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Organizational, Not transactional, Legal Engineers

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Jennifer Arlen, *The Failure of Organizational Sentencing Guidelines*, 66 **U. Miami L. Rev.** 321 (2012), available at SSRN.

Robert Rosen

Many are claiming that the market for legal talent is undergoing fundamental transformation. If so, there are undoubtedly multiple causes, at the least because the legal market is a highly differentiated one. In the individual and personal plight sector, user-friendly consumer interfaces and legislative and judicial restrictions on access to justice are of importance. In the corporate sector, intelligent search engines, outsourcing and the internalization of legal work are of importance.

Today's changes in the corporate sector of the legal profession, in my opinion, mirror the changes in the engineering profession at the beginning of the last century. The basic story is that engineering was once a liberal profession, marked by engineers working in engineering firms. Now, although engineering firms still exist, by and large, engineers work inside corporations. In this transformation, engineers, like lawyers today, lost the monopoly rents which they were able to extract in market transactions between professional firms, which largely controlled elite expertise, and corporate organizations.

To prosper, and to secure jobs for engineering graduates, engineering was forced to redefine what work within the corporation was within engineering's jurisdiction. To minimize conflict, the profession articulated how engineering work was to be controlled inside the corporation. And to regain professional status, engineering graduates became general managers.

Engineering did not only play defense. Organizational engineering emerged, most famously as espoused by Frederick Winslow Taylor, who had trained as a mechanical engineer. Later, safety engineers, product safety engineers, and security engineers, among others, became career paths within corporations and job choices for those who entered engineering school. Playing offense, the engineering profession secured more corporate jobs for its graduates than had been available to it as a liberal profession.

Read against this background, Jennifer Arlen's *The Failure of Organizational Sentencing Guidelines*, 66 **U. Miami L. Rev.** 321 (2012), marvelously explains why change in how lawyers serve corporations is necessary and suggests an offensive strategy. In this article, Professor Arlen continues her earlier work demonstrating that the Organizational Sentencing Guidelines have failed to reach their goal of deterring corporate misconduct and begins to explain how organizational compliance programs can be better designed to detect, report, and respond to non-compliance.

As Professor Arlen has demonstrated previously, sanctions will not deter corporate crime, because sanctioning the organization doesn't necessarily sanction the responsible individual and the responsible individual is

difficult to detect because the organization is relatively opaque from the outside. Instead, "corporate policing" is required. For large corporations this creates a challenge: How to design and implement effective compliance programs?

In this article, Professor Arlen focuses on the perverse effects of the Organizational Sentencing Guidelines on corporate policing. The Guidelines mitigate punishment for those corporations which have adopted compliance programs. But the guidelines fail to adequately take into account the increase in misconduct detected by these programs. Hence, even mitigated, corporations face increased penalties as a result of their corporate policing.

Elegantly using the scoring of the Organizational Sentencing Guidelines, Arlen demonstrates that firms ought not develop compliance systems which include reporting-out if the difference between the probability of government sanction and the probability that the government detects the crime on its own is greater than 30%. There is little doubt that there is a vast disparity between the government's ability to threaten sanctions when the evidence is presented to it on a plate and the government's abilities to ferret out corporate wrongdoing.

Perhaps recognizing this dilemma, in 1999, then-Deputy Attorney General Eric Holder instituted a policy of deferring sanctions (Deferred or Non-Prosecution Agreements) for the implementation of government mandates, the establishment of improved internal monitoring and increased reporting of violations. This policy recognizes that compliance programs *ex ante* can reduce the likelihood of crime and *ex post* can uncover and sanction the responsible individuals.

Arlen applauds this policy but stresses that to be effective this policy requires the government to judge the quality of compliance programs. But this may be beyond the government's abilities. We know that agency costs create incentives for managers to portray ineffective compliance programs as effective ones. And, we know that the government has failed to detect programs that are merely cosmetic. Our inability to effectively distinguish compliance programs may have led to the inefficient result that Arlen finds: Government unwillingness to reduce sanctions to levels that reward compliance programs. Rather than believing that wrongdoing has come to light because the compliance program is effective, government may be as willing to believe that reported wrongdoing demonstrates that the compliance program was toothless.

Arlen suggests that not government mandates but corporate initiatives are required for the design and implementation of effective compliance programs. At one level, compliance programs may be seen as part of a managerial or accounting task. Arlen tells us that "directors and managers of large firms need the information and oversight that a good compliance program can provide." (n.69, P. 349.) At this level of abstraction, there is no reason to believe that lawyers have anything special to contribute to compliance programs.

When Professor Arlen focuses on compliance programs, however, she does suggest how the legal profession might battle to include corporate policing within its jurisdiction. First, implementing effective compliance programs requires skills long thought to be typical of litigators, such as investigatory skills before (P. 332) and after violations. (P. 333.) When violations are discovered, they must be reported to the authorities, with care and precision (P. 331), and then mediation and settlement activities will take place between the organization and the government. (P. 332.) An effective compliance program also requires education about the law (P. 332) and promoting the values of legal compliance. (P. 331.) Transactional lawyer skills are relevant for the design (engineering) of compliance programs. Transactional lawyers are highly attentive to conflicts of interest and these conflicts within an organization often are generators of compliance violations. (P. 331.) Transactional attorneys are well trained to spot where monitoring is required when the organization supports activities likely to generate conflicted situations. (P. 332.)

On my reading, the takeaway from this article is that government policy does and increasingly will create demand for effective corporate compliance programs and that lawyers can claim that the creation of effective programs is within their jurisdiction. That is, legal talents are incorporated in the design and implementation of

any effective compliance program.

For lawyers to provide the necessary expertise to create effective compliance programs, however, requires changes in how legal work is controlled within the corporation. In brief, zealous advocates will not design compliance programs that effectively police corporations. Because litigators have sold themselves as zealous advocates, their presence in the compliance process will be met by suspicion. This is a serious challenge. But, I began this piece noting the serious times that face the legal profession. This is not the place to adequately address this challenge, but let me simply note again that engineering changed how engineers practicing within the corporation were controlled.

Ronald Gilson famously said that lawyers were transaction-cost engineers and thereby made the corporate pie grow larger. Having followed engineers inside the corporation, lawyers may find themselves becoming organizational legal engineers. Professor Arlen tells us that designing effective compliance systems will make the corporate pie grow larger. How else can organizational legal engineers make the pie grow larger?

Professor Arlen indicates that she is now reviewing deferred prosecution agreements to uncover the variety of government mandates and compliance programs that they include. Her research undoubtedly will uncover other skills necessary for the design and implementation of effective corporate policing. Given the needs of law students, let's hope some of these skills are lawyerly ones. And that without their work, we can only expect *The Failure of Organizational Sentencing Guidelines*.

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