate sphere[.]")

Miranda style warning from time to time.[27] Additionally, if the attorney EO, for proper performance of their EO job, needs to have an option not to disclose to the company an advisee's communications to the EO, that option must be specified, in writing, as part of the job description of the attorney EO.

Now, let's return from that warning interruption. The corporate attorney EO's retreat to thinking of a corporation as something other than a pattern of communication is needed almost only as the EO, as advisor, moves from a counselor role to the adversarial roles of fighter, negotiator, or securer of property rights. The view of the corporation as an artificial person almost always is not needed in the EO's ordinary job of being a counselor empowered to devise, implement, and promote the company's ethical culture. For the purposes of the job of the EO as counselor it is best to think of the corporation as patterns of communication.

There are no sociological studies that I know of that statistically measure the effectiveness of a corporate ethics governor changing to regarding the corporation as a set of communications patterns. Yet, experience and logic indicate that such a view is realistic and helpful. Therefore, let us go forward with the premise that the attorney EO should refrain from thinking of a corporation as an artificial person; and instead, think of the corporation as a series of patterns of communications, both between persons within the corporation, and also between employees and persons outside the corporation.

If the corporation is a series of patterns of communications — then the ethical culture of the corporation lies in the form and the content of those ongoing communications. Those patterns of communications are linguistic and sociological patterns. Generally, because of law school training, it is easier for the lawyer to discover words, and analyze what those words mean in a linguistic sense, than it is for him or her to recognize, analyze, and evaluate sociological patterns. The lawyer's inherent difficulty of recognizing, analyzing, and evaluating sociological patterns in his or her corporation is compounded by the fact that any observer's view is fragmentary and based on his or her viewpoint.

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27. The Miranda style warning might be:

> The company is my client. You are not my client. You do not have an attorney-client privilege with me. I may tell the company anything you tell me. The company can tell other people, or the government, anything the company knows.
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> I am doing an investigation for the company. You do not have to tell me anything you want only your own private attorney to know. If you request it now, I will give you a chance to consult with your own private attorney before you talk with me. If you refuse to cooperate with me in this investigation, I may tell the company you refused to cooperate. I may recommend penalties for a refusal to cooperate.

The observer's difficulty of recognition, analysis, and evaluation of those patterns is compounded further by the fact that we live in these patterns. Just as we breathe air or walk on land or drive to work in a car, we experience corporate communication patterns as something we are within. Thus, for example, the attorney EO may not recognize gossip at the coffee pot as a pattern of communication that constitutes the company as an organization, nor recognize the mode of distribution of an ethics code as itself being a pattern of communication, nor recognize the physical views that entry level accountants have of the ethics officer with (or not with) the CEO as a pattern of communication.

The discovery and analysis of the patterns of communication that contain ethical values content is a necessary step in changing ethical decision-making within the company. The ethical culture of the corporation lies in the form and the content of those ongoing communications.

> Assumption #2
> Bad: Corporate law is the foundation for corporate ethics and the decisive factor in an employee's ethical choice of action.
> Good: Values within the company world are the foundation of corporate ethics and the decisive factor in choice of action.

During his articulation of capitalism, Adam Smith expressed the inherent fault of corporate managers:

> [B]eing the managers rather of other peoples' money than their own, it cannot well be expected that they [management] should watch over it with the same anxious vigilance with which . . . [they] frequently watch over their own . . . . Negligence and profusion [*i.e.*, extravagant spending for self-benefit], therefore, must always prevail, more or less, in the management of the affairs of such a company.[28]

Legislators cannot enact statutory detailed prohibitions to prevent all the different possible actions which are negligent just as they cannot enact statutory detailed prohibitions against the extravagant spending for self-benefit noted by Adam Smith. Rules don't specify everything. Rules can't specify everything. Effective corporate governance has to rely on individuals making correct decisions in multitudes of situations. Let's take some examples: Governmental regulations demand that "annual reports to stockholders must contain management's discussion and analysis of the firm's financial condition." The content of the final discussion signed by the CEO and CFO is determined by dozens of corporate employees making dozens of individual choices, which cannot be defined in advance. Likewise, consumer fraud laws

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28. ADAM SMITH, THE WEALTH OF NATIONS 330-31 (Penguin Group 1999) (1776).

of the states demand that there be no misleading statements. What the salesman says in each conversation cannot be made into a set of rules for everything that might be said. Moving to examples in the possible use of corporation rules to specify "good" choices, consider the executives deciding what health insurance should be afforded to employees "this year" or deciding whether the company should spend the money for better air-cleaners on their furnace chimneys even though not required by the Environmental Protection Agency. Trying to devise company rules of absolute command in advance of knowing the particulars of those situations seems impossible. In short, in the fast-paced, goal-directed activities each person is engaged upon, the individual values of that person are brought to those new and variable situations not yet defined, or which cannot be defined, in a formal written rule. Values, not rules, become the decisional forces.

Yet, lawyers invariably try to build the moral choices of action to be made in innumerable situations upon a framework of statutory words of prescription and prohibition. Such a framework is not surprising — law schools teach neither how to manage a corporation nor real ethics (just professional ethics), nor corporate ethics. Law schools just teach lawyers how to write a clear rule of prohibition.

Lawyers trained only as lawyers default to using the law as a framework for the corporate ethics to govern the corporation.[29] Faced with the difficulty of articulating a framework for the corporation's ethics, the rationalization of a corporate counsel as ethics officer runs like this:

- I don't know philosophy or ethics, but I do know law;
- I don't know if my idea of the ultimate good is morally superior to other people's choices;
- The law works on reasonable principles and logic;
- No one is going to prosecute me or the corporation if we follow the law;
- I don't have to adjudicate moral choices by employees if I simply quote statutes as the standards and tell them anything they do that is legal is OK;
- I won't have to quarrel or make anyone angry with me if I make the statutes our standards; and, after all,
- What top management is really asking me to do is not to criticize them, but rather to provide liability insurance for corporate executives[30]; so

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29. *See*, *e.g.,* Lynn Sharp Paine, *Managing for Organizational Integrity, in* HARVARD BUSINESS REVIEW ON CORPORATE ETHICS 92 (Harvard Business School Press 2003).

30. The corporate counsel EO who believes that an ethics program (as distinguished from a legal compliance program) is only there as liability insurance for the executives is working under an erroneous

- Therefore, I will build corporate ethics on the framework of what the law requires or prohibits, rather than on what any ethics theory requires.

The alternative idea of surveying philosophy books and choosing an ethics theory for the company's written business ethics program boggles the lawyer's mind. Of course, any sensible corporate counsel is right in being boggled by the idea of business ethics, because:

There is no such thing as business ethics.

Since corporate management guru Peter Drucker first said it, several ethicists have often repeated his statement: "There is no such thing as business ethics . . . . There's just ethics; and we all have to practice them every day in everything we do."[31] Drucker used the term "business ethics" as the term "corporate ethics" is commonly used, to wit: the corporation's ethics or the business's ethics; and, as we have already noticed, the artificial concept called "corporation" or " the business" cannot make moral choices or itself have ethics in it's non-existent brain.

Lawyers are right in rebelling against trying to use a framework of a single specific ethics theory of "ultimate good."[32] Ethics in everyday commercial life is not a theoretical affair governed by an overwhelming specific theory of ethics. Ethics is a practical affair. Ethics is for people doing everyday jobs and having everyday conversations with employees, customers, and suppliers. In making business decisions, or decisions on social interactions within the community or in the company, employees do not rely on fine-spun textbook theories or logical consistency.

Minds evolved from centuries of survival tell us that it is simply common sense that we have a right to look after ourselves. We convince ourselves that we are making the right choice by rational reflection on the circumstances in which we find ourselves and using simple personal values. Every day the human mind performs complicated feats of subconscious pattern recognition

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belief. It is that belief that leads employees (including top management) to see nothing "wrong" with disregarding rules meant only to protect top corporate management.

31. JACK BEATTY, THE WORLD ACCORDING TO PETER DRUCKER (The Free Press 1998); *see also* DONALD R. KEOUGH, THE TEN COMMANDMENTS FOR BUSINESS FAILURE 80 (2008) (referencing the statement made by Peter Drucker); V. Henderson, "The Ethical Side of Enterprise," Sloan Management Review, Spring 1982, pp. 37-47.

32. Drucker distinguished between societal ethics and individual ethics. His denial of a universal business ethic of society's making may have been initiated by the movement in Germany before World War II to have businesses enforce the notorious ethics that Nazi society adopted. *See* Michael Schwartz, *Peter Drucker and the Denial of Business Ethics,* 17 J. OF BUS. ETHICS 1685 (1998) (Drucker voiced the empirical observation that individuals make moral decisions; that an impersonal business entity did not make moral decisions).

to interpret the world we observe and allow us to make choices instantly based on past observations.[33] Personal core values to evaluate "good" and "bad" actions are established by the mind, and we use those internal values every day, "without thinking about it." What the employee (that includes an executive) uses in making ethics decisions are personal core values.

Most ethics and compliance programs are designed by lawyers and feature laws and regulations.[34] The programs are unlikely to feature nonlegal exhortations, discuss personal core values, or employ sociological methods encouraged but not mandated by government regulation. The usual lawyer-drafted ethics program is rife with stuffy sentences, which emphasize that the program exists only because it is required by law, not because the results of the program will be good for the company or the employee reading the program. For example, a score of ethics programs I have seen start out: "The Board of Directors has adopted a Code of Ethics (as defined by Item 406 of Regulation S-K) that applies to the Company's Officers and Directors."

Worse than the stuffy wording, the typical "Code of Ethics" drafted by lawyers to be read by all employees, from CEO to receiving clerk, directly uses the incorrect idea that ethics equals legal compliance. The following is an example of the lawyer-drafted documents I see:

> CODE OF ETHICS OF THE ACME WIDGET WONDERS COMPANY
>
> Nothing in this Code of Ethics, in any company policies and procedures, or in other related communications (verbal or written) creates or implies an employment contract or term of employment.
>
> Sign the acknowledgment form at the end of this Code of Ethics and return the form to the Human Resources Department indicating that you have received, read, understand, and agree to comply, with the Code of Ethics. The signed acknowledgment form will be located in your personnel file. Periodically, or as there are substantive changes to the Code of Ethics, you may be asked to sign an acknowledgment indicating your continued understanding of the Code of Ethics.

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33. MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (Little, Brown and Company 2005).

34. *See, e.g.*, 2007 Ethics Survey, *supra* note 3, at 4; *see also* Paine, *supra* note 28, at 87 ("Designed by corporate counsel, the goal of these programs is to prevent, detect, and punish legal violations. But organizational ethics means more than avoiding illegal practice; and providing employees with a rule book will do little to address the problems[.]"). *Id.*

COMPLIANCE IS EVERYONE'S BUSINESS

> It is the Company's policy to comply with and require its directors, officers, and employees to comply with this Code of Ethics, including all applicable legal and regulatory requirements relating to the matters contained in this Code of Ethics, and to avoid and require its directors, officers, and employees to avoid violations relating to such legal and regulatory requirements, including without limitation, the following: Wire Fraud; Mail Fraud; Bank Fraud; Securities Fraud; Fraud Against Shareholders; Internal Controls and Procedures; Auditing Matters (both financial and with respect to all quality assurance systems); Dishonest or Unethical Conduct; Improper Disclosures in SEC Reports; Improper or Inadequate Public Disclosures; Integrity of Scientific Data.

With a lawyer-drafted code of ethics that starts out like the above sample, the attorney EO has communicated to employees (from factory inspector of peanut butter production to Chief Financial Officer) the idea that ethics is only a matter of minimal compliance with onerous and obtuse statutory language.

Likewise, corporate counsel, in advocating for an increase in budget for the ethics program, are more likely to use a narrative business case about how the program fulfills legal requirements than a narrative business case about how the program supports management or strategic objectives of the company.[35] The advice of corporate counsel to top management on what should be in ethics and compliance programs is short of moral reasoning and the benefits of moral action, but long on what the law requires the company to

35. *E.g.,* 2007 Ethics Survey, *supra* note 3, at 9. "The 2007 NBES has been able to show definitively that companies that move beyond a singular commitment to complying with laws and regulations and adopt an enterprise – wide ethical culture dramatically reduce misconduct." *Id*. at v. The studies of the National Ethics Resource Center have shown companies without effective ethics training incur fraud losses of up to twice the amount of those who have implemented appropriate ethics training. Not only are losses to white-collar crime greater in those companies but they are also more prone to suffer losses from hostile workplace actions, discrimination actions, and lost business opportunities due to their damaged reputation among both current and potential customers. Companies who adopt an enterprise-wide ethical culture have employees with more job satisfaction and more engagement in trying to assure the success of the company. Useful data and an illustrative graph are available at *Why Ethics & Compliance Programs Should be Spared from Cost Cutting Measures*, which is a PowerPoint presentation by the Ethics Resource Center, and can be viewed at www.ethics.org.

spend money doing.[36] As a result, minimum compliance with law, not maximum compliance with moral values, has become the corporate ethic.

"If it's legal, we can do it" is the slogan of mediocrity, not of ethical performance. Law is not a sufficient framework for the ethics to be used by employees of the company. First of all, legal compliance (law) is not ethics. Ethics is a decision process taken with reference to a standpoint internal to the employee. In contrast, legal compliance is action taken with reference to a standpoint external to the employee. It is true that a law is a fact to be considered in making an ethical decision, but in the ethical decision process a law is only that. I would like to take some time discussing the idea of law as ethics, because the morality-equals-morality fallacy is rampant in corporations. In corporations, an attitude of "If the lawyer says it looks legal, let's do it" typically overwhelms moral claims not contributing affirmatively to stock price or executive pay.

In any legal system there will be some overlap between legal and moral rules. The area of overlap is the area where most persons would place murder and burglary. It is this primary law that tempts us to argue that law and moral standards are one and the same thing. Yet few would argue that Hitler's laws designed to exterminate Jews were moral standards. Examples can be multiplied of actions that are legal but not ethically correct, and *vice versa*. President Richard Nixon received good legal advice that he could fire the independent special prosecutor investigating him, but the action was probably not ethically correct. Martin Luther King received good legal advice that he could not violate segregation laws, but his action in violating them was probably ethically correct. The Declaration of Independence was good ethics, but an illegal act. If my brother is drowning and I can save him, I can legally avert my eyes, but it is immoral to do so.

> "It is not an adequate ethical standard to aspire to get through the day without being indicted."[37]
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> – Richard Breeden, former chairman of the Securities and Exchange Commission, during the Enron investigation, chastising corporate officers for colorable compliance with laws as their excuse for wrongdoing.

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36. When an ethics officer advocates a cost expenditure because the law requires it, the officer misses a fundamental point. The view that the ethics program is a legal requirement marks the costs as an undesirable to be minimized or avoided. What is better shown is that good ethical culture has a fundamental business value. The view that ethical care has a business goal value marks the ethics program as desirable to be performed.

37. Kevin G. Salwen, Editorial, *SEC Chief's Criticism of Ex-Managers of Salomon Suggests Civil Action Likely*, WALL ST. J., Nov. 20, 1991, at A10.

It is the realization that law and ethics are not the same thing that leads Sarbanes-Oxley[38] and legislation of like it to demand that corporate governance both promote compliance with governmental rules and also promote ethical conduct. The legislative demand for legal compliance plus ethical conduct is a legislative recognition that employees are not effectively regulated by law alone, and that law and ethics are not the same.

To defend the use of legal requirements as an ethics code, an attorney EO might want to adopt the position of Natural Law theorists such as Lon Fuller. Those theorists argue that in a democracy a statute reflects the morality of society, and law and morality cannot be neatly distinguished. Natural Law theorists are countered by Legal Positivist theorists. Legal Positivist theorists, such as H.L.A. Hart, take the position that there is no necessary relationship between a statute and morality.[39] Those theorists see law as created for some utilitarian benefit of the legislators or those they represent, not something necessarily derived from morality.[40] Furthermore, even if the attorney EO adopts the Natural Law theory that the statute reflects public morality, it still is sounder to base a company's ethics program (as opposed to legal compliance rules) not upon a statute or company rule, but instead upon the underlying values of the public law. Even for the Natural Law theorist, there are several reasons why it is better to base a corporate ethics program upon underlying moral values than upon statutory or company commands *per se.* We can discuss some of those reasons at this point.

An EO's approach to ethics as a matter of setting specific rules and saying the company demands compliance is built on the assumption that Existence of Law = Compliance by the Individual. The existence of a company rule or legislative statute, however, does not equal compliance by employees. Legal constraints rely on a long train of factors. First, the individual must remember there is a law on the general subject, then the individual must make a decision that the law applies to the specific situation involved; then the individual must believe that a violation will be discovered; then the individual must believe that if a violation is discovered, someone will report it to the authority who will punish; then the individual must believe that the risk of punishment is

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38. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat.745, 789-90 (2002).

> (c) DEFINITION. In this section, the term ''code of ethics'' means such standards as are reasonably necessary to promote – (1) honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships; (2) full, fair, accurate, timely, and understandable disclosure[;] and (3) compliance with applicable governmental rules and regulations.

39. H.L.A. Hart, *Positivism and the Separation of Law and Morals,* 71 HARVARD LAW REVIEW 593-629 (1958); *Lon L. Fuller,* Positivism and Fidelity to Law – A Reply to Professor Hart*,* 71 HARVARD LAW REVIEW *630-72 (1958).*

40. *See generally, id.*

disproportionally high compared to the gain to be achieved. The train of factors goes on, because the individual must believe the law is morally valid and compliance is "right;" further the individual must believe the prohibited conduct will *not* help the company and that therefore the company will not protect him or her. Lastly, for a legal constraint to prevent action, the individual must not rationalize violation of the statute or company rule as needed to achieve a greater good for himself or for the company. It is rare that corporate rule-breakers are dissuaded by all these factors coming together.

As legal risks have become more diverse, as company rules and government regulations have become more complicated, as management and employees at all levels have become more accountable at the same time that their jobs have become more complicated and require more instant action – the activities and control rules associated with the governance, risk management and compliance of anyone's job have expanded to become becoming extraordinarily complex and numerous. One more rule is lost in the morass.[41]

Approaching ethics programs as a matter of rule compliance overemphasizes the threat of detection as the channeling force in human behavior. Even if employees recognize the formal corporate rules (including announced state and federal laws) as valid, formal corporate rules are not a sufficient foundation for company ethics – because rule-breakers believe they will not be found out. What appears to be the majority of criminologists recognize that it is not the existence of a rule or the severity of punishment that effectively deters crime. More important in deterring rule violations is the actor's perception of a high probability of detection.[42] If the prospective criminal thinks he or she will not be caught, the existence of a rule against the act will not deter the wrongdoing.

Without an ethical structure within the company to avoid wrongdoing, it is folly to rely on the idea that an employee's rule-breaking will be reported by another employee.[43] Reporting of misconduct causes hostility and retaliation by peers and management, and the employees see that. Indeed the

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41. *Cf.* Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968, 971 (2002) (arguing that top performers in business organizations are those who are who are highly focused at the business of competing, which means their minds tend to block out limits on competition (like rules or ethics) that are likely to be distracting).

42. *E.g.,* "The results point to large deterrent effects emanating from increased certainty of punishment, and much smaller, and generally insignificant effects, stemming from increased severity of sanction." Jeffrey Grogger, *Certainty vs. Severity of Punishment,* 29 ECON. INQUIRY 297, 297 (1991).

43. See the excellent extended discussion by Robert Jackall in his article *Whistleblowing & Its Quandaries*, which discusses additional factors other than those I mention in this article, all of which point to reliance on whistleblowing as leaning on a frail reed. Robert Jackall, *Whistleblowing & Its Quandaries*, 20 GEO. J. LEGAL ETHICS 1133 (2007).

Federal Whistleblower Act[44] and similar statutes proceed on the assumption that reporting of misconduct does cause hostility and retaliation by peers and management. And therein lies a problem: the reporter of violations in an unsupportive ethics culture is known by various names, snitch and rat fink being the more polite of those names. Legislation protecting the job of the whistleblower is generally ineffective, since they cannot shield the employee from peer ostracism and expressions of resentment in the world in which the employee lives. What seems to be a typical experience was related by the Risk Officer of Fannie Mae (which had great legal compliance rules on paper):

> I fear that few people at Fannie Mae will report future irregularities or improprieties that they observe. And why should they? They observed that Fannie Mae promoted literally every employee who was involved in or assisted the effort to suppress the truth about the accounting and financial irregularities I reported[.] More importantly, they also watched while I was stripped of my duties, excluded from meetings, downgraded in my performance reviews, denied appropriate promotions, had my abilities denigrated and my motives questioned, and was ultimately forced from the Company.[45]

More important, the enactment of company rules on a deterrence theory approach assumes that employees who are deciding upon rule-breaking action will respond to a published rule but are indifferent to the moral legitimacy of the rule. Yet, contrary to that assumption, it is clear from everyday experience that the moral legitimacy value score assigned to a law by the potential lawbreaker determines his or her compliance, not the existence of a prohibitory law.[46] Driving a car in excess of the speed limit, adultery, and the Eighteenth Amendment to the Constitution come to mind as examples.

Further, the attorney EO must go outside what was taught in law school and understand psychology. The EO usually recognizes that both competition in the market and personal greed create mental pressures to make a conscious decision to break announced rules. The attorney EO does not so often recognize that competition and greed put people under pressure to find

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44. Whistleblower Protection Act, 5 U.S.C. § 1201 et seq. (1989).

45. *The OHFEO Report: Allegtions of Accounting and Management Failure at Fannie Mae: Hearing Before H. Subcom. on Cap. Mkt., Ins., and Gov't Sponsered Enter.*, (2004) (written testimony of Roger Barnes, Former Manager of Financial Accounting, Deferred Assets, Controller Division, Fannie Mae), *available at* http://www.house.gov/financialservices/media/pdf/100604rb.pdf (last visited Dec. 20, 2008).

46. *Cf.* RONALD L. AKERS, CRIMINOLOGICAL THEORIES: INTRODUCTION AND EVALUATION 22 (Fitzroy Dearborn Publishers 2d. ed. 1999) ("This research has found that the perceptions of informal sanctions, such as the disapproval of family and friends or one's own conscience and moral commitments, do have deterrent effects. Indeed, they have more effect on refraining from law violations than the perceived certainty of arrest or severity of penalties.").

rationalizations — self-satisfying but incorrect reasons for behavior — to justify to themselves the breaking of society's announced morals. The attorney EO must recognize the existence of psychological pressure and the human ability to rationalize one's own violation of a published rule. The rationalization that "it really is OK for me to do it" or "it really is not a violation" happens easily. Whatever the rationalization, unless there is a company ethics culture to the contrary, it often is enhanced by the additional rationalization that "everyone else is doing it, so it must be OK."[47] Generally people do not rob, cheat, and steal without thinking that it is OK to do so. Rationalization is the mind's effort to make sense of what we ourselves are doing.

Freddie Mac had rules, but its executives had rationalizations. Freddie Mac even had a Chief Enterprise Risk Officer who performed the job correctly and told the executives they were breaking the rules for verification of the assets and income of the mortgagor.[48] In a memo to then CEO Richard Syron and other executives, Barnes warned that Freddie Mac was dealing in mortgages that were contrary to rules for safe lending, being made without verification of income, assets or employment.[49] He specifically warned the executives the mortgages were dangerous both to Freddie Mac and to the borrowers they were chartered by Congress to help.[50] In response Syron and other top executives preferred to rationalize their action as necessary for profitability of the company and the whistleblowers as business dimwits.[51] The management team even had a PowerPoint presentation labeled "Confidential - Highly Restricted," rationalizing their course of action on the ground that if they "preserved capital" and did not buy the dangerous

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47. Saul W. Gellerman, *Why "Good" Managers Make Bad Ethical Choices, in* HARVARD BUSINESS REVIEW ON CORPORATE ETHICS 49 (Harvard Business School Press 2003).

48. Regarding the warnings, *see generally* Barnes testimony, *supra* note 45; *see also The Role of Fannie Mae and Freddie Mac in the Financial Crisis: Hearing Before the H. Comm. on Oversight and Government Reform,* http://oversight.house.gov/story.asp?ID=2252 (last visited July 6, 2009) (documents accompanying Chairman Waxman's opening statement) [Fannie May Hearing].

49. Barnes testimony, *supra* note 45.

50. *Id*.

51. The documented rationalizations described by the executives themselves did not mention that the executives were being rewarded by multi-million dollar compensations packages because of the short-term profitability of the company. Freddie Mac Chairman and Chief Executive Richard Syron received nearly $19.8 million in compensation in 2007. *E.g.*, Associated Press, *Freddie Mac CEO Got $19.8 Million in 2007,* MSNBC.COM, July 18, 2008, www.msnbc.msn.com/id/25740405. As a result of his financial rewards and apparent success in being paid enough to live comfortably in the future, Syron is another example of getting rich and getting away with it. Freddie Mac employees probably still think Syron was smart to get rich by unethical conduct and they have been imprinted with the idea that the value operative in the company is to get anything you can for yourself if the company still can report a gain this financial year.

mortgages then competitors would buy the dangerous mortgages![52]Their course of action was summed up as follows:

> "All four of you seem to be in complete denial that Fannie Mae or Freddie Mac are, in any ways, responsible for this. Your whole excuse for going to risky and unreasonable loans that are defaulting at an incredibly high rate is that everyone is doing it. If we don't do it, we'll be left out."
>
> - Representative Darrell Issa, R., California[53]

The Freddie Mac debacle is an example of an organization with highly qualified and experienced officials[54] deliberately breaking rules, rules meant to assure the long term survival of the company and the good of their customers, and engaging in what society now considers morally reprehensible actions. Why did they do it? Because in spite of company rules requiring verification of mortgagors' income, assets or employment, the executives rationalized breaking the rules as doing good for the company. The existence of a rule does not eliminate the rationalization for breaking the rule.

Similarly, as another example, consider General Electric's problems with price fixing, bribery, and fraud in the 1980's.[55] General Electric had rules; the executives had rationalizations. Executives took action that was contrary to clear company requirements for legal compliance. The executives rationalized what they were doing as serving the best interest of General Electric and that profit for the company was more important than compliance with an abstract law. The existence of a rule does not eliminate the rationalization for breaking the rule.

Perhaps the strongest reason for not using corporate law as the framework for corporate ethics is that law cannot cover the broad need for prevention of wrongdoing in the way that ethics can. To express the thought in the fashion of a Murphy's Law: If you have perceived all four of the possible evils that can exist, and prevent all of the possible evils by rules, then a fifth evil will promptly develop.

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52. Fannie Mae Hearing, *supra* note 48, at 6 (PowerPoint presentation to Fannie Mae management team).

53. Associated Press, *Former Fannie Mae, Freddie Mac Executives Ignored Warnings,* FOXBUSINESS.COM, Dec. 9, 2008, *available at* http://www.foxbusiness.com/story/markets/business-leaders/fannie-mae-freddie-mac-executives-testify-capitol-hill/.

54. Syron was deputy assistant secretary of the United States Treasury, served as assistant to Paul Volcker (then the chairman of the Federal Reserve Board), held a senior post at the Federal Reserve Bank of Boston, was a member of the Federal Reserve Board's Open Market Committee (which sets monetary policy), and was CEO of the American Stock Exchange.

55. Douglas R. Sease, Editorial, *GE's Image Makes Conviction More Jarring,* WALL ST. J., July 5, 1985, at A4.

The sheer size of a company, the complexities and uncertainties of information, and the rapidly changing actions both within the company and also with its suppliers and customers make it impossible to create a rule to prevent every evil the mind of man can conceive. The actions of employees are infinitely changing and opportunities for wrongdoing are infinite; rule makers are finite. No internal control system is infallible. No audit or auditor can detect all system flaws. Even with certification of internal controls and all sorts of check the box checklists of compliance, we still have management problems at unexpected places in the company.

In short, you cannot hope to eliminate wrongdoing by corporate employees (including top management) by enacting more rules. Perhaps the only major results of increasing rules are an increase in time documenting events that comply with the rules and an increase in the creativity of the people hiding their misdeeds. Building a corporate ethics program[56] upon the framework of "what the law requires" is doomed to failure.

> "[Expletive deleted] you to compliance guys." "Business guys rule."
> - Mike Hudson, *INDYMAC: What Went Wrong? How an "Alt-A" Leader Fueled Its Growth with Unsound and Abusive Mortgage Lending* (June 30, 2008)[57]

> "That persons with management responsibility must find the principles to resolve conflicting ethical claims in their own minds and hearts is an unwelcome discovery. Most of us keep quiet about it."
> - Kenneth R. Andrews, *Ethics in Practice*, *in* HARVARD BUSINESS REVIEW ON CORPORATE ETHICS 82 (2003).

An employee follows formal rules of the corporation only if he or she believes there is a "right" justification for doing so. That justification may be fear of a penalty, but only if the environment has taught the employee that he or she will be caught and punished. More often than the fear of punishment, the justification for action is a personal value of what is "right." I take the company's pen home or use the company's computer for personal e-mail or fire 10,000 employees to raise stock prices because I think it is the right thing to do. My value that "its OK if everyone else is doing it" or my value that "better the employees being hurt than me or the stock price remaining flat" makes the decision. Moreover, fear of punishment is not usually relevant in

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56. In contrast, a legal compliance program can be based upon "what the law requires."

57. MIKE HUDSON, CENTER FOR RESPONSIBLE LENDING, INDYMAC: WHAT WENT WRONG? HOW AN "ALT-A" LEADER FUELED ITS GROWTH WITH UNSOUND AND ABUSIVE MORTGAGE LENDING 4 (June 30, 2008), http://www.responsiblelending.org/mortgage-lending/research-analysis/indymac_what_went_wrong.pdf (*quoting* Tripp v. Indymac Fin. Inc., No. CV07-1635-GW (VBKx), 2007 WL 4591930 (C.D. Cal. Nov. 29, 2007).

most business decisions because there is no formal prohibition against either of the alternative choices. Formal rules do not, and cannot, minutely manage either the day to day work of the salesperson or of the vice-president of accounting. The day to day moral decisions of both the salesperson and the vice-president are driven by their values

An employee's moral value behind their decision will not itself be examined by the employee at the time of the decision for action. The value is self-justified; it exists without further rationalization. An employee's existing moral value is believed "right" in itself. It is believed "right" because it exists. As Malcolm Gladwell[58] tells us, the human mind performs complicated feats of subconscious pattern recognition to interpret the world we observe and allow us to make choices without thinking, that is, by instinct. Usually, the mind and emotion do not delve more deeply than to recognize that an action will fit into a perceived pattern of actions in the world in which the action is to be taken. Usually the decisive factor in a choice of action is internal value judgment, not something underlying the existing value. Trial lawyers have long known that, and pick juries and make closing arguments based on the forensic theory the internal values the jurors have brought with them into the courtroom.

Our initial values are powerfully affected by what we observe in the world in which we live at our work. Some say that the employee's initial pre-employment values are not only powerfully affected, they are overwhelmed. For example, see Robert Jackall's study of corporate managers[59] which concluded that moral compromises, rationalizations, and evasions dominate the behavior of corporate executives. His conclusion was that formal corporate rules were overwhelmed by what he called the "moral rules-in-use." Those "moral rules-in-use" were followed without the executive feeling that he or she was doing something wrong, and the rules-in-use validated decisions that otherwise might not have been made by decent people. The world that the employee sees in daily life in his or her job "create[s] an extremely powerful engine for socialization into immorality."[60]

Lawyers are not immune from the effect of the work world changing their existing values. The day-to-day practice environment experienced by a lawyer supplants any previous standard of morality. Day-to-day experiences become the personal standard for behavior. The young lawyer thrown into Rambo-hardball-no-holds-barred litigation is taught that civility is not to be used lest

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58. GLADWELL, *supra* note 33.

59. ROBERT JACKALL, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS (Oxford University Press 1988).

60. John M. Darley, *The Dynamics of Authority Influence in Organizations and the Unintended Action Consequences, in* SOCIAL INFLUENCES ON ETHICAL BEHAVIOR IN ORGANIZATIONS 37 (John M. Darley et al. eds., 2001).

it weaken her advocacy. The corporate lawyer in a corporation in which management is constantly being hired and fired is impressed with the value of keeping one's head down and avoiding confrontation with top management on anything. Further, we must recognize that a successful business lawyer depends upon keeping the client happy. The set of skills that keep a client happy develops lawyers with strong incentives to overlook management wrongdoing.[61] As Milton Regan put it in his intensive study of how law firm practice changes the moral standard of what is right: "[a] striking amount of wrongdoing can occur in settings populated by people who are generally decent and well-intentioned."[62] Jackall described this effect of the business environment as an overwhelming instrument of self-deception. I dislike using the term "self-deception" in this context. The employee is not engaging in self-deception in the usual sense of that term. Instead it can be said that the employee is accurately observing and critically deciding. The decision point for the employee is a new value, learned at work, used as a standard for decision-making within the time the employee is at work. The employee is not deluded, or self-deluding. In the everyday business world, there are not neatly verbalized rules that contravene the company's printed rules; instead there are patterns of communication (voiced and observed activity) that hold the supervening values of the business world in which the employee lives. The values of the world in which the employee thinks he lives form the decisional choice.

It cannot be overemphasized that generally speaking, an employee makes a rational decision for survival and self-worth according to the environment in which he or she finds himself. If the employee were to make a similar decision at home or in an expedition within Africa, the value used, and the decisions made, might well be different from those used and made at work. At work, the employee's decision is based on his or her understanding of the "right thing" in the corporate world in which he works. The employee does in fact understand the situation and those around him or her; the employee does in fact make a rational decision in the company world, and the decision is based on sensory inputs which do in fact exist, coming directly from the company world.

As a manager of ethics, the Attorney EO should want the employee's understanding of the "right thing" to be morally appropriate action. Unfortunately, the appropriate corporate values are not necessarily the same

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61. Stephen M. Bainbridge, *The Tournament at the Intersection of Business and Legal Ethics*, 1 U. ST. THOMAS L. J. 909, 918 (2004).

62. MILTON C. REGAN JR., EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER 294 (The University of Michigan Press 2004).

as the values the employee has observed as operative within the company world.

In an underlying sense, the communication of a common set of ethics values makes a human community possible. Immanuel Kant's example of this is a community's ethical prohibition against lying to members of our own community.[63] Without that ethical prohibition we could not rely on any means of communication within our community as a source of information. If we enlarge our understanding of communication beyond linguistic communication to include all given and observed actions we can more easily grasp the nature of the way decisional choices of action are taught in the company. "Business ethics" is what makes common effort by the employees effective. But business ethics is not a logical unity; it is a combination of the personal ethics of individuals. A company's business ethics is the set of communicated standards of behavior *by individuals in their daily relationships with other individuals* within and not within the company community. That takes us back to Drucker's idea that there is no business ethics, it's just ethics of individuals, and to Brown's idea that a company is composed of patterns of communications.

Assumption #3
Bad: The Ethics Officer should give morally neutral advice.
Good: The Ethics Officer does give advice containing moral positions and values.

Lawyers look around their legal world, and see that most lawyers don't express their moral ideals to clients, and don't give moral decision-making advice to their client. The *de facto* moral neutrality adopted by most lawyers, especially highly visible trial lawyers, is a major cause of newly admitted lawyers adopting moral neutrality as a normative standard.

Generally, American lawyers today have slipped from regarding amoral advice as a permissible minimum to regarding amoral advice as a required maximum. They feel duty bound to give clients morally neutral advice on legally allowable choices of action. "The dominant view [by lawyers] of legal practice is founded on a purported demarcation between the legality and morality of a proposed course of conduct, with lawyers providing information on the former but leaving the latter untouched, to be resolved only at the client's discretion."[64] That dominant view is what can be termed the Standard Concept."

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63. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS, 182 (Mary J. Gregor, ed. Cambridge Univ. Press 1996).

64. Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 227 (2006).

> Standard Concept" - a lawyer should be morally neutral, giving legal options to the client to choose, according to the client's own ethical standards, without moral comments or arguments by the lawyer.

A lawyer steeped in the working environment of the Standard Concept "knows" that a lawyer's personal ethics should not enter the product of their advice. At the time of giving oral advice, or preparing written advice, the attorney automatically uses the Standard Concept of "don't give a moral comment." The Standard Concept does not need daily justification by the lawyer. The Standard Concept is self-justified simply because it exists.

Corporate lawyers are no different in their habits regarding moral advice. For example, a Standard Concept corporate counsel ethics officer who uses the Standard Concept might be asked, "Do we need to upgrade the environmental controls in our Mexican plant to equal those of our Texas plants?" The morally neutral attorney corporate attorney will simply answer "No." In contrast, a corporate attorney who is free of the Standard Concept might reply that there are two items to be considered, the legal requirement and the value of protecting the environment. In addition to a statement of legal requirements, she would affirmatively urge that the health of employees and the community, and also the company's American and Mexican public relations, would be better served if the Mexican factory met the Texan plant standard for protecting the environment. She would point out that her answer regarding legal minimum requirements should not be regarded as foreclosing intra-company discussion of the environmental and public relations needs to upgrade the Mexican plant.

The Standard Concept dominates the working life of American lawyers. Most of them confine themselves to the analysis of the law as it is, without regard to the justice of the client's action taken within that law. Faced with a morally objectionable goal of a client, most lawyers use the Standard Concept and choose, *a la Enron*, to facilitate a client's ethically questionable action. Being comfortable with the Standard Concept, they do not feel any responsibility to question a client's decision in an ethical sense, or to advise the client that the client's goal runs contrary to accepted moral objective.

The Standard Concept is a value that affects the daily output of lawyers. Thus, for example, I often see lawyer-provided ethics codes that recite that it is illegal to discriminate on the basis of race or gender, but in which there is no exposition of the CEO's expectation that everyone in the company actually believes in that goal, much less any exhortation to going beyond passive nondiscrimination to engage in the active elimination of discrimination by others. Because of the Standard Concept, the usual lawyer-provided corporate ethics code merely states legal requirements, but ignores moral values. Those ethics codes are inadequate. They do little except meet legal compliance goals.

Worse, it is a perversion of the job of an ethics officer (whether or not he or she is an attorney) to give leadership that states legal requirements, but omits statements of values and values judgments. The EO's job becomes perverted into one of promoting a corporate environment of legalism ("If it's legal, we can do it."), conformity ("Sure I'm against rape, but we all enjoy a little raucous humor."), and minimalism ("We don't have to do that, if we want to make profits this quarter.").

It is the job of a legal compliance officer (LCO) to promote legal compliance. In contrast, the job of the Ethics Officer (EO) is to promote ethics excellence. Promoting ethics excellence requires instilling and maintaining ethics values which encourage employees to take the best actions. Promoting ethics excellence requires the ethics officer to express moral values openly. The Standard Concept must be abandoned by all those who enter the job of an ethics officer.

It is difficult for lawyers to abandon the Standard Concept, which has been theirs since their graduation from law school. Eradication of the concept requires understanding the cause and strength of a lawyer's emotional commitment to the concept. Consequently, we should take some time here to explore how the Standard Concept arises and its validity.

Law school substantive law courses, focusing as they do on logic, and the legal way of reasoning, have the effect of warning students not to let their legal analysis become faulty because of their moral judgments about the people in the cases they discuss. In like manner, law school professional ethics courses, teaching that lawyers have a duty to raise legal defenses for a person accused of crime have the effect of advising students they should accomplish a client's goal without examining the moral worth of the client's objective.

Generations of lawyers have passed through a law school education devoid of courses in the subject of moral responsibility.[65] Courses in professional responsibility mostly teach legal minimalism ("If it's legal within the professional rule, you can do it"), not moral responsibility. The content of typical professional ethics courses reinforces the belief that ethics is a matter of the legal club's rules, not personal moral responsibility. The instructional

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65. The problem has been noted for about a century. *See* JULIUS STONE, LEGAL EDUCATION AND PUBLIC RESPONSIBILITY (Association of American Law Schools 1959). However, some do not view a law school education devoid of courses in morals as bad. John Memory and Thomas Rose argue that "[l]aw school education does not generally include development of facility in application of principles of morality and justice, which can, in addition to being highly subjective, be highly varied. Law school education is heavily concerned with developing the ability to apply legal principles in highly varied factual situations[.] Interjecting a consideration of the justice and morality of courses of action would be a move in the wrong direction." John M. Memory & Charles H. Rose, III, *The Attorney as Moral Agent: A Critique of Cohen,* 21 CRIM. JUST. ETHICS 28 (2002) *available a*t http://findarticles.com/p/articles/mi_hb3009/is_1_21/ai_n28975318/pg_8.

content of professional ethics courses is exemplified by a statement made in the ubiquitous friend of generations of law students, the Legal Ethics text from the Nutshell Series. It proclaims "What we call 'lawyer's ethics' is law in the same sense that the Rules of Civil Procedure are law."[66] By avoiding courses in the subject of personal morality or normative ethics, law schools teach lawyers they have no moral responsibility for imposing the effects of the client's objectives upon others, so long as the client's objectives are arguably legal.[67] Graduates turned lawyers abide by that approach. Thus arises the profession's Standard Concept – a morally neutral lawyer giving options to the client to choose according to the client's ethical standards.

Likewise in their effect on lawyers, statements abound in the literature of professional responsibility that lawyers should not direct their attention to moral issues involved in proposed client action. *E.g.,* "Lawyers, however, must be concerned with legal rights, not moral rights, whatever the latter may be."[68]

Lawyers who shrink from moral action should understand that historically lawyers and legal professional codes were not enamored with the Standard Concept. The first national code of ethics was the American Bar Association's 1908 Canons of Professional Ethics[69] , a deliberately personal moral and aspirational code. The Canons were promulgated by the ABA until the 1960's. The Canons were based on Professor David Hoffman's Fifty Resolutions in Regard to Professional Deportment.[70] Those Resolutions were statements of moral goals. They valued personal and pubic good as primary, and the objectives of the client as secondary. For example, Resolution 13 provided that a lawyer would:

> [N]ever plead or otherwise avail myself of the bar of infancy against an honest demand. If my client possesses the ability to pay, and has no other legal or moral defense than that it was contracted by him

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66. RONALD D. ROTUNDA & MICHAEL I. KRAUSS, LEGAL ETHICS IN A NUTSHELL, vii (Thomson West, 2003). For a similar example of so-called ethics instruction see the CALI *Interactive Tutorials 2008, Professional Responsibility*, which ends its sessions on "Professional Responsibility" by summarizing: "Attorneys must conform their conduct to a wide range of rules drawn from a variety of sources. This program is designed to review these sources of law governing attorney conduct. This program is divided into three sections: exploring rules of discipline, sources of civil and criminal liabilities, and sources of control by courts and administrative tribunals." CALI Lessons Subject List - Professional Responsibility, http://www2.cali.org/index.php?fuseaction=lessons.subjectlist&cat=pr (last visited Aug. 13, 2009).

67. A notable exception is the approximate two dozen law schools affiliated with the Roman Catholic Church, which focus on natural law doctrine, personal ethics, and social justice.

68. *See* Memory & Rose, *supra* note 65.

69. CANONS OF PROF'L ETHICS (1908, as amended in 1931).

70. The text of the Fifty Resolutions seems to exist nowhere else except in a few tomes available only in exceptional libraries and only on the Internet at http://www.drbilllong.com/LegalHistory/EthicsIII.html.

> when under the age of twenty-one years, he must seek for other counsel to sustain him in such a defense. And although in this, as well as in that of [statutes of] limitation, the law has given the defense . . . yet, in both cases, I shall claim to be the sole judge (the pleas not being compulsory) of the occasions proper for their use.[71]

Hoffman's Resolution clearly takes the position that the lawyer first consults his or her conscience before the interests of the client. This position was carried into the ABA's 1908 Canons of Professional Ethics. Canon 32 made it straightforward that the lawyer was to advocate that the client act in compliance with the lawyer's own understanding of moral values:

> Canon 32. The Lawyer's Duty in Its Last Analysis.
>
> > [The lawyer] advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to *impress upon the client and his undertaking exact compliance with the strictest principles of moral law* (emphasis added).[72]

In 1969 the American Bar Association replaced the 1908 Canons with the 1969 Model Code of Professional Responsibility. The stated grounds for change highlighted that the existing 1908 Canons were to be replaced because the Canons were cast in the language of excellence in moral achievement.

> "They were not cast in language designed for disciplinary enforcement . . . ."
>
> - MODEL CODE OF PROF'L RESPONSIBILITY Preface (1969)

The change to professional ethics as a tool for regulatory enforcement was completed by the ABA's 1983 Model Rules of Professional Conduct, which announced:

> "Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process."
>
> - MODEL RULES OF PROF'L CONDUCT Scope (1983)

Official comments in state rules of professional responsibility often give *carte blanche* to clients for legal action which is immoral action.

> "The duty of a lawyer . . . derives from the lawyer's membership in a profession that has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our

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71. David Hoffman, *Fifty Resolutions in Regard to Professional Deportment, Resolution XIII,* available at http://www.drbilllong.com/LegalHistory/EthicsIX.html.

72. CANONS OF PROF'L ETHICS, Canon 32 (1908; as amended in 1931).

> government of laws and not of individuals, each member of our society is entitled to . . . seek any lawful objective through legally permissible means . . . ."
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> - DISTRICT OF COLUMBIA RULES OF PROF'L CONDUCT R. 1.3 cmt. 1, 2

> [Clients are] "entitled to . . . seek any lawful objective through legally permissible means . . . ."
>
> - MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1983)

The emphasis a practicing lawyer sees in today's rules of professional conduct is not ideals, aspirations, and hortatory injunctions to weigh ethical choices between legally permissible courses of action. The lack of discussion of personal ethics, but great discussion of professional ethics, creates a lawyer's world in which the lawyer's job, whatever it may be, is governed by the Standard Concept.

There is a huge problem with using the Standard Concept in accomplishing the job of a corporate attorney EO. The theory of the "Standard Concept" is built for a limited theoretical model. By and large the theory of the morally neutral lawyer is developed for use in adversarial advocacy, particularly in criminal defense or civil litigation. In criminal defense and civil litigation the theoretical model is that of *two* contesting lawyers, each advocating an opposing *legal* result sought by their client, for a judge to determine which of two well-advocated courses of action should be taken (*e.g.,* vote of guilty or not guilty). The model is not that of an ethics officer's work. The work of a corporate lawyer as ethics officer lies primarily in the counseling model, outside of the adversarial advocacy model. For example, in writing an ethics code or advising his executive team client whether to make risky mortgages, or advising how to discover wrongdoing in the accounting department, the EO is not operating within the adversarial advocacy model for choices between legal results to be made from the positions of two advocates. The lawyer EO is not one of two lawyers tasked to bring conflicting proposals before a neutral judge who will then choose which course of legal action to take. Instead the lawyer EO is the judge. The lawyer EO, by virtue of the job, is tasked with making his or her own judgment about morals and then taking action based on that judgment. Because of the differing models in which the work is performed, it is quite possible for us to call upon the attorney to be amoral when defending a criminal, but call upon the lawyer as ethics officer to act morally and give moral advice on a proposed future course of action.[73]

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73. *See, e.g.,* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 7 HUM. RTS. Q. 1 (1975).

Indeed the lawyer EO in not always involved with legal goals; instead he or she is frequently in a position to give advice about a non-legal result (*e.g.,* in a market of declining sales whether the company should cut expenses by terminating the employment of ten percent of the employees, or instead cut profits and dividends eight percent by retaining the employees). Often, the tension management faces is a tension between two equally important values. The practical choices between values are not always crass expediency. More often, they are choices of compromise to reach a best result possible in an imperfect world. The EO's job on a daily basis often is accomplished using a process of compromise[74] in which there is a need for a rationale that fits with both company and public morals, a rationale that the EO needs to articulate in moral terminology as part of the job of achieving acceptable compromise.

In his incisive study of the American bar, Martin Mayer made an observation which is still true: "Lawyers' activities break down most conveniently into four categories: fighting, negotiating, securing [i.e., drafting documents to secure property rights] and counseling."[75] Only the first two of those categories are built on the adversarial advocacy model. The work of a corporate lawyer as an ethics officer lies primarily in the fourth category (counseling), outside of the adversarial advocacy model. The ethics officer is charged with the job of "doing what is right," advising the client to "do what is right" or causing other employees to do "what is right." Doing that job means defining for others what is "right." The Standard Concept is contra productive for use in the required work of an ethics officer. To do the job effectively, the EO, even if an attorney, cannot be a morally neutral person, and must give moral advice.

If an ethics officer who is an attorney feels incompetent to give moral advice as part of his or her job, a redefinition of duties with the client is in order. An attorney EO who is not giving moral advice should advise the client

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74. Compromise among competing values and rationalization of the business choice of action is a part of "process pragmatism." Process pragmatism is derived from the philosophy of American philosophers William James and John Dewey. The conceptions of compromise and judgment in process pragmatism are developed well by Martin Benjamin's book SPLITTING THE DIFFERENCE: COMPROMISE AND INTEGRITY IN ETHICS AND POLITICS and sketched well for lawyers in Mike Martin's concluding section of MEANINGFUL WORK: RETHINKING PROFESSIONAL ETHICS. MARTIN BENJAMIN, SPLITTING THE DIFFERENCE: COMPROMISE AND INTEGRITY IN ETHICS AND POLITICS (University Press of Kansas 1990); MIKE W. MARTIN, MEANINGFUL WORK: RETHINKING PROFESSIONAL ETHICS 210 (Oxford University Press 2000). Process pragmatism does not use a "principles down" approach to solving moral problems in practice; it is not based on the authority of the highest applicable pre-existing standard; it is based on the authority of the most practical ethical outcome among available alternatives. Process Pragmatism is noted in articles by this author at http://www.corporate-ethics.us/BizPragmatismTheory.htm.

75. MARTIN MAYER, THE LAWYERS 29 (Greenwood Press 1966).

that the attorney is giving only legal advice and that ethics advice should be obtained from competent ethics counsel.[76]

Nor does moral neutrality suit corporate counsel, whether or not he or she has been appointed to be an ethics officer for the company. Among the top and middle managers corporate counsel by default is in the best position to be a conscience of the corporation. "By default" is a phrase I have used intentionally. In our present society, we all have learned to avoid disagreement by avoiding discussion of religion and morals. Moral judgments are not easily expressed by those anywhere on the corporate ladder, so there is silence on the subject of moral objectives. However, in that silence, the company lawyer starts with the advantage that corporate leaders expect (1) that legal counsel will be aware of the generally accepted moral values of society which will be expressed by judge, jury or regulatory agency, and (2) that if anyone will speak up about those public moral values, it will be the company attorney.[77] By default, a corporate attorney is in a position to be a corporate conscience.

Being a corporate conscience is not self-limited to recognizing that there is a moral aspect to proposed conduct. A conscience has the urge to prefer right to wrong. A conscience makes the judgment call of what is right, provides management with that judgment, and exhorts management to prefer right over wrong.[78]

The corporate conduct being ethically examined may or may not be a matter of law. Sometimes a corporate conscience must go beyond legal analysis. Suppose, when being sued, the corporate management agrees that the involved employee did indeed act illegally, *e.g.,* was 100% negligent, but legal analysis shows the suit is brought a day later than permitted by the limitations statute. In this supposed case, it may be appropriate for counsel to state to management that (1) the plaintiff has a valid claim, (2) except for the 100% sure legal defense of the statute of limitation, but (3) the company ethically should compensate the plaintiff in some manner.

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76. *Cf.* Larry O. Natt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 388 (2005) ("Lawyers must first consider whether, in offering nonlegal advice, they are violating their duty under Model Rule 1.1 to provide 'competent representation to a client.'").

77. This article is urging that an attorney EO should be the conscience of the corporation. But I go further. I urge that not only the attorney EO, but also corporate counsel for a company without an EO, should be the conscience of the corporation. Others have made similar suggestions. *E.g.,* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U.L. REV. 1, 25 (1988).

78. Conscience *n*. 1.a. The awareness of a moral or ethical aspect to one's conduct together with the urge to prefer right over wrong[.] 2. The part of the superego in psychoanalysis that judges the ethical nature of one's actions and thoughts and then transmits such determinations to the ego for consideration. AMERICAN HERITAGE DICTIONARY 400 (3d ed. 1992).

A special, practical, need for corporate counsel to be a corporate conscience arises because top executives are prone to the sin of hybris. Those employees close to a top executive have their corporate rewards determined directly by the executive, and those in direct contact with the executive pander to the executive's desires. The executive thus begins to assume that he or she need not be concerned with how his or her desires affect others. As a practical matter, within most corporations, it is usually a corporate attorney who is best positioned to remind the top executives that they are not the centers of the universe, and that there are others to whom the company must be responsive if the company is to thrive. The Standard Concept company lawyer rejects the opportunity for moral reminders and only reminds the executives of the law to which the corporation must be responsive. The corporate attorney, whether or not an ethics officer, should reject the Standard Concept and seize the opportunity to remind executives of the values of stakeholders other than top management. Corporate counsel who do not seize the opportunity to correct management hybris can be accused of being moral accomplices to immoralities.

When the choice of company action involves moral decision making, the advice of the corporate attorney, whether acting as ethics officer or not, should include his or her own moral comments.[79] The position that moral advice should be part of the corporate counsel's advice is probably a minority position, but I suggest that there has been inadequate discussion within the legal profession on that topic.[80]

The ABA does not take sides on the question. In its Lawyers' Manual on Professional Conduct, the ABA neutrally notes that "a lawyer's recommendations arguably should go beyond advising the client about that which is merely legally permissible and ought to incorporate moral and ethical considerations as well."[81]

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79. I recognize that there is a danger in arguing that an attorney may use his or her personal choice of a governing moral value to advocate to his advisee an action choice. Such advocacy might be misunderstood to include an advocacy either in violation of legitimate corporate authority, or without good judgment, or without sensitivity to context. Please understand that I am interested in the personal ideals of lawyers that meet minimum standards of decency and are in some way morally justified, and which are openly expressed by a morally autonomous lawyer who respects the moral autonomy of the corporate employee he or she advises.

80. *See* Vischer, *supra* note 64, at 228. "Leading theorists have tried to overcome the traditional view's distinctly uninspiring vision of lawyers as amoral technicians. Their attempts, however, have tended to steer clear of any explicitly extralegal conceptions of morality, opting instead to focus on client autonomy, client loyalty, political legitimacy, and justice understood as legal merit as the normative values on which the vision of the good lawyer is based[.] Only a few theorists have brought moral claims into their conceptions of the attorney's role, and even fewer frame those claims in terms of personal morality." *Id*. (citations omitted).

81. ABA LAW. MANUAL ON PROF'L CONDUCT § 31:701 (1998).

There are four reasons why moral advice should be part of a corporate counsel's advice, whether or not the attorney is an ethics officer:

1. The advisee needs to be aware of the bias and values of the advisor attorney to better evaluate the advisor's advice.
2. The advisor attorney is entitled to be, and should be, a morally autonomous person, making independent value judgments and acting upon them.
3. The advisee who has not adequately considered the moral implications should have his or her attention directed to the moral implications and the need to address those implications.
4. All corporate employees need maximum exposure to sights of a corporate world, which contains core values that should not be compromised.

Let's look at the first of those.

Reason 1. The advisee needs to be aware of the bias and values of the advisor, to better evaluate the advisor's advice.

An attorney's moral perspective often determines the legal advice she gives. Robert Vischer[82] did an excellent job of analyzing instances of legal advice to show us that the lawyer's own sense of moral right or wrong, although not expressed in the opinion, can be the decision-maker on the legal advice to be given. For example, he examined the situation of the White House lawyer who was asked whether certain interrogation techniques would be unlawful under a statute prohibiting "torture" and pain must be "severe" before it is "torture."[83] Certainly it helps us to understand the attorney's conclusion on what is "severe" pain when we know that the lawyer started with a moral theory of utilitarianism (what is improperly high enough to be "severe" is dependent on the utility of information obtained). As he put it: "Clearly, any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack, which could take hundreds or thousands of lives."[84] Every person — every attorney — has internal values that bias his view of the world. The debates that rage over the appointment of United States Supreme Court Justices, which include great examination of how the candidate's values show in past opinions,

82. Vischer, *supra* note 64.

83. *Id.* at 232.

84. Memorandum from Jay S. Bybee, Assistant Attorney General, to White House Counsel Judge Alberto Gonzales, 41 (Aug. 1, 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.

are convincing evidence that a lawyer's moral values become an implicit part of a legal opinion stating what the law allows or prohibits.

If a corporate attorney's advice does not state the moral qualities assumed in the advice, the moral component of the attorney's judging process still exists. The corporate advisee is not alerted to the moral bias component of the advice. To be open and act ethically, the corporate attorney should not keep it secret when ethical values have been used by the attorney in reaching conclusions.

Reason 2. The advisor is entitled to be, and should be, a morally autonomous person, acting upon independent value judgments.

> "No one is obliged to take part in the spiritual crisis of a society; on the contrary, everyone is obliged to avoid this folly and live his life in order."[85]

Where there is clear general agreement on the criteria for judgment (*e.g.,* thou shall not kill thy cubical mate to get his wallet) there is no need for considerations of alternative criteria of judgment. Where there is no need for considerations of alternative criteria of judgment, moral guidance is not needed. It is where the criteria for judgment is not agreed upon (*e.g.,* truth in the quarterly profit statement versus stockholder profit by creative accounting) and the course of action is morally questionable, that moral guidance is needed. Yet this is where the lawyer shrinks from exercising moral leadership. The lack of clear noncontroversial criteria for resolving moral dilemmas, and the resulting emotional feeling that ethics is, in the end, only a matter of personal preference makes lawyers uncomfortable about exercising their own moral autonomy in the position of corporate attorney.

The corporate attorney is *entitled* to be a morally autonomous person, acting upon his or her independent value judgments. That is generally accepted. Yet the lawyer's own Standard Concept and timidity prevent him or her from exercising the entitlement to be morally autonomous. The question, therefore, is not whether the lawyer is entitled to be a moral person, but whether the lawyer should be a moral person. *Should* the lawyer arise from amorality to morality?

In a frequently anthologized article, Elliot D. Cohen laments that a morally neutral lawyer cannot be a morally good person and instead is morally irresponsible.

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85. ERIC VOEGELIN, SCIENCE, POLITICS AND GNOSTICISM: TWO ESSAYS 22-23 (William J. Fitzpatrick trans., Gateway Editions 1968).

> For, as we have seen, the pure legal advocate inhabits a world in which his moral judgment is quite beside the point. If morality is relevant, it is so at the level of the judge or the legislator, but it is quite outside the purview of the lawyer's function. The lawyer must know the law and must know that he owes his undivided allegiance to his client . . . . But the moral world is inhabited by persons . . . who autonomously confront their moral responsibilities; so that, for a lawyer who has grown comfortable with passing the buck of moral responsibility, there is little hope of his aspiring to the morally good life.[86]

"The pure legal advocate who consistently acts upon his standards will not recoil from efficacious immoralities as long as they are legal options."[87]

Cohen adopts a classic self-benefit theory of the morally good life: we are not born with the Moral Law within us but rather learn to be a good person. Learning how to be a good person comes not only from our family, our culture, and our education; we also must develop into being a good person by consistently acting as a good person. If you do not take moral action when you can, then you are immoral. Other authors urge the practical ground that performing the job of a lawyer as a morally autonomous person enables the lawyer to find a source of spiritual satisfaction and meaning in his or her work.[88] Many would agree with the view that a lawyer's work should include a role for his or her personal moral ideals.[89]

Let us lay aside the philosophical discussion of the self-benefit of being morally autonomous. For social and economic reasons shall we agree with those who say corporate lawyers ought to be morally neutral, or instead shall we agree with Cohen that corporate lawyers ought to be morally autonomous? That is, at least in the context of corporate attorneys as ethics officers, should ethics officers make their own moral decisions, not bowing to the moral decisions of others, and then as morally autonomous persons act upon those decisions?

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86. Elliot D. Cohen, *Pure Legal Advocates and Moral Agents: Two Concepts of a Lawyer in an Adversary System, in* JUSTICE, CRIME AND ETHICS 123 (Anderson Publishing Co. 1991).

87. Elliot D. Cohen, *Pure Legal Advocates and Moral Agents Revisited: A Reply to Memory and Rose,* 21 CRIM. JUST. ETHICS 39, 41 (2002).

88. *Cf.* BENJAMIN, *supra* note 73, at preface; JOSEPH G. ALLEGRETTI, THE LAWYER'S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE (Paulist Press 1996); THANE ROSENBAUM, THE MYTH OF MORAL JUSTICE: WHY OUR LEGAL SYSTEM FAILS TO DO WHAT'S RIGHT (Harper Collins Publishers 2004).

89. My own bias on this subject results from early exposure to Paul Tillich's arguments in LOVE, POWER AND JUSTICE: ONTOLOGICAL ANALYSES AND ETHICAL APPLICATIONS. PAUL TILLICH, LOVE, POWER AND JUSTICE: ONTOLOGICAL ANALYSES AND ETHICAL APPLICATIONS (Oxford University Press, 1954).

Choosing the path of the Standard Concept is a soft corruption. Amoral lawyers, looking the other way so as to not find what the client's legal objective will cause or conceal, and taking no moral leadership, are not far removed from the hard corruption of the Madoff and Enron schools of corporate leadership. To the extent that we agree with the idea that ethics officers ought to be morally independent, not subservient to the greedy or oppressive goals of management, then to that extent we must reject the Standard Concept of the pure legal advocate.

Ethicists are starting to take note of the injustice to the public created by lawyers' intentional blindness to the objectives of their corporate advisees.

> Theories abound as to the root causes of the Enron debacle. Every colorable explanation, however, implicates Enron's lawyers as having failed to provide a needed check on the self-aggrandizing transgressions of Enron's management. There is little doubt that Enron sought and received professional advice that reassured Enron's management that its strategies legally could be realized. Lawyers wrote opinions certifying loan transactions as true sales, provided nonsensical justifications for the CFO who wished to avoid disclosure of his compensation, complied with the CEO's request that they not explore the accountants' treatment of transactions before certifying the transactions' validity, and repeatedly facilitated Enron's strategy of structuring dubious transactions so that nobody could understand them, by using language to describe them in proxy and financial statements that, although literally and technically correct, was in practice completely opaque. At bottom, lawyers were the but-for cause of Enron's demise because the transactions at issue could not have closed in their original form without the approval of lawyers and other professionals.[90]

This line of ethical inquiry leads to the conclusion that amorality by corporate attorneys in their advisory capacity must be rejected. Ethical action by corporate attorneys in their advisory role is needed for social utility (economic) and social justice (fairness) reasons.

Certainly the public is taking the position that corporate counsel *ought* to be a morally autonomous person, acting upon his or her independent value judgments. The public does not want the corporate counsel to be subservient to the greedy or oppressive goals of members of the management team. It is unacceptable to the public – and it should be unacceptable to lawyers – for corporate counsel to abstain from using moral judgment.

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90. Vischer, *supra* note 64, at 240-41 (citations and quotation marks omitted).

As we earlier observed, the work of a corporate lawyer as ethics officer lies primarily in the category of counseling, outside the adversarial advocacy model. The ethics officer is paid to advise corporate employees (including top executives) to make the morally preferable choice of action. We constantly must remind ourselves that a function of an ethics officer is not the function of a legal compliance officer. Although the functions of both may be merged into one title or person, the job of the ethics officer primarily involves counseling ethical decisions by his or her advisees, not fighting legal battles with enemies of the company. Whether specifically stated in the written job description, the general concept of the ethics officer is that he or she is to be morally independent, not subservient to a manager's unethical desires, improper actions, and corruptive rewards. The general concept of the ethics officer job is that the EO is to be a corporate watchdog, the corporate conscience, and the corporate ethics educator. To act properly in discharging his or her duties, the attorney as ethics officer must reject the Standard Concept of the pure legal advocate.

The hold of the Standard Concept on the minds of attorneys is strong. Those who are corporate attorneys, whether or not an attorney EO, need to be reminded, from time to time, that the Model Rules (which most states[91] use to pattern their own state rules of professional ethics) explicitly give a lawyer permission to be more than an advisor of the state of the law.

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.[92]

The Restatement (Third) of the Law Governing Lawyers[93] likewise permits lawyers to discuss with clients the nonlegal and moral aspects of a proposed course of conduct.

In the proper performance of the job, the attorney EO *is entitled to be* a morally autonomous person, making independent value judgments and acting upon them. In the proper performance of the job, the attorney EO *should be* a morally autonomous person, making independent value judgments and acting upon them. Therefore, now is a time in history when the legal profession should call upon corporate lawyers (whether or not designated as ethics

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91. A caveat is necessary here. Not all states have adopted all of the provisions of Rule 2.1, and the codes and official comments of states do vary.

92. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2004).

93. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94(3) (2000).

officers) to aspire to go beyond legal advice and give moral advice, especially when the advisee is seeking a morally questionable, although legal, objective.

Reason 3. The advisee who has not considered adequately the moral implications should have his or her attention directed to (1) the moral implications and (2) the need to address those implications.

Presently, attorneys tend to assume that a corporate advisee does not wish to have any advice from a lawyer except advise on what the law permits or prohibits. The attorney who becomes an EO is not disabused of his or her assumption that moral neutrality is expected. That is because for all practical purposes, it is only in the last ten years[94] that the separate title of Ethics Officer in a company has arisen. Colleges still produce graduates trained to be accountants, plant managers, human relations officers and lawyers, but not ethics officers. Usually, no one in the company has a background that allows them to tell the lawyer EO what the exact duties are to be. Indeed, I receive occasional inquiries which fall into the category of "I've just been hired as an ethics officer; what should I do?" The dual lack of a societal history and of a company history of ethics officers are the main reasons why the attorney EO does not know the job delimitations.

Thus, unencumbered by a job description directly specifying that the EO is to make moral decisions and give moral advice, the attorney EO starts with the assumption that if the company hired him it must be because he is a lawyer; they must expect him to act like a lawyer and give advice like a Standard Concept lawyer. This assumption by the attorney preempts a decision which may not have been made by the advisee.[95] The advisee accepts the amoral advice given by an attorney EO as complete advice and assumes there are no ethical issues to explore. Thus, by default the attorney EO assumes, and management accepts, amoral advice. The company counsel who blithely assumes that management does not want to have anything but the law discussed does a disservice to management. The slogan "if it's legal, we can do it" may be originating in the company because the attorney EO or corporate counsel puts forward with vigor only the law.

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94. Michael Rion, former President of Hartford Seminary, was Ethics Officer at Cummins Engine in the 1980's and is generally credited with pioneering the job of the Ethics Officer. Although his resulting book, THE RESPONSIBLE MANAGER, was noted as impressive, few companies created an Ethics Officer position until Sarbanes-Oxley came along with its requirement that there be a member of senior management charged with the ethics program for the company.

95. *Cf.* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYER'S ETHICS 87 (LexisNexis 2d ed. 2002). This idea is expressed by Freedman and Smith, who conclude, "while representing a client, the lawyer should counsel the client regarding the moral aspects of the representation." *Id*.

I recognize that an attorney EO sometimes may run a job-threatening risk when giving moral advice on proposed or past choices of action, especially if it involves telling the CEO or other C-level executives[96] they are wrong.[97] Risk to the attorney's continued employment is not to be lightly dismissed. As I discuss elsewhere in this paper, the history of whistleblowers demonstrates that the road of morality may indeed be narrow and rough. Yet, giving moral advice on the choices of action is the proper office of the attorney EO.

There are two bright spots that I have found. First, corporate counsel are generally intelligent and know how to advocate both legal and moral "best courses of action" to management without being abrasive. Second, my experience is that most people in the company management structure, from section manager to CEO, are decent people in their communities outside of their working world. They typically accept some responsibility for making decisions on a moral basis. They typically have assumed what is "good " in business decision only by being in the company and observing "business as usual." They may have a morally healthy breadth of interest in events in their world, and want to be alerted to something about which they have not consciously given thought.[98]

The advisee should have moral information. Specifically, the advisor should direct the advisee's attention directed to (1) the moral implications and (2) the need to address those implications. That direction of attention should be done both because it is part of the ethics officer's job, and also because failure to inform the advisee of the moral implications is a restriction on the moral autonomy of the advisee. The advisee must have received all relevant information before he or she can make an autonomous decision.

The advisee who has not considered adequately the moral implications of action is entitled to have an attorney EO direct attention to the need to address those implications. The very birth of the idea of having an ethics officer comes from the felt need that management lacks ethics resources in corporate governance decision-making. Corporate governance typically involves identification of extralegal interests of stakeholders outside of the management decision-making group, including the public economy, government regulators, dependent suppliers, customers, employees, stockholders, and environmentalists. Solving the problems of actions with and among various groups requires identifying the needs and values of the stakeholders and assigning some resolution of those values. Thus, for proper management, the management advisee needs input from the attorney EO that

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96. *I.e.,* the CEO, COO, CFO, CTO, CLO (General Counsel), VP Sales, VP Marketing, etc.

97. Which is one of the reasons why in seminars for a board of directors I suggest the Board hire and fire the Ethics Officer, rather than a company executive officer.

98. *Cf.* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 158 (West Publishing Co. 1986).

goes beyond amoral legal advice. To be truly morally autonomous, the manager must have information on ethics concerns. The information and counsel available must include more than legal information and counsel. The attorney EO can provide moral factors and ethics counsel that will impact the long term good of the corporation.[99]

The Comments to the Model Rules skate close to stating that proposition. Comment 2 to Rule 2.1 states in part:

> 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. . . . 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 implied.
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> A client may expressly or impliedly ask the lawyer for purely technical advice. . . . When such a request [for only legal advice] is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.[100]

The ABA Comment does not address the new and unique job of an attorney EO. Contrary to the comment, written before the EO job existed, a lawyer who is an ethics officer is "a moral advisor as such."[101] The corporate community in which the attorney EO is operating observes the EO, whether or not an attorney, as someone who supervises and counsels on ethics considerations. For an attorney EO to give purely technical legal advice is inadequate. Indeed, if an attorney EO is asked to give only technical legal advice, the attorney EO may have to decline and point out that his or her job is to do more than that. Even when the advisee is experienced in legal matters, the lawyer's responsibility as EO includes "indicating that more may be involved than strictly legal considerations."[102]

The ABA Comment also is much too timid for the 21st century. The comment does not address the new social and governmental environment, in which businesses are required to conform to social moral goals that are being enforced by law. Businesses now suffer from a new public investigative emphasis and new penalties devised for judgments that are not derived from

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99. *Cf.* Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 438-39 (1985).

100. Model Rules of Prof'l Conduct 2.1, cmt. 2 (2004).

101. *See id*.

102. *Id*. at cmt. 3.

law. Lawyers need to point out to executives that, for example, the company is going to suffer from lawsuits and jury verdicts if the community is aroused by news that the company each day dumps the maximum legally allowable amount of toxins into the air instead of disposing of the toxins in a more expensive way.

Whether or not the corporate lawyer is formally tasked with the job of EO, the corporate lawyer's responsibility includes describing ethical values that are involved in a decision to take a course of action. The advisee is entitled to have his or her attention directed to (1) the moral implications and (2) the need to address those implications.

Reason 4. All corporate employees need maximum exposure to sights of a corporate world, which contains core values that should not be compromised.

Early in this discussion we noted the nature of the corporate world as a world of communications. The need to communicate good ethics values arises because employees make moral decisions based on the corporate world as they see it. We do not need to belabor this previously explained idea, except to note that this is the fourth reason why moral advice should be part of a corporate counsel's advice. The attorney EO, by including moral values in a communication, helps to create the corporate world values that employees observe others using.

III. THE NEOETHICS: SOCIAL REDISTRIBUTION OF LOSS CAUSED BY IMMORALITY AND SOCIAL IMPOSITION OF CORPORATE RESPONSIBILITY TO PREVENT IMMORAL ACTION

In 1950, management guru Peter Drucker started an address to lawyers by stating: "At first sight it may sound rather queer to talk about the 'economic responsibilities of corporate management.'"[103] Drucker went on to warn that the looming future problems would be problems of management social responsibility, such as decisions affecting economic stability of the country.[104] He warned that if these problems were not solved, then the public would subject corporations to powerful regulations.[105] In discussing what would be "the effect on our economy if the Ford Motor Company had collapsed," Drucker went on to forecast to his lawyer audience that there would be

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103. Peter F. Drucker, *The Economic Responsibilities of Corporate Management*, *in* SOCIAL MEANING OF LEGAL CONCEPTS, NO. 3: THE POWERS AND DUTIES OF CORPORATE MANAGEMENT 242, 242 (New York University School of Law 1950).

104. *Id.*

105. *Id.*

legislation requiring corporations to have outside directors and other impositions of public morality in corporate government.[106] What Drucker foresaw happening we now are seeing.

Until this century, the public did not request governmental control of the morals of business managers. Calls by legislators for direct imposition of public moral values on private enterprise were limited. The reason for the shift to require general control by society of business morals is found in a preceding shift of market and management ideology.

The twentieth century market ideology was not built on a model of thousands of traders using a computer and the Internet to buy the stock of a company and then sell it the same day, week, month, or quarter. The 20th century market ideology was that a corporation's shareholders would be shareholders for a long-term, waiting patiently over the years for a modest return greater than Treasury bonds or savings would bring. It was assumed that stock price would be based on a company's asset surplus and dividends paid. Generally, the management goals (assumed by public finance economists, government, owners, and management alike) were to have employees produce goods or services, make a profit on sales, accumulate assets, and pay dividends out of the surplus accumulated. The ideology was that corporate employment and production of goods and services were good for the economy, and management would see to those things to maximize assets and dividends, and therefore accountability to the public need only be enforced by the company going out of business from lack of sales. This twentieth century market ideology weakened the idea of public regulation of internal corporate governance.

However, as the century drew to a close, boards of directors rewarded managers instantly when an annual, or sometimes even quarterly, stock price increase occurred. Executives received huge salaries and bonuses even as assets and sales were shrinking. Owners and management financially benefitted from rises of stock price that occurred simply because of management's release of information, such as a forecast of future sales or profits. There was a shift in the day-to-day goals of corporate managers.[107] It was not a shift to social goals such as Henry Ford's goal of providing the maximum number of jobs at high wages to Americans.[108] The shift was to a

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106. *Id.*

107. That shift of management values, not a part of the world in which Alan Greenspan thought he lived, was what Greenspan, Federal Reserve Chairman at the time, was later to call "a flaw in the model . . . that defines how the world works." Associated Press, *Greenspan Admits 'Mistake' That Helped Crisis,* MSNBC.COM, Oct. 23, 2008, http://www.msnbc.msn.com/id/27335454 [Greenspan article]. "Greenspan denied the nation's economic crisis was his fault . . . but conceded the meltdown had revealed a flaw in a lifetime of economic thinking and left him in a 'state of shocked disbelief.'" *Id.*

108. Dodge v. Ford Motor Co., 204 Mich. 459, 468, 170 N.W. 668, 671 (1919) ("My ambition . . .

goal of quarterly stock price increases irrespective of accumulation of assets. Long-term survival of the company was not primary. Indeed, managers were rewarded for having their company merge with others[109] or otherwise change its corporate existence primarily to create a stock price gain, irrespective of an increase in stockholder equity. Those goal shifts by executives resulted in a number of changes, which diminished the company's long-term safety, stability, and survival.[110] As the century ended, management's stock price focused ideology was colliding with the public's production and asset focused ideology.

That collision made some regulators uneasy. Standards for corporate governance that had worked for the 20th century for the benefit of society started to look old fashioned or immoral. Government started paying attention to social and economic disruption being caused by the values of management. As the millennium approached, we started to see what could be called an "entire economy" view of corporate management decisions. That is, there began to be some worry from economic regulators that corporate action might cause the entire economy to react badly. As the new century started, the worry became reality. Economic disasters caused by executives' gross departures from accepted public values caused a public call for public regulation of private business moral decisions. In a democracy the calls of a majority become the concerns of the government's regulators, legislators, prosecutors, courts, and juries. They read the newspapers, are molded by what occurs during their time in office, and are liable to change their opinion of what is an appropriate legal result. Public policy emerged to require private corporation accountability to pubic economic and social goals.

Although written for the context of his "Integrative Economic Ethics," economist Peter Ulrich summarized the preferable public policy as follows:

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is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profits back into the business.") . The court did not agree that social worth was a legitimate value for management decisions.

109. A good illustration of this is WorldCom's acquisition of 65 companies in five years. Accounting allowed the company to maximize the financial advantages of the acquisitions while minimizing the negative aspects. Stock analysts ignored the lavish payments to management because management focused on the behavior so welcomed by everyone, and the share price continued to rise. The unsafe practices for the long-term survival of the company are well discussed in the posting by Dennis Moberg & Edward Romar. Dennis Moberg & Edward Romar, WorldCom Case Study Update 2006, http://www.scu.edu/ethics/dialogue/candc/cases/worldcom.html (last visited Feb. 27, 2009).

110. The management actions are exemplified by the practices described in Knowledge@Wharton, Accounting Games Companies Play (Especially with Revenues and Costs), http://knowledge.wharton.upenn.edu/printer_friendly.cfm?articleid=1011 (last visited July 11, 2009).

> The economic players, in all of their roles, must first of all be approached as citizens who acknowledge certain moral duties; as reflective consumers and capital investors, as critically loyal 'organizational citizens' in the working world, and as citizens of the state.[111]

One of the first public regulators to recognize that internal corporate governance is key to public goals put it this way.

> Corporate governance is . . . holding the balance between economic and social goals and between individual and communal goals. The governance framework is there to encourage the efficient use of resources and equally to require accountability for the stewardship of those resources. The aim is to align as nearly as possible the interests of individuals, corporations and society. The incentive to corporations is to achieve their corporate aims and to attract investment. The incentive for states is to strengthen their economics and discourage fraud and mismanagement.[112]

Corporate governance is traditionally defined as being the methods (plural) by which a corporation is directed, administered, and controlled. Unfortunately, corporate managers and corporate attorneys have chosen to think of the methods of corporate governance as confined to essentially only one method (singular): a set of rules for compliance. Corporate governance limited to a set of compliance rules has not stopped the acceleration of random corporate failures with massive fallouts driving thousands out of work and shaking the national economy. The response of the public has been an acceleration of calls for change. There are calls for action to be taken that is contrary to long-held values of free enterprise[113] and for corporations to acknowledge moral duties to the society that allows them to exist.[114]

Lawyers tend to view the legislative addition of ethics requirements to corporate governance as essentially only another in a list of single legal items

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111. Peter Ulrich, *Ethics and Economics*, *in* ETHICS IN THE ECONOMY: HANDBOOK OF BUSINESS ETHICS 9 (Peter Lang 2002). Ulrich's theory of Integrative Economic Ethics expresses the view that economics theory must integrate society values, so that economics takes account of more than marketplace prices. *Id*. at 32.

112. MAGDI R. ISKANDER & NADEREH CHAMLOU, CORPORATE GOVERNANCE: A FRAMEWORK FOR IMPLEMENTATION (World Bank Group, 2000).

113. In 2008 the U.S. Treasury seized control of mortgage firms Fannie May and Freddie Mac, and the Federal Reserve took control of American International Group, essentially wiping out stockholders by the dilution of stock.

114. For example, as I write this, on February 5, 2009, FoxBusiness.com is showing an interview with Gerald Levin, former Time-Warner CEO, in which he says it is time "to make corporations respond equally to their shareholders and to the public interest."

for lawyers to observe and implement with a set of legal rules. That view is shortsighted. Vast social and economic changes have occurred since Worldcom, Tyco, Global Crossing, and Enron. If we adopt a historian's view encompassing 200 years of history, we see there is a new and emphatic demand for something beyond rules to control private business choices. The new demand is for companies to have both legal compliance *and* ethics compliance. The ethics that are to control business decisions are not another set of bright line minimum legal standards that can be checked off when they are barely met. The new demand is an emphatic demand for something beyond legal compliance for the purpose of preventing harm to the public.

In a democracy, laws are enacted and jury verdicts are rendered in the environment of society's ideas of right and wrong. A jury's view of what constitutes negligence and the legislature's view of what actions should be criminally punished are both based on the public's shared values. These standards are not constructed in an ivory tower of academia. These standards are not being set by trade associations or the marketplace. The public and government – and judges and juries – now make decisions for corporate responsibility and corporate punishment and individual reward based on the public perception of the moral choices corporate employees should make. These are new requirements for corporate officers – to act privately not only legally, but also in accordance with a public morality. Today's required standards for business now becoming law through statutes, court decisions, and jury verdicts, are being driven by a public morality in action.

There is something to Lon Fuller's view that all law has an implicit internal public morality.[115] But more is involved in today's corporate regulatory environment. The American public is now supportive of law based on legal moralism of the sort advanced by Patrick Devlin. Legal moralism is the view that a shared morality is essential to the existence of a society; thus law legitimately can and should be used to prohibit behaviors that conflict with society's collective moral judgments.[116] Even when private behavior does not result in physical harm to others, according to this view, the preservation of society is primary. A person's autonomy legitimately can be restricted simply because the person's choice conflicts with society's collective morality. Thus, legal moralism implies that it is permissible for the state to use its coercive power to enforce society's collective morality, and that it is permissible for law and lawyers to be the required instruments of that enforcement.

The public's new emphasis on legal moralism has created a new combination: legal rules for business that include public moral philosophy that business must implement. We call this paradigm Neoethics. Neoethics is a

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115. Fuller, *supra* note 39, at 645.

116. PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (Oxford University Press 1965).

new word – a fresh idiom – to give emphasis to the new public insertion of overall pubic values for individual employees to follow in the business world. It is a public corporate governance ideology both (1) aimed at business morality; and (2) requiring corporations to enforce public morality among the company's employees. The ethics requirement (value) now being embodied into the law in wholesale fashion is a requirement that business employees will act – and will have acted in the past[117] – in accordance with the contemporary public morality at the time of judgment. It is over and above a requirement that business employees will act in accordance with lawyer-generated rules.

Neoethics calls for corporate lawyers and corporate managers to consider the public's view of business ethics as a subject of study and devise the tools to enforce the public morality.[118] To protect and promote the company, attorney EO's should consider Neoethics. Neoethics will impact the design of ethics as a tool of corporate governance, specifically as a tool of corporate defensive strategy. Using the Neoethics paradigm will affect, among other things:

1. The perception the attorney EO will have of the urgency and place of ethics in corporate governance;

2. The values the attorney EO will suggest for the corporate ethics program; and

3. The advice an attorney EO will give today, explaining why an action legal today may be punished tomorrow.

The public now understands that a corporation is an organization in which individual managers project their own desired effect upon those outside the company. The public is dismayed to find the projected effects upon the public are not controlled by society's values but rather by the values of executives. The executives' values are perceived as a rationalized self-centered rapacity that runs roughshod over the lives of others. The public has the instinctive analysis that companies pursue poor ethical choices and need changing. The

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117. Past action punished by later changes in public values are exemplified by what occurred when asbestos manufactures were caught by judge made strict product liability, and when corporate board members now are found guilty of breach of fiduciary duty for failing to do more than was required of directors in the last century to prevent accounting department fraud.

118. *Cf.* Harvey L. Pitt, Chairman, U.S. Sec. and Exch. Comm'n, keynote address at the Sec. and Exch. Comm'n Securities Regulation Institute (Jan. 23, 2003) (transcript available at http://www.sec.gov/news/speech/spch012903hlp.htm). "Government is best equipped to ensure that appropriate standards of ethics and competency are established, and then rigorously implemented and enforced. But, if the legal profession doesn't establish and enforce effective professional ethics for corporate attorneys, the federal government, including the Commission, will surely step in and fill the void." *Id.*

public's reaction is to turn to legislation requiring "ethics," thus expecting managers and lawyers, in their role of advisors to corporate managers, to cause the public ethics to become a decisive factor in ruling the actions of company executives. The public expects that lawyers will vocalize society's values as they advise corporate employees (including management) whatever the values of corporate officers.

A corporation is amoral, without mind or hand or larynx to make a decision or write an accounting entry or voice a command. Individual corporate employees make immoral[119] decisions and take immoral actions. The public's implicit definition of appropriate business ethics has the effect of merging two dictionary definitions of ethics. The dictionary describes two meanings for "ethics:"

1. The study of the general nature of morals and of the specific moral choices to be made by a person; and
2. The rules or standards governing the conduct of a person or the members of a profession. *E.g.,* lawyers' codes of ethics or automotive industry standards.

The public's Neoethics merge these two dictionary definitions. Neoethics intends that in giving advice or moving the company's activities forward, the professional duty of corporate lawyers is one owed primarily to the public. Thus, the corporate lawyer should affirmatively resist helping a corporate manager achieve an immoral objective. The public instinctively understands that the lawyer's duty is not primarily to assist the Chief Financial Officer or other C-level[120] executives in achieving ethically questionable but legally colorable objectives, but rather the lawyer's duty is to help the corporation survive for the long-term. The public instinctively understands that an executive officer is an advisee (not necessarily the client) of the corporate attorney, and that the corporate attorney has a high duty to protect the long-term survival of the company. The Neoethics the public has formed tells managers and lawyers to conform not only to professional or industry rules of responsibility, but also to the society's commonly established moral principles.

Neoethics will not tolerate the excuse that "it was legal when I did it last time," or even "it was legal when we did it." Legal rules and ethics are not the same, and conformance to both law and ethics is now required. Moreover, the public's toleration limit is now low for management actions that unfairly cause economic damage to individuals to society. It is no secret that the majority of

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119. Here, as elsewhere in this article, I use "immoral" in the common dictionary sense of "contrary to established moral principles," and not in the sense of violation of a finely spun philosophical or theological theory of good and evil.

120. *I.e.,* the CEO, COO, CFO, CTO, CLO (General Counsel), CMO, VP Sales, VP Marketing, etc.

the voting public is angered by random corporate failures caused by management done for the benefit of corporate insiders. The perception caused by the news media's blanket and immediate coverage of unfolding corporate greed has created outrage.[121] When you are one of the hundreds of thousands of persons whose pensions have been reduced by decisions of the company president and then see your company president was paid millions as a bonus for successful performance as an executive, or you lost your job at the same time as the company president had a million dollars added to her salary, you are outraged! The outrage has created a new low toleration limit for management self-centeredness, new laws to punish past wrongdoers – or the organization that enabled the wrongdoer – and new laws to prevent future wrongdoing. And you want punishment meted out! President Obama uses phrases like "culture of greed and scheming,"[122] and no one publically disagrees with him. This has brought a changed public demand regarding the personal ethics that an individual businessperson *must* follow or risk public punishment.

Neoethics uses law as the channel to make corporate governance respond to the public perception of the moral choices. Neoethics demands that corporate officers make decisions that consider public morality. Neoethics goes further and demands punishment responsive to the community's standards of personal ethics. This is a new concept for corporate officers to understand – to act today in accordance with a future public morality in use at the time the officer's action will be judged. Community morals are not static. The changing community moral judgment will be expressed in new judge and jury-made law, as well as in new directions taken by government's prosecutors, regulators, and legislators. These new directions can be seen in examples such as prosecutors deeming it less socially important to protect the corporation's attorney-client privilege than to have a CEO sent to prison. Al Ringleb, in his well-known college text for business schools, is one of those business text authors who now warn of these new difficulties for management.

> . . . the public as developed an increased concern over business ethics. As a consequence, managers should expect changes in the law to formally address those public concerns. Practices considered legal but

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121. The outrage is also alive in England, such as evidenced by the English public to flagrant cheating on taxes. *See* Proceeds of Crime Act, 2002, c. 29, Part 7 § 334(1)(b), *available at* http://www.opsi.gov.uk/acts/acts2002/ukpga_20020029_en_1. The Proceeds of Crime Act created liability for solicitors and accountants who suspect their clients of tax evasion. Solicitors and accountants are required to report their clients to the authorities without telling their clients they have done so. Solicitors and accountants who do not report their client are subject to a penalty of up to 14 years in jail. *Id.*

122. President Barack Obama, Speech naming his choice for Chairwoman of the Securities and Exchange Commission (Dec. 18, 2008).

> morally questionable are very likely to be examined much more closely by legislatures and the courts . . .
>
> Managers should assess their current operations for policies or activities that may be legal but are nonetheless morally and ethically questionable. While non liability may have been assured in the past, the public's new concerns raise the probability that the company will be confronted with liability.[123]

Corporate lawyers especially should be aware of a further example of Neoethics. Presently legal journal articles, textbooks, and court decisions are suggesting that public policy would be served by court decisions eliminating protection for lawyers who assist in actions which are not a violation of an existing statute but which a jury finds tortuous, such as a breach of a fiduciary duty.[124]

As we noted earlier, law and ethics are not the same. The public is demanding *ethics* programs in corporate governance. For example, the Sarbanes-Oxley (SOX) legislation[125] and the Federal Sentencing Guidelines[126] both require a company to go beyond legal compliance and *additionally* have an ethics program. Logically, if there is to be an "ethics" program, and "an organizational culture that encourages ethical conduct," there must be a set of

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123. AL H. RINGLEB, ROGER E. MEINERS & FRANCES L. EDWARDS, MANAGING IN THE LEGAL ENVIRONMENT 136 (West Publishing Company 1990).

124. *See e.g.*, Kevin Bennardo, *The Tort of Aiding and Advising?: The Attorney Exception to Aiding and Abetting a Breach of Fiduciary Duty*, 84 N. D. L. REV. 85, 85 (2008). "Part V applies public policy to reach the conclusion that attorneys should not be given any exception from liability when sued for aiding and abetting a client's breach of fiduciary duty. . . . Despite courts' conclusions to the contrary, no solid foundation exists to create an exception for attorneys from liability for aiding and abetting a client's breach of fiduciary duty[.] Applying aiding and abetting liability to breaches of fiduciary duties creates clear liability for those who assist in such breaches[.] Since such advice is to be discouraged, attorneys who proffer it should be held liable to the extent they cause harm." *Id.* at 94-96. *See also* 1 GEOFFREY R. HAZARD, JR., & W. WILLIAM HODES, A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT, THE LAW OF LAWYERING (3d ed. 2009) (Professor Hazard argues that when the attorney's client is a fiduciary of a third party, that third party assumes "derivative client" status, so that the lawyer must ensure that the client volunteers complete and truthful information to the third party derivative client.); Anstine v. Alexander, 128 P.3d 249, 256-58 (Colo. Ct. App. 2005) (Allowing jury's apportionment of one percent of the fault to the attorneys for aiding and abetting the client's breach of fiduciary duty.).

125. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

126. "To have an effective compliance and ethics program, . . . an organization shall . . . promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law." U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a), (a)(2) (2004). "Section 8B2.1(b)(4) makes compliance and ethics training a requirement[.]" *Id. at* § 8B2.1(a) commentary (2004). The 2004 amendments to the Federal Sentencing Guidelines reinforced the requirement of legal compliance *and* ethics training to all employees.

right and wrong values to be followed. There is no reason to argue for the discipline of ethics unless there is a set of right and wrong values to be used.

The next question is "whose set of right and wrong values?" Obviously, the public would not answer the question by agreeing to the present, existing, self-centered standard, which is now the target of public wrath. Instead the public wants a change. The public answer, for practical purposes of corporate governance, is that the public demands business decisions that use values that conform to a societal collective idea of good. This is not a public acceptance of the philosophy or theology of a universal Moral Law, of the sort described by C.S. Lewis.[127] Instead the public answer appears rooted in non-philosophical, non-theological based yearning for business to conform to common values used by society outside of society. Of particular concern are society's values of equality of treatment, justice, and maximization of economic good for the greatest number of persons in the total society. Phrased generally as a reasonable working conclusion for the attorney EO to use,[128] the company ethics culture should include ethical values upon which there is general public agreement.

A corporation is not like Plato's abstract concepts of beauty and justice. A corporation does not exist outside of mankind and spontaneously arise into this world. A corporation is an organization created and maintained by society. Organizations are open systems affecting, and affected by, the social environment beyond the corporate boundaries. The people with moral stakes in a business's action include all parts of society, including, without limitation, the sundry economic and demographic strata of the country, state and federal public bodies, the local town residents in which the business has its plants or offices, the company's competitors, suppliers, employees other than executives,[129] executives, the attorney EO, stockholders, legislators, and governmental regulators. The stakeholders outside the company exceed the number of stakeholders within the company.

In giving advice within the company, corporate lawyers generally have ignored the moral claims of stakeholders outside the company. Corporate lawyers intending to protect the company in the Neoethics environment must recognize that both news media and the courts sometimes will grade outside

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127. C.S. LEWIS, MERE CHRISTIANITY 3 (The Macmillan Company1952).

128. Of course, the attorney EO should not advocate the use of those societal values that are deemed immoral or malevolent by the attorney EO's own morally autonomous judgment.

129. In listing stakeholders in the company's actions, I deliberately extract top management and the attorney EO from the class of all employees, for this statement. Those three classes frequently have different values and expectations of what the company "should" do. Likewise, I have separately listed legislators, regulators, and voters as separate stakeholders because they frequently have different values and expectations of "should" for the company.

stakeholders to have greater interests than the interest of stockholders to maximize their profit.

If we understand the Neoethics of society, we will not be surprised when legislators, judges, and juries elevate outside moral interests to the place where they punish the corporation when an executive takes action contrary to the company's own rules.[130] It is no longer an acceptable excuse to say "I did not know my subordinate did that!" The action for which the corporation is being made to pay to society may be one in which the employee who did the act does not recognize as patently contrary to any statute (*e.g.,* the employee may not recognize that it may violate a banking regulation to issue home purchase loans from the bank's funds without verifying the home buyer's assets and employment).

There is a plethora of scholarly articles questioning the legal logic and legal soundness of *respondeat superior* as a basis for corporate liability when it is only one person for their own personal gain that did the illegal act, and even contrary to corporate directions.[131] Most of these scholarly articles do not discuss why legal logic has been suppressed. It isn't the legal logic of agency law and *respondent superior* that imposes the present rash of civil and criminal liabilities.[132] The driver of the present impositions of corporate liability for "unjust" conduct of one employee is social engineering. It is the type of social engineering that gave the legal system the doctrine of product liability without fault of the manufacturer. The company is made liable because of:

1. A value-driven public demand for the corporation to absorb the loss that has been inflicted on society's members; and
2. A value-driven public demand for the corporation to internally police its employees to prevent public loss and to bear the expense of that internal policing.

The public wants the company to bear the primary costs of policing internal corporate morals. Those public desires are being enforced by

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130. "Criminal liability can attach to an organization whenever an employee of the organization commits an act within the apparent scope of his or her employment, *even if the employee acted directly contrary to company policy and instructions*. An entire organization, *despite its best efforts to prevent wrongdoing in its ranks*, can still be held criminally liable for *any* of its employees' illegal actions." *E.g*., Paula Desio, U.S. Sentencing Comm'n, *An Overview of the Organizational Guidelines,* http://www.ussc.gov/corp/ORGOVERVIEW.pdf (last visited Dec. 10, 2008) (emphasis added).

131. *See, e.g.,* Kathleen F. Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593 (1988); V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355 (1999); and the group of articles in 44 AM. CRIM. L. REV. (2007).

132. One is reminded of the statement, "The life of the law is not logic, but experience." OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe Howe ed., Harvard University Press 1963) (1881).

regulation, legislation and court decisions. *In re Caremark*[133] gives us an example. The prior law[134] was that a director's duty of care did not require implementing a corporate compliance program. *Caremark* changed the standard, holding that the Board could not escape liability if it failed to implement a legal compliance program (*i.e.,* internal policing[135]). As the phrases "utter failure" and "systematic failure" of opinion suggest, a board's *Caremark* duty to provide internal policing is relatively low, but it does exist. *Caremark* signals that judge-made law will now direct penalties measured by what the public believes a director "should do" in internal governance, rather than leaving it entirely to stockholder or director judgment.

It makes utilitarian sense to task a corporation to punish the executives or the corporate treasury because of an employee's moral lapse. It makes sense even if the employees lapse from society's commonly accepted values was unbidden and against published corporate rules. Social redistribution of loss caused by immorality, plus gaining present retribution/catharsis, and future deterrence of immoral action, are all logical utilitarian policy goals.

The reality of the combined social and legal public ethics requires that the decisions made by company employees (including top management) use values that respond to the framework, perception, and ethical demands of the twenty-first century public and its law enforcers. Thus the values that the EO and management insert into the company world must be values that are conformable at least in part to the values of persons outside the company. A management that will keep the company out of trouble is a management that will consider not only the interests and values of stockholders, but also the interests and values of the other stakeholders in the company's actions.

To go beyond mere protection of the company to advance and to promote the company in the Neoethics environment, management and corporate attorneys need a three-step approach. First, executives and attorneys must aspire to be moral leaders within the company. Second, executives and attorneys must know the community's broadly shared values. Third, corporate attorneys cannot be morally neutral in their advice, and executives must consider community values in their decision-making process.

IV. THE ACTION PLAN: CHANGING THE WORLD IN WHICH EMPLOYEES THINK THEY LIVE

Let us now go forward in forming an action plan for the attorney ethics officer. Underlying our plan will be four points we have discussed.

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133. *In re* Caremark Int'l, Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

134. *See* Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 130 (Del. Ch. 1963).

135. *Caremark Int'l, Inc.*, 698 A.2d at 970.

1. There is no corporate ethics; there is only ethics of the individuals within the corporation.
2. The employee's moral decision-making is not based on formal rules; the employee's choice of action is based on values.
3. Employees make decisions based on the world in which they think they live.
4. A corporation is patterns of communication that form and hold values to be used within the corporate world.

These four points lead to an action plan for changing the ethical decisions of individuals in the corporation. We will change ethical decisions by changing the world in which employees think they live. We will make the changes by using the corporate patterns of communications to transmit values that employees will perceive as operative within their world. In short, the plan can be called "Less Rules, More Preaching."

V. SOURCES OF VALUES OUTSIDE THE CORPORATE CULTURE

That people make ethical decisions according to internal principles is a starting point. We need to know the process that gives rise to those personal governing values. Sociological research has long told us that internal moral values are formed initially by family oriented teaching. Children first learn morality from their family. The family bonds teach moral emotions such as sympathy, the satisfaction of cooperation, and guilt. Building on those emotions, the family stories, intra family teaching, intra family words and intra family deeds teach moral values to the child. The child then moves into a larger society that reinforces or changes those moral notions by family-style instruction, again by stories, teaching, words and deeds.

What does society teach? Society has its own understanding of its own ethics, which is shaped by religion and practical philosophy. To the extent that those societal ethical values are definitive and widely announced and seem to be actually operating in the society, those societal values are taught to, and become internalized in, the individual. Again, those values are reinforced and changed by stories, teaching, words, and deeds that are visible to the growing child.

Law is an inseparable part of the stories in which we learn about societal values, and may or may not help to shape our acceptance of moral standards. Law can define a desirable social value and communicate that definition to a wide audience quickly. Unfortunately law, by its mere existence, does not show actual operation of the value in the observer's world. Unless the value is shown to the audience as actually operative in the world in which the observer thinks he lives, the value does not become internalized in the observer to become operative for decisions.

External cultural events generate internal values that motivate choices of action. Events demonstrate values that seem to be actually operating in society. Public events are a form of observed story with a moral. Business marketing research tells us that. Research such as that found in *The Consistent Consumer*[136] points to general cultural and historical events during pre-adult years as powerful causes of the core values that people use to judge the desirability of action, including their actions at work or among peers. For example, people who were born and grew through their teen years during the 1930's Great Depression and the 1940's World War II tended to develop two strong internal values: (1) there is great virtue in saving money and conserving material possessions which will bring personal relief from hardship later; and (2), there is no greater virtue than personal courage on behalf of the group to which one belongs.[137] In contrast, people born in the 1985-1995 era grew to experience the economic Long Boom; the complexity and swift changes of information on the computer internet; prominent persons like O. J. Simpson accused of crime and apparently getting away with it; and constant rapid changes of business and social arrangements. The people born in the 1985-1995 era developed core values that seemed operative in the world, such as in the game of life, there is nothing better than money to enhance leverage and keep score; getting information one way or another and acting quickly on the new information to win over others is good; change is to be expected and preferred over permanence; and with enough money you can get away with practically anything.

When the adult moves into the business world as an employee of a specific company, the employee brings those values from family, society, and events. However, in the business world the adult finds a different group of persons. The employee must get along with the others in his or her business world, eight hours a day, day after day, to survive in it. The employee must necessarily observe and follow the methods and values of those with whom he communicates, on pain of banishment from the rewards of belonging to the group. The former child, now a citizen of society, and an employee, is subjected to the powerful culture of the corporation within which he or she lives a major portion of their life. The move to the corporate world is a different larger society that reinforces or changes earlier formed moral notions by family-style instruction, again by stories, teaching, words and deeds. It is because desirable first-learned moral values may be changed by the corporate

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136. KEN BELLER, STEVE WEISS & LOUIS PATLER, THE CONSISTENT CONSUMER: PREDICTING FUTURE BEHAVIOR THROUGH LASTING VALUES (Dearborn Trade Publishing 2005). Chapter 24 explores how the values of different groups affect their vulnerabilities and strengths as employees. *Id*. at 213.

137. *Id.*

world that ethicists sometimes encourage the employee to ask, "Would I want my family to know about this?"[138]

VI. COMMUNICATIONS AND VALUES IN THE CORPORATE CULTURE

Ethical culture in the corporate world is the combination of corporate factors that demonstrate and teach its values. The values are the corporate "right thing." The ethical culture of an organization shows an observing employee what others consider to be the "right decision;" whether doing the right thing matters and whether others expect the observing employee to make the "right decision."

The ethical culture is established, demonstrated, and taught in both the patterns and the content of the communications. The employee's actual values used in decision-making are established by all the stories, teaching, words, and deeds the ethical culture puts forward for employee observation.

The average attorney EO thinks in terms of writing a code of ethics, posting it, and then enforcing it somehow. The written statements in formal ethics programs, such as a code of ethics or vision statement have only a limited use. They have the advantage of being clear communications posting values in each employee's world. That is good. But it is not enough. Written formal statements are only one pattern of communication among many. Statements in a code of ethics may be outweighed by a volume of contrary communications, or even by just a few observed actions that are contrary to the words in the company's formal ethics program. As Robert Jackall, after surveying his studies of corporate behavior put it:

> For the most part, formal guidelines have little to do with day-to-day behavior, and all corporate players know it. Instead, the moral rules-in-use that emerge directly out of a specific milieu's particular ethos – itself forged in addressing exigencies – shape day-to-day behavior. These rules-in-use regularly conflict with corporate actors' necessary public embrace of abstract virtues, designed for internal audiences who know better but have a stake in maintaining fictions, or for external audiences who know nothing about the specific worlds at issue.[139]

Finding and studying all of the corporation's significant patterns of communication requires a great level of consciousness about all communication acts. Historically, most of the important messages about operative values have been communicated by face-to-face communications or

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138. *E.g.,* KENNETH BLANCHARD & NORMAN VINCENT PEALE, THE POWER OF ETHICAL MANAGEMENT 27 (William Morrow and Company, Inc. 1988).

139. JACKALL, *supra* note 59, at 1134.

nonverbally by actions, which have spoken louder than words. That's changed. The way people interact, produce, collaborate and resolve conflicts has dramatically changed during the electronic age. The frequency and availability of face-to-face communication has been dramatically shut down. Even corporate voice-to-voice communication has been shut down in favor of e-mails, instant messaging, Twittering, and texting on Blackberrys. The loss from culture of those visual and auditory communications that were part of face-to-face conversations, or from persons directly viewing other persons, demands a new consciousness in finding and analyzing communications patterns.

An attorney EO's action plan should involve a list of *all* the most common communications of values among employees. A typical list would include:

- Demonstrations of the influence of values on activities,
- Demonstrations of values related attitudes,
- Organizational myths (the word "myth" is confusing to non-sociologists because of the implication of false or supernatural belief. The term "organizational myths" is a shorthand term for those circulated stories which either concern the history of the company or explain the company's social structure),
- Formal teaching,
- Informal teaching,
- Gossip[140],Ethics program components,
- Code of Ethics, company Mission Statement, and company Vision Statement.
- Reward and punishment systems and results,
- Ethics audits and evaluation ("Ethics audits and evaluation" is meant to be a shorthand term for anything that answers the questions of what is my co-worker, supervisor, department manager, and top management looking for and how is he or she evaluating what is seen?), and
- Decision-making processes in an organization.

Now, look for where and how these items are communicated. Do not look solely for electronic or written communications. Those patterns and the

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140. Care should be taken not to overlook a special function of gossip as a pattern holding corporate values. A primary function of gossip is that it builds a feeling of being in the group, at the same time as it defines the group values and defines the actions one must take to belong to the group. Therefore, care must be taken to analyze as part of the pattern of gossip not only the pattern and content of the company gossip, but also to analyze what is driving the formation of a gossip group.

content are what you will be managing in changing the world of the employees.

This paper is not an extended text so one example of finding and analyzing communications patterns will have to suffice. Take the first item in the above list, to wit: demonstrations of the influence of values on activities. Does the corporate world include communication of executives showing personal concern for others? But how is that executive concern communicated? It's one thing to have a newsletter picture of a black-tied company presenting a million-dollar check to help the symphony entertain the upper levels of society. (That pattern of only helping people outside the company may be presenting the wrong value choice to company employees.) It is another thing to have a corporate executive take a Saturday to physically lead a group of employees on a construction of a house for a homeless family, and for you to encourage those employees to tell their coworkers about their experience and get them to do such work for the homeless. The physical activity communication pattern presents directly to some employees the influence of a right value on the executive and creatively uses the communication patter of gossip to show the value to other employees.

If the ethics officer wants to be effective in changing the ethical culture ("the world in which the employees think they live"), the communication forms and content must be consciously and continuously used. The communications must show[141] appropriate values to the employee viewing the world in which he or she works. The attorney EO must study the corporate patterns of communication, then use those communications to show the appropriate values for the individual's decision process do in fact exist in his or her corporate world. That's why the slogan "Less Rules, More Preaching" is appropriate.

Of the dictionary meanings of "preach," I select "earnest advocacy of a principle" as what I am trying to convey. I choose the word "preach" because of its connotations of constant conveyance of true belief. However, effective earnest advocacy is not a harangue. Lawyers know that. Orations, or self-congratulations in a pompous or arrogant manner, do not convince. Lawyers know that. Actions speak louder than words. Lawyers know that. Lawyers can communicate; they need only to shed bad assumptions and use their skills to change an entire corporate world, one individual's decision at a time.

Finding and studying the corporation's patterns of communication should start with looking for, and at, the patterns used by the management (from supervisors and middle management to top management and CEO). Why?

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141. "Show" includes the meanings of (1) be visible; (2) exhibit for inspection; (3) represent; (4) allow to be perceived; (5) demonstrate; and (6) prove the existence or operation.

First, because leaders have the most visible and authoritative positions.[142] Leaders are placed by management throughout the organization so that leaders can: (1) effectively communicate; (2) be authority figures because of their knowledge of how the corporation works; and (3) be the persons most able to reward and punish. Leaders, therefore, are the most influential in demonstrating (teaching) to employees the values used (and to be used) in the world in which they live. Leaders are the most effective in demonstrating values-related attitudes, and in demonstrating the influence of values on activities. Their communications are the most influential.

VII. THE MEHRABIAN FACTOR

There is a second reason why changing ethical values must start with the patterns used by the management (from supervisors and middle management to top management and CEO). That reason is found in the Mehrabian Factor.

How employees perceive *the action* of the corporate leaders in making value choices is critical to employees knowing *what is right in the corporate world in which they live.* If the actions of leaders are contrary to the verbal message of values, then the perception of the employees within the corporate world is that the actions carry the real values of the company, not the verbal messages. My shorthand way of expressing this is to call it the "Mehrabian Factor."

Albert Mehrabian's findings on inconsistent messages have been quoted throughout human communication seminars and studies worldwide. In his studies,[143] Mehrabian comes to two conclusions. First, there are three elements in any face-to-face communication: words, tone of voice, and body language. Second, the non-word elements are particularly important for communicating values, if words and actions, one tends to believe the body language.

It is emphatically not the case that nonverbal elements convey the bulk of the message regarding moral values.[144] The point is that when the conveyed

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142. The exception to intentional design is gossip (conversation among friends).

143. Current Professor Emeritus of Psychology, UCLA. Albert Mehrabian documented and discussed his studies in his book SILENT MESSAGES: IMPLICIT COMMUNICATION OF EMOTIONS AND ATTITUDES. *See* ALBERT MEHRABIAN, SILENT MESSAGES: IMPLICIT COMMUNICATION OF EMOTIONS AND ATTITUDES (Wadsworth Publishing Company 2d ed. 1981).

144. Some people claim that in any communication situation, the message is being transported mostly by non-verbal cues, not by words. This is a mistake. Mehrabian explains this on his webpage. ("My findings on this topic have received considerable attention in the literature and in the popular media. "Silent Messages" contains a detailed discussion of my findings on inconsistent messages of feelings and attitudes (and the relative importance of words vs. nonverbal cues) on pages 75 to 80[.] Please note that this and other equations regarding relative importance of verbal and nonverbal messages were derived from experiments dealing with communications of feelings and attitudes (i.e., like-dislike). Unless a communicator is talking about their feelings or attitudes, these equations are not applicable." Albert

message is about values, about what is good and what is bad, actions and nonverbal clues are more important than words. The Mehrabian Factor can be simply stated: actions showing values will displace words stating values.

Notice the actions of top management do not need to be the volume bulk of the value communications. Their actions simply have to be congruent with the rest of the message about values. Because the top management is the most visible and the most authoritative in the world of the company, their actions are critical to demonstrating the values to be used when decisions are to be made. The actions of top executives must be managed first in the ethics program. The attorney EO must first concentrate on changing the world in which top management thinks it lives; then on having appropriate management actions shown to other employees; then on changing the world of those other employees. Moreover, the EO must spend an amount of time teaching executives, which is disproportionate to the number of executives. That is to say, instructional time spent working with one executive must be multiples of the instructional time spent working with one entry-level employee.

VIII. ADDITION AND EVIDENCE PLACEMENT

Ethics is often characterized as "the right thing to do." This is overly simplistic, for ethics involves making a choice using values of what is right and what is wrong, and those values may not be uniform among us. Values are self-justifying because they exist and each of us have different viewpoints and experiences. Values exist because previous training or experiences have taught the employee that values bring about desired effects in the world in which the employee lives. For example, your experience that keeping your mouth shut about the manager's expense account keeps you on the payroll may differ from mine, because I have never worked for that manager. Keeping quiet about wrongdoing may be an employee's value of what is "the right thing to do," but not yours as an attorney EO.

It is not effective to simply demand that an audience give up a value when they "know" that value is really the operative good value for the decision to be made. To supplant a present value within the corporate world with a superior value, you can move the employee's observation of the present value behind more recent and more numerous instances of a superior value. Change in ethical values is best accomplished by constant addition of demonstrations and perceptions of the existence of the desired ethical values. Constantly repeat the desired value. When an employee makes a decision based on the

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Mehrabian, "Silent Messages" – A Wealth of Information About Nonverbal Communication (Body Language), http://www.kaaj.com/psych/smorder.html (last visited Dec. 10, 2008).

world in which he thinks he lives, the employee is likely to use as appropriate the value most abundantly and most recently observed.

Think in terms of demonstrating appropriate values to the employee's world; don't think in terms of verbally ordering a substitution of values. It's a matter of process that public relations persons sometimes call evidence management.[145] Evidence management for the attorney EO involves placing symbols of moral value (evidence) so that the value to be presented is constantly manifested within multiple views.

It is worthwhile noting two special points for purposes of developing strategies for adding manifestations of the desired values to the company world. First, an employee's view of values and communications cannot be more than a fragmentary view. Her view is bound to be centered in her space and her time. This is a price of being human. A human's view of the corporation will be partial. It will be limited to those persons with whom there is communication in one form or another, and to the items that are communicated in one form or another to the viewer. Hence, the attorney EO must provide for sundry and various placements of the identical moral values.

Second, note and keep in mind that in the business corporation, the ethical values of beneficence, altruism, and co-operation are, in an important sense, suspended from use. The employee sees the persons in the company world as beneficent, altruistic, and cooperating only in a limited sense. The beneficence, altruism, and cooperation are limited by competition. We are competing, not sharing. If you win the contract, someone else has to lose. If you gain the job offer, then someone loses it. That's competition. Whether we are competing in number of units sold, or competing for best quality of production units manufactured, or competing for a job promotion, or competing for the attention of a supervisor, or competing to raise the price of stock shares, or competing to be the one retained during the next business downturn, we are competing. There will be those who win and are rewarded in the competition; and those who lose get nothing or are punished. That observed process teaches the lowest-rung employee and the CEO alike that the company in which they live is a world without beneficence or altruism as operative values and in which cooperation is only to be to the extent necessary to benefit oneself. Hence, the attorney EO should give special attention to providing in the company world instances of actions that demonstrate the

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145. *See, e.g.,* LEONARD L. BERRY & NEELI BENDAPUDI, HARVARD BUSINESS REVIEW, CLUEING IN CUSTOMERS, http://www.slingstone.us/uploads/Mayo_Clinic_Clueing_In_Customers.pdf. Among others uses of evidence management, the authors discuss the Mayo Clinic's use of evidence management to place symbols of clinic's value of "The only interest to be considered is the best interest of the patient" in front of their customers. However, the author's discussions with Mayo ethicists indicate that Mayo also uses this value and placement for their employees.

moral qualities of beneficence, altruism, and co-operation to benefit someone else.

IX. AVOIDING MONO-CULTURAL COMMUNICATION IN MANAGING ETHICAL CULTURE

Deciding *which* values should be communicated, and *how* they are communicated, needs attention to the fact that:

The world in which I live is *not* the world in which you live.

All of us tend to be mono-cultural communicators. Mono-cultural communication is communication based upon the assumption that everyone in our group, or everyone who looks like us, has the same cultural perception of what is right or wrong.[146] If we stop to think about it, we know the assumption is not necessarily correct. Everyone who looks like us or is in our group does not necessarily have the same perception of what is good. They may have not grown up in families with our values, not been in the same type of schools, not had the same religious experiences, not had similar traumas or rewards, not had honest supervisors, and not ever had any of the major life experiences of my world. The values they learned while growing up and while working will be different in some degree, minor or major, than my values. This means, for example, you cannot assume that everyone in your company starts with the value that honesty in bookkeeping is always good in the company world. Some may have learned the value that honesty in bookkeeping is not good if it causes the price of stock to nose-dive; indeed they may have learned that fudging the books has for years helped make stockholders happy and employees secure and suppliers paid. Or to take a cynical example closer to home, some law firm associates may have learned on the job that the firm highly values always billing for eleven hours of work during the ten hours at the office, particularly when the partners' incomes are dependent on the billable hours of associates.

To be an effective manager of ethics you must understand that some groups of employees live in a different world than others. The values they see as normal are not those seen by other employees as normal. It may be a matter of location (*e.g.,* New York division office versus Minneapolis division office) or department (*e.g.,* underwriting in a life insurance company versus sales). The biggest difference between worlds may be separating the top executives from other employees. Thus Dell executives, when firing other corporate executives, see nothing amiss in communicating an executive's final paycheck of millions of dollars as the "standard severance arrangement for executive

146. *See, e.g.* Brown, *supra* note 23, at 44-45.

officers"[147] (one year's pay in the millions plus an amount equal to what would have been a bonus for good performance if there had been another year of employment!) That is not the world of unemployment compensation that the rest of the Dell employees see as the "standard severance arrangement."

In spite of an intellectual understanding that the person we address may not necessarily have the same values we do – mono-cultural communication is a process that we use, uncritically, every day. We use it because it eliminates the time and effort of more carefully considering the values held by the persons with whom we communicate.

Mono-cultural communication must be avoided by the attorney EO. Ken Beller, a communications analyst and the author of *The Consistent Consumer* and of *Great Peacemakers*, has phrased the problem well: "If I use my values as the lens for my communication, you fail to see what I want to communicate. If I use your values as the communication lens, then you can see and use what I am communicating."[148]

Of all the types of communicators, mono-cultural communicators have the most difficulty in recognizing differences in values held by others.[149] Because mono-communicators view everyone's values as similar, they see not using the proper values in decisions as a lack of intelligence or a lack of formal educational training. Mono-communicators are constant failures in changing the operative values used by others because mono-communicators do not recognize what needs changing.

To be an effective manager of ethics you must start with the assumption that the world in which employees (including top management) live is *not* the world in which you live. Making the mistake of assuming that the world in which you live is the world in which others live can be a cause of corporate governance spectacularly falling short. We've seen a case of that in the news media: on October 23, 2008, the Associated Press[150] reported that longtime banking chief Allan Greenspan was in a "state of shocked disbelief" that huge financial institutions were short of money. Greenspan acknowledged under Congressional questioning that he had made a mistake when he thought that "banks operating in their self-interest" would protect the equity in their institutions.[151] Greenspan called it "a flaw in the model that I perceived is the critical functioning structure that defines how the world works."[152]

Greenspan's model was in a world in which a bank is an artificial person who highly values the accumulation and increase of assets over decades of

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147. Dell, Inc., Current Report (Form 8-K), at 2 (Jan. 5, 2009).
148. Interview with Ken Beller, Communications Analyst and Author (Aug., 2008).
149. BROWN, *supra* note 23, at 52.
150. Greenspan article, *supra* note 107.
151. *Id*.
152. *Id*.

time. He did not seem to understand that the world of bank managers and stockholders no longer values the long-term existence of the artificial person bank. Today's banks come and go, merge and split, and managers are terminated, moved, changed, and managers rewarded or punished, because of a bank manager's goal unlike the goal of the artificial person (bank) in Greenspan's world. Bank managers had changed to value reported income and stock price at the end of the fiscal quarter as a higher "good" than long term asset accumulation or long term survival of the bank. The world of the governed was not the world of the mono-communicating regulator.

Mono-cultural communication is a two-way block. The uncritical assumption of similar values not only affects what the communicator says to others, it also affects how that same communicator understands what he or she hears in the communications received. A mono-cultural sender tends to ignore the signals of values he or she is sending. On the other side of the coin, signals of the values underlying the sent communication tend to be ignored or misinterpreted by a mono-cultural receiver.

X. CHANGING THE ETHICAL CULTURE OF THE WORLD OF TOP MANAGEMENT

The ethics officer is one leader in the corporation, but only one, albeit the one charged with leading the other leaders in ethical matters. The executive team members are a number of leaders, but only some of the leaders. Immediate supervisors are only some of the leaders. The ethics officer, as the one formally charged with leading the other leaders on ethics matters, must target leaders at all levels, starting at the top but going downward to line supervisors. The EO's best initial action to infuse moral values into the total employees' world is to enlist top management members in the work. Leaders play the primary role in the communication of the items in an organization's ethical culture. Consequently, leaders must be used to play a central role in the communications of the values to be used in moral decisions.

The EO must not only be a conscious leader, but also must be a conscious communicator and jealous advocate. The EO must lead the leaders, and then assure that the actions of leaders are communicated so that the actions are perceived by as many as possible. The initial three steps of the attorney EO should be:

- Self study of the patterns of communication within the world of the Chief Executive Officer and the C-Level.[153]

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153. *I.e.*, the CEO, COO, CFO, CTO, CLO (General Counsel) VP Sales, VP Marketing, etc. *See* Wikipedia, corporate title, http://en.wikipedia.org/wiki/C-level (for a definition by examples that will give a list of persons to consider for the C-Level world you want to convince).

- Changing the world in which the top managers think they live by introducing appropriate values into the communications in the C-Level world.
- Convincing the C-Level leaders of the company to demonstrate appropriate values in the world in which employees live. Sell the benefits for matters that interest the C-Level. Benefits, of course, for the company, but for the C-Level if possible.

To the extent that the leaders' resistance to change is not overcome, there will be no change. The initial part of leading change among top management is to seek a consensus from top management on what are the top values to be used in decisions by everyone in the company. The C-level must decide at one time, in one place, together, "What are the values that will not be compromised?" It is important to have a consensus formed by the top management team rather than have a fiat from the Board of Directors or the CEO. Trice and Beyer have noted that both at the individual level and also at the organization group level there is great resistance to a change of culture. [154] The fear of the unknown, self-interest, habit, threats to security, threats to power, threats to influence, and different perceptions and goals are noted by them as the reasons for this resistance to culture change.[155] A consensus formed by the management team helps to defeat those reasons for resistance to change in the individual team member.

A formal consensus building session by top management has another function: beyond defining values, the session communicates among the C-level the moral values of the C-level world in which they think they live. Top managers are generally decent people outside their business world and if you put them all in a room and ask for an articulation of important moral values, they will do so as though the values are their own values also in the C-level world. That articulation among peers is a beginning in building an appropriate world in which management should live. Once that articulation has taken place, shifting to the question "What are the values which should not be compromised in our business?" will place those values more strongly into the managers' world. The EO's job then becomes one of maintaining and strengthening the items demonstrated in the world in which the top managers live.

It is centrally important that the EO call upon management to show in their own actions the corporate values they want all employees to use in performing the company business. For an effective example of use of communication patterns to demonstrate the values of the company world to

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154. HARRISON M. TRICE & JANICE M. BEYER, THE CULTURES OF WORK ORGANIZATIONS 171-72 (Prentice Hall 1993).

155. *Id.* at 185.

employees, note the communications pattern of Southwest Airlines executives who ride their own airline sans first class seating and help customers put their luggage into overhead bins. They establish to the employees who see it (and the others who learn of it by gossip within the company flight crews), a company value of fairness (providing equal transportation to VP and flight attendant, each traveling to their work location) plus a company value of going outside your job description to help customers. Another example of a demonstration of corporate values to employees was the General Motor's CEO riding a multi-million dollar corporate jet to ask for public money, at the same time asking for employees to accept wage cuts. Unfortunately, that showed the GM employees the operational value in the GM world is getting what you can for yourself.

A problem that some attorney EO's will encounter is that top managers may view the executive suite floor as a special little world not subject to the rules of "lower" employees. A simple example of this was given to me by the Human Relations Director of a national financial company who complained to me that C-level unthinkingly kept undermining his efforts in the ethics program. He explained it like this:

> It's hard to enforce an ethics code if the bosses think it does not apply to them. They don't think the expense account rules apply to them. The higher in the company you go, the more exceptions there are to the rules of conduct. It's even hard for me to enforce our dress code of always wearing a suit if the executives come to work in blue jeans.[156]

Symptoms of such a "my world is special" view were exemplified by Merrill Lynch CEO John Thain, who last year spent more than a million dollars redecorating his office so that he might have a better place in which to contemplate the number of employees that would be fired because the company was failing. Many C-level executives mistakenly think their actions do not impact what other employees see as the operative values they can and should use (in spite of written rules to the contrary). Changing the world in which the top managers think they live may involve convincing top managers that, at a minimum, they must understand that all employees get a message from the values the C-level executives are using.

Once consensus moral values have been established at the top, then the EO can shift to infusing those moral values into the company world in which all employees live. Using the top management to insert (demonstrate) values into a company world is a straightforward process. Top managers should:

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156. Interview with the author (Aug. 2008). He allows me to use his comment only if I do not use his name and do not give the specific day or place of the interview.

1. Model and coach, specifically:
   talk corporate vision (not the mission, rather the vision of what we will be; talk corporate values, talk ethics as a priority; walk the talk – *i.e.,* take action that shows ethics are a priority; communicate what is happening in the company (keep people in the loop); encourage thoughtful dissent; don't sweep problems under the rug; show employees they care about someone other than themselves; and celebrate the successes of everyone.
2. Be procedurally fair and content fair (in making changes and enforcing the culture).
3. Enforce the culture, specifically:
   reward the people who do right (and do it so employees know it); and discipline the people who do wrong (and do it so employees know it), including making the tough calls for discipline of star performers.
4. Demonstrate their concern for the interests of internal and external stakeholders

After top management has a consensus on the values that should not be compromised, and they are not showing inconsistent values to other employees, then the ethics officer can move to the patterns of communications that involve other employees in the company and use those communications to show appropriate values within the corporate world.

The attorney EO will be well advised to develop the content of patterns of communication involving the company's small working groups of about a dozen or fewer persons.[157] These groups have special impact, first because of the immediacy of communications that show value, and second because of the desire of members to be social members of the group, and third, because of the special family-style instruction that occurs in small groups. The success of such small-group interaction is illustrated by the success of hazardous industries, such as chemical plants, in having periodic safety meetings held by a working superior, in which they address only their own group, as opposed to the lesser effect of gathering all employees into an auditorium to hear the same safety content.

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157. *Cf.* RION, *supra* note 94, at 117 ("And a small, disciplined group that shares basic values and purposes will, through time, become a genuine community; that is, it will increasingly be a setting in which mutual care and support arises naturally, in which identity is shaped and values are reinforced or changed."). Rion pioneered corporate ethics over 25 years ago and as Corporate Ethics Manager for Cummins Engine Company, he was one of the first to help companies tap the power of shared values. His strategies for managers are well worth reading.

What will be the values that the attorney EO will want to show in the communications within the corporate world? The choice will depend on the EO's understanding of the company's event history, its employees (including top management), and its needs. For example, if the company is a pharmaceutical testing company, then the values to be emphasized may be the four that Beauchamp and Childress[158] show as undergirding much of bioethics:

- Autonomy (a rational individual should be give freedom in personal decisions);
- Justice (fair and impartial treatment of all persons);
- Beneficence (others should be treated in their best interest); and
- Nonmaleficence ("First do no harm", as in the Hippocratic Oath).

If the company is primarily a sales company, then the values to be emphasized may be those in the Four-Way Test that Rotary International asks their business members to use:

- Is it the TRUTH?
- Is it FAIR to all concerned?
- Will it build GOODWILL and BETTER FRIENDSHIPS? Will it be BENEFICIAL to all concerned?[159]

However, for most companies, the ethics officer should concentrate on a value set expressed as the following:

- Promise Keeping;
- Fairness;
- Doing Good;
- Not Hurting Others;
- Honesty;
- Respect for Human Diversity; and
- Legal Compliance

Notice that the above list does not include the value of company profit or the value of stock price increase. Usually, those values will be a part of the company culture without effort on the part of the ethics officer.

What makes applied ethics so interesting, but also perplexing, is that ethical decisions often turn on a dilemma, a choice between two goals that are each appropriate, but one of which must prevail. One of those two goals is often company profit or stock price increase. The usual problems that cause

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158. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 67 (Oxford University Press 4th ed. 1994).

159. History of Rotary International, http://www.rotary.org/EN/ABOUTUS/HISTORY/RIHISTORY/Pages ridefault.aspx (last visited Aug. 12, 2009).

company difficulties are when company profit overcomes honesty, fairness, and not hurting others. What this means, as a practical matter of applied ethics, is that the attorney EO must not only introduce appropriate values into the company, but also must show which are the values that should not be compromised. If honesty wins, company profit may suffer in the short term. If company profit wins, honesty will suffer. The patterns of communication and its content not only must show operative values, but also must show which values have priority. Every opportunity must be taken to show in the employees' world the instances in which appropriately higher values have prevailed in moral choices and that the choice of the higher value resulted in a net gain to the company and to the employee involved.

So there you have it. If we understand the nature of the corporation and the nature of ethical decisions, we can take effective action to improve the ethical decisions that drive corporate actions affecting society. We can use the form and content of the patterns of communication to place appropriate values, and their relative priority, into the world in which employees live. The best ethics plan is a plan of less rules and more attention to managing the evidence of values.

XI. CONCLUSION

Attorneys as ethics officers have the obligation and the opportunity to change the ethics of employees (including top management). The legal profession's Standard Concept of the lawyer as morally neutral is inappropriate to the role of attorney as corporate counselor or ethics officer.

Society now actively demands that companies police their employees' private morals and private actions in the work environment to conform to public morals. Legal compliance by itself is not enough for the public, nor should it be enough for the attorney EO or the corporate management team. A program of legal compliance, at its best, is only partial protection of the company. A program of only legal compliance is not enough to proactively reduce company exposure to future legal problems with government, public, employees, and other stakeholders. A sound ethical culture of the company protects the company and does more. A sound ethical culture goes beyond protection to become promotion of the company. For good corporate governance, corporate management of personal moral values is required.

For ethics management, junk the lawyer's concept of a corporation being an artificial person. Individual real persons, not artificial persons, make moral decisions. Individual real persons, not artificial persons, put those decisions into words or action. For ethics management, use the concept that a corporation is patterns of communication among real people. The form and content of those communications hold the values the employee will use.

For ethics management programs: don't use compliance with corporate law as the framework for the program. Rules are not enough to control every possible wrongdoing. More importantly, employees' moral decisions are not ultimately based on law or the announced formal company rules. Choice of action is ultimately based on values.

The moral values that employees (including top management) use in making choices in the corporate world are the values they experience in the verbal and nonverbal communications that form the corporate world. The form and content of the patterns of communication that constitute the company can be used to change the values employees experience. An effective slogan for the attorney EO to remember is "Preach More." That is to say, the attorney who is an ethics officer must openly and earnestly communicate values in the world in which employees think they live.