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Learning to be More than a Lawyer

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LEARNING TO BE MORE THAN A LAWYER

*Carol Ellis Morgan**

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A company executive approaches an in-house attorney with a question: can the company put a group of administrative employees on a one-week leave without pay as a cost-savings measure? Assuming no discrimination or contractual issues exist, and employment is at will, the answer is simple: yes. While this answer may reflect accurate legal advice, is it adequate?

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I. THE LIMITS OF LEGAL ADVICE: MODEL RULE 2.1

The American Bar Association (ABA)'s Model Rules of Professional Conduct Rule 2.1 acknowledges that a lawyer's role is not limited to legal advice: "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."¹

While the second sentence of Model Rule 2.1 is permissive and does not mandate reference to non-legal considerations in rendering advice, the second paragraph of the comments to Model Rule 2.1 seems to go one step further and issues a strong suggestion, if not an admonition, that pure legal advice may not be adequate in some situations. It reads that:

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

In other words, based on the comments to Model Rule 2.1, a lawyer may not be effective in certain circumstances if such advice is strictly legal and devoid of other considerations. Whether one can argue that providing inadequate legal advice is tantamount to

¹ MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2018). Forty-nine states have adopted some version of Model Rule 2.1: forty-five states have adopted it verbatim, two states (Colorado and Arkansas) have added language about alternative dispute resolution, and two states (Georgia and Texas) have slight modifications. California has not yet adopted it. See CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct Rule 2.1: Advisor*, AM. BAR ASS'N (Sept. 29, 2017), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_2_1.pdf for an overview of the differences among states in their adoption of the Model Rules.

² MODEL RULES OF PROF'L CONDUCT r. 2.1, cmt. 2 (AM. BAR ASS'N 2018).

malpractice is debatable based on the particular facts. However, an indisputable goal of any lawyer is to provide valuable assistance to a client. For this reason, lawyers need to understand when legal advice may not be enough and when to refer to other relevant considerations. At a minimum, “advising clients of the practical consequences of the advice is well within the scope of a lawyer's duties, as well as a best practice.”³

II. THE ROLE OF THE CORPORATE/TRANSACTIONAL LAWYER: ADVISOR AND COUNSELOR

Notably, the heading for Model Rule 2.1 is “Advisor” under the Part II title of “Counselor.” One could argue that Model Rule 2.1 applies only to the advisory role of lawyers in a non-litigation setting and not the advocacy role of lawyers in a litigation context,⁴ which is covered by Part III of the Model Rules.⁵ Regardless, Model Rule 2.1 has particular meaning for corporate/transactional attorneys who aspire to be trusted advisors and counselors to their clients. John Parker, former general counsel of Coca-Cola Enterprises, Inc., provides a compelling graphic description of the role of lawyers.⁶



³ Kristen M. Blankley, *The Ethics and Practice of Drafting Pre-Dispute Resolution Clauses*, 49 CREIGHTON L. REV. 743, 747 (2016).

⁴ See, e.g., Kevin H. Michels, *Lawyer Independence: From Ideal to Viable Legal Standard*, 61 CASE W. RES. L. REV. 85, 102-107 (2010) (discussing when a lawyer must use their independent professional judgment).

⁵ See MODEL RULES OF PROF'L CONDUCT pt. III (AM. BAR ASS'N 2018) (listing the standards that govern a lawyer's ethics and duties as an Advocate).

⁶ John Parker, Remarks at a panel discussion at the University of Georgia School of Law (March 4, 2015) [on file with author].

Parker suggests that being a good lawyer who works hard and consistently provides high quality legal advice is admirable and even fundamental; however, it is not the ultimate goal for a corporate attorney. Lawyers with strong technical skills are abundant and easily replaceable. An advisor adds value with soft skills such as leadership, judgment, and integrity. A counselor provides even more benefit as a trusted and reliable partner of the client with a solution-oriented approach and a thorough understanding of the client, its business, politics, goals, and risk appetite.⁷

Thus, while lawyers may accurately identify legal risks and consequences, advisors and counselors help clients appreciate all possible risks and consequences, whether legal or non-legal. Importantly, advisors and counselors do even more: they are problem-solvers and help a client consider alternative solutions that will achieve the client's goals. To do this, advisors and counselors need to understand the client's business objectives, earn the client's trust and respect, and have confidence to ask tough questions and deliver candid advice.

III. UNIQUE ROLE OF IN-HOUSE COUNSEL

While all corporate and transactional lawyers generally aspire to be advisors and counselors, in-house counsel are in a unique position of serving in multiple roles. They work with the company daily and share common experiences; they understand and appreciate the mission and goals of the company; they establish relationships with the business people, ideally based on mutual trust and respect; they have a global view of the strategies and priorities of the company; and they understand the risk appetite of the company. In-house counsel are essentially in a partnership with the business while also maintaining the independent professional judgment required of a lawyer. As a result, they have the knowledge, confidence, and perspective to consider all the possible consequences of decisions, to ask challenging questions, and to help design solutions.

⁷ *Id.*

Focusing on the role of the general counsel, a joint study conducted by the Association of Corporate Counsel and the Center for the Study of the Legal Profession at Georgetown University Law Center concluded the following: “Today, and in the future, a general counsel must offer much more than legal acumen. Our research shows that being a successful law department leader requires a more expansive notion of the concept of lawyering. This extended view encompasses not just legal advice, but also counseling and strategic input.”⁸

Ben W. Heineman, Jr., former general counsel of General Electric Company and senior fellow at Harvard’s schools of law and government, described a general counsel as a “lawyer-statesperson who is an outstanding technical expert, a wise counselor, and an accountable leader who has a major role in assisting the corporation achieve that fundamental goal of high performance with high integrity. For the lawyer-statesperson, the first question is, ‘Is it legal?’ But the ultimate question is, ‘Is it right?’”⁹

IV. REVISITING THE OPENING SCENARIO

Let us assume that the in-house attorney in the opening scenario of Part I of this article goes beyond just legal advice and asks the company executive questions to get more information. Let us assume further that the in-house attorney learns that with the cost savings from the unpaid leave, the company will meet its financial goals for the quarter, and that the executive will be entitled to a bonus. With this information, will the attorney be doing a disservice to the client by not raising non-legal considerations? Some of these non-legal considerations may include: a) the financial hardship on the employees and their families; b) the impact on morale and productivity of employees if they learn that their financial sacrifices funded the executive’s bonus; c) the reputation of the company in the community; d) the impact on attracting talented employees to the company in the future; and e) alternative cost-cutting measures.

⁸ ASS’N OF CORP. COUNSEL, SKILLS FOR THE 21ST CENTURY GENERAL COUNSEL (2013), https://www.acc.com/_cs_upload/vl/membersonly/Surveys/1356049_2.pdf.

⁹ Deborah Scally, *The Changing Face of the General Counsel*, CORP. BOARD MEMBER, (2016), http://cdn2.hubspot.net/hubfs/380858/The_Changing_Face_of_the_GC_-_Corporate_Board_Member_Magazine_Q2_2016.pdf?t=1506023545643.

Note that in this scenario the company's decision may negatively impact both the company and third parties (*i.e.*, employees and their families). As the Comments to Model Rule 2.1 point out, when practical considerations, such as the effects of certain decisions on others are more predominant than the legal issues, "[a]dvice couched in narrowly legal terms may be of little value to a client."¹⁰ Thus, in situations such as the opening scenario, where the effect on others is significant, lawyers need to consider that legal advice alone may not be sufficient. Because of their close proximity to the client, in-house attorneys are particularly equipped to recognize that need.

The idea is not that lawyers will impose their own moral and ethical values on the client. "[R]ather, the 'relevant moral and ethical considerations' clearly include understanding the client's own tradition of responsibility to others and helping the client to think through the issues from the client's own tradition."¹¹ By acting in their advisory and counseling roles and ensuring that corporate clients take all relevant factors into consideration, both legal and non-legal, lawyers help their clients make reasoned and fully-informed decisions. The ultimate decision-maker will, of course, be the client.

V. WHAT LAW SCHOOLS CAN DO

The primary role of law schools is to guide students in the study of the law so that they will become knowledgeable and competent lawyers. How can law students learn about and appreciate the value of becoming an advisor and counselor, in addition to being an outstanding lawyer? One way is to embed students in legal departments as part of corporate counsel externships.

The University of Georgia School of Law initiated its corporate counsel externship program in 2010. Currently, over twenty organizations participate, including for-profit companies (both public and private) and non-profit organizations.¹² Students earn

¹⁰ MODEL RULES OF PROF'L CONDUCT r. 2.1 cmt. 2 (AM. BAR ASS'N 2018).

¹¹ Neil Hamilton, *Internalizing a Fiduciary Mindset to Put the Client First*, 24 NO. 3 PROF. LAW. 9 (2017).

¹² *Corporate Counsel Externship*, U. OF GA. SCH. OF L., <http://www.law.uga.edu/corporate-counsel-externship> (last visited Feb. 11, 2019).

academic credit and may work in legal departments on either a part-time basis (1 or 2 days per week) or full-time basis (4 days per week).¹³ They also attend a weekly seminar focused on corporate counsel practice that emphasizes the multi-faceted advisory role of an in-house counsel.¹⁴

Attorneys who supervise students in the corporate counsel externship agree that their counseling role extends beyond legal matters. “Everything I do involves being both a lawyer and business partner Students definitely see me in both roles.”¹⁵ “As a lawyer, you have legal concerns, but once you’ve been at a company for a while, you start to understand other risks that aren’t necessarily legal but can be detrimental to the organization Clients start to trust you and want your judgment. They want to know what you think, and they value your opinion.”¹⁶ “In-house counsel has to serve dual roles as lawyer and business partner because the company is your client, and everything the lawyer does must be in the client’s best interest.”¹⁷ “The best type of in-house lawyer is one that can seamlessly blend both roles of being lawyer and business partner.”¹⁸

Students who have participated in the corporate counsel externship have appreciated and learned about the role of in-house counsel in advising on both legal and non-legal matters. “Something I learned from the corporate counsel externship is how to make that careful balance between putting a lawyer hat on to identify risks, which is something we do in law school and on exams and being a business advisor for the corporation The corporate counsel externship exposed me to working with business folks to make sure they get what they want while ensuring regulatory compliance.”¹⁹ “In-house counsel have a responsibility to understand the business and consider things that are not legal. A lot of times, these things

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Telephone Interview with Jan Davidson, Assoc. Gen. Counsel, Delta Air Lines, Inc. (Oct. 15, 2018).

¹⁶ Telephone Interview with Laurisa Curran, Assistant Gen. Counsel, Am. Cancer Soc’y, Inc. (Oct. 10, 2018).

¹⁷ Telephone Interview with Benjamin Prevost, Senior Litig. Counsel, NCR Corp. (Oct. 18, 2018).

¹⁸ Telephone Interview with Ling-Ling Nie, Chief Compliance Officer & Assistant Gen. Counsel, Panasonic Corp. of N. Am. (Oct. 24, 2018).

¹⁹ Telephone Interview with Andy Shin, Corp. and Real Estate Legal Assoc., Mohawk Indus., Inc. (Oct. 8, 2018).

are far from legal.”²⁰ “The corporate counsel externship taught me to really understand the business operations of my client and how to collaborate with business folks The corporate counsel externship showed me that in-house counsel play a role of both lawyer and business partner making them instrumental in the entire vibrancy of the organization.”²¹ “Sometimes business partners expect you to say no and instead, want you to tell them how they can go about doing something. We are often asked to wear a business hat, and it’s been really helpful having had exposure to that in the corporate counsel externship.”²²

With dedicated supervising attorneys and students open to gaining new perspectives about the practice of law, the corporate counsel externship offers students a unique opportunity. Students experience firsthand how corporate and transactional attorneys distinguish themselves in practice and provide value to clients by being more than lawyers and advising and counseling clients on legal and non-legal considerations. While an in-house setting provides an ideal opportunity for students to gain this experience, students can apply these advisory and counseling skills in whatever practice of law they ultimately pursue.

VI. CONCLUSION

As a base premise, corporate and transactional lawyers need to be outstanding lawyers. They can bring even more value to their clients if they become effective advisors and counselors. Model Rule 2.1 strongly encourages lawyers to counsel clients on both legal and relevant non-legal considerations.²³ Since in-house counsel often serve in advisory and counseling capacities on non-legal matters in addition to their legal role, law students can learn about becoming an advisor and counselor by observing and working with in-house counsel in corporate counsel externships. These experiences can help students aspire to be more than lawyers in practice and

²⁰ Telephone Interview with Riane Sharp, Legal Specialist, Change Healthcare (Oct. 18, 2018).

²¹ Telephone Interview with Raj Shah, Senior Regulatory Attorney, MagMutual (Oct. 8, 2018).

²² Telephone Interview with Alexa Piszczak, Assistant Gen. Counsel, Primerica (Oct. 9, 2018).

²³ MODEL RULES OF PROF’L CONDUCT r. 2.1 (AM. BAR ASS’N 2018.)

ultimately provide valuable service to their clients as advisors and counselors. However, as one commentator has suggested, perhaps lawyers who counsel clients on both legal and non-legal considerations are not being more than lawyers; they may be doing exactly what lawyers are supposed to be doing.²⁴

²⁴ Larry O. Natt Gantt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 420 (2005).