

10-1-2001

## Problem-Setting And Serving The Organizational Client: Legal Diagnosis And Professional Independence

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### Recommended Citation

Robert Eli Rosen, *Problem-Setting And Serving The Organizational Client: Legal Diagnosis And Professional Independence*, 56 U. Miami L. Rev. 179 (2001)

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# **Problem-Setting And Serving The Organizational Client: Legal Diagnosis And Professional Independence**

ROBERT ELI ROSEN\*

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## I. FOUR CASES WHERE LEGAL ADVICE FAILED<sup>1</sup>

### (1) DIVISION WORLD

Three lawyers in one firm were outside tax counsel to Division World. They would receive work from Division World's inside lawyers who, in turn, were responding to questions from corporate and divisional finance departments. "We [outside counsel] would be asked whether a particular tax code provision has been interpreted in one way or another. We would research the question and report back to the inside counsel."

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1. This article is a revised version of Robert Eli Rosen, *The Responsible Organization of Corporate Legal Services* (1984) (unpublished Ph.D. dissertation, University of California-Berkeley) (on file with author) [hereinafter Rosen, *Responsible Organization*]. The research sites and methods are described therein. Any quoted language relating to any one involved in or with the cases are taken from my dissertation. Any unattributed quoted language from lawyers or managers is taken from my dissertation research.

The inside counsel then would communicate the information to "the client," the different finance departments.

Eventually, a securities class action suit was brought against the company for overstating its financial position. Although any of the entries in the corporate books arguably could be justified, in sum they constituted misrepresentation. The company did not survive this suit.

## (2) HYPERTECH

Hypertech produces sophisticated electronic products. Its staff of research engineers is serviced by a prominent outside patent law firm. These attorneys are available and responsive to Hypertech's engineers. Whenever an engineer asks for a patent, the law firm processes it. Hypertech now possesses a ream of patents, of undetermined value. No inquiry has ever been made for any patent about its desirability to the company. Hypertech has yet to enforce any of its patents, yet it annually spends at least one million dollars on this process.

## (3) INTERNATIONAL CHEMICALS

An International Chemicals salesman contacted one of the company's inside counsel to draw up a contract for a sale to Beauty, Inc., a major manufacturer of personal products. Beauty planned to use the chemical it was buying in its perfumes. Chemicals previously had sold the chemical only for use in making steel. The salesman was delighted, but concerned. He saw a new market opening up, but was worried because the chemical's medical effects were unknown. He explained the problem to the inside counsel. The lawyer responded by drawing up a contract with various disclaimers of warranties (including in respect to fitness for the proposed use) and with indemnification clauses in the event of third-party suits against Chemicals. The salesman, satisfied his company was insured against liability, proceeded not only to deal with Beauty but also to aggressively market the chemical to the beauty industry.

After International Chemicals became a major supplier to the beauty industry, the chemical's adverse medical consequences were uncovered. Although largely protected by the indemnification clause, the company, in response to public pressure, made efforts to compensate those harmed. The efforts may have been token, but nonetheless they were costly to International Chemicals. The company also increased its public relations expenditures, trying to restore its good name. Eventually, the government intervened and imposed costly regulations on the chemical's manufacture and distribution.

#### (4) GOOD LABS

Good Labs contacted a Washington outside counsel, inquiring about whether a certain vitamin supplement could be marketed in the United States. The lawyer researched the law and wrote a memo, correctly stating that it could be marketed. Through personal contacts, the outside counsel discovered that the FDA was concerned about the product because it was being hailed spuriously as a "wonder drug." He also reported these concerns.

The lawyer's advice did not surprise Good Lab managers or Board. An internal dispute, dividing corporate management, about whether to market the vitamin supplement had motivated the inquiry. One management coalition said: "It's probably legal but it's going to be bought as a 'wonder drug' and our company shouldn't be identified with it. Anyway, the FDA will eventually limit its use." Another coalition argued: "Let the customers decide. We won't violate any laws, but until they come into effect, we can make good money."

The vitamin supplement was marketed. The sales exceeded projections, mostly due to the "wonder drug" gossip. The FDA publicized the product's lack of proven effect, condemning the companies marketing it for profiting from a patent medicine. When regulations restricting the product's sale were enacted, Good Labs withdrew it. The company never measured the degree to which marketing this product tarnished its public image. The FDA, however, viewed the marketing of this product as a sign of Good Labs' mercenary management and began an investigation of the company's major product to determine whether it was being over-prescribed. Publicity stemming from that investigation reduced the sales of what had been the company's major profit center. Good Labs' profits declined in just the subsequent four months by the amount they had increased due to the sales of the vitamin supplement.

## II. PROBLEM-SETTING AS A PROBLEM

In one sense, none of these lawyers can be faulted for their work: The information they provided was accurate. In one sense, they served their clients: They followed instructions. In one sense, these cases do not illustrate a failure of legal ethics: When confronted with the consequences to their clients and the public, the involved lawyers replied with variants of what has been called the lawyer's "kiss-off:" "That's not my job."<sup>2</sup>

This article is a second opinion. The above descriptions of these

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2. William H. Simon, *Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 74 n.100 (1978).

four cases have the benefit of hindsight. With hindsight, it is easy to fault these lawyers for failing to properly diagnose their clients' needs.<sup>3</sup> This article presents facts about these cases, developed through research,<sup>4</sup> some of which were unknown to the involved lawyers. Knowing, or assuming, these additional facts, it is easy to accuse these lawyers of failing to communicate with their clients. It is easy to fault them for having failed to understand client communications to them. With a better knowledge of the facts, it is easy for an academic to tell you that these lawyers failed to listen to their clients.<sup>5</sup>

In this second opinion, I do not aim to find fault or make an accusation. I do criticize actions taken by unnamed lawyers and other organization actors. On these facts, one could accuse the involved lawyers of prejudices, biases and distortions in their decision-making processes.<sup>6</sup> But, I choose to emphasize biases and distortions in the organizations they serve. I speak of organizational, not lawyer, pathologies. For the reader, those who took these actions are unnamed. For me, they are my informants. To them, I am most indebted. Let me emphasize, they are all professionals, doing the best they can in complex situations. They appear here to teach us about the frailties to which we all are subject.

The aim of this article is to develop cues to alert lawyers to situations in which they may need to question whether they have heard all that their clients are communicating to them and rethink their diagnoses.<sup>7</sup> In so doing, I aim to assist organizational lawyers to exercise "independent professional judgment," understood as including the capacities to be responsive to the fuller context in which lawyer-client communications take place and revision the problems as set for them. I aim to assist lawyers to be responsive to, not directed by, context.

Re-visionings of the contexts in which lawyers act may differently answer the question, "What is a lawyer's job?" The lawyer's "kiss-off" is questioned whenever law jobs are contextualized. Understandings of the scope of lawyerly concern have consequences in three related inquiries: (1) How are clients served by their lawyers? A manager involved in one of the cases said, "I want the lawyer to make me feel comfortable

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3. The Division World lawyers failed to see the aggregate problem. The Hypertech lawyers failed to determine what the organization needed. The International Chemicals lawyer failed to consider the organization's non-contractual liabilities. The Good Labs Washington counsel failed to understand the organization's dependence on regulators.

4. Rosen, *Responsible Organization* *supra* note 1.

5. In how they listened to divisional managers (Division World), engineers (Hypertech), salesmen (International Chemicals) and the Board (Good Labs), the lawyers failed to hear the organization's messages.

6. *Cf.*, BEHAVIORAL LAW & ECONOMICS, (Cass R. Sunstein ed., 2000).

7. "Diagnosis" is a subject worthy of a Foucault. For one definition, see ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS 40-44 (1988).

in my job.” He wanted the lawyer to assume responsibility for more than solving the “legal” problem. Each of the four cases demonstrates the potential gap between serving clients and solving legal problems for them; (2) What is the lawyer’s social function? A lawyer involved in one of the above cases concluded: “A lawyer is essentially a nonproductive drag on society. I have a completely parasitic function.” Each of the four cases speaks to the possibilities of job enhancement programs for organizational lawyers; and (3) What are the ethics of legal practice? As one lawyer said, “I don’t feel it is part of my job to follow up.” In characterizing these four cases as instances of failed lawyering, I am assuming that the problems the clients experienced, known to us by hindsight, are part of a lawyer’s job responsibilities. Lawyers have a duty of loyalty to their clients; at least to the extent that the problems are predictable, delivering professional services requires, at least, considering them.<sup>8</sup> In this article, I employ organizational theory to reveal dimensions of these problems that are predictable.

How a job comes to be constituted is what organizational sociologists call “the problem of job-definition.” This problem has special poignancy for lawyers. A distinctive trait of professionals is their claim to control their work.<sup>9</sup> The lawyer, like any professional, feels that she should be allowed to define how she goes about accomplishing her job.<sup>10</sup> Like a doctor who ought not be servile in response to a patient saying, “I’ll diagnose myself,” a lawyer is not a servant who must take the task as given to her. Professionals and professions demand a relative

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8. David Luban, Alan Strudler & David Wasserstein, *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348 (1992).

9. “A profession proceeds on the assumption that . . . the individual does not know what is good for him. The client . . . is often ignorant. Authority passes to the professional, who must give him what he needs, rather than what he wants. . . . The [professional’s] client, unlike the customer, is not always right.” T.H. Marshall, *The Recent History of Professionalism in Relation to Social Structure & Social Policy*, in CLASS, CITIZENSHIP, & SOCIAL DEVELOPMENT: ESSAYS OF T.H. MARSHALL 164, 158 (1965). The professional’s assumption may not be realized in practice. As E.C. Hughes notes:

“It is characteristic of many occupations that the people in them, although convinced that they themselves are the best judges, not merely of their own competence but also of what is best for the people for whom they perform services, are required in some measure to yield judgment of what is wanted to those amateurs who receive the services.”

E.C. HUGHES, MEN & THEIR WORK 54 (1958).

10. The centrality to professionals of control over problem-setting is demonstrated by George Miller’s study of scientists and engineers. One might have thought that client control over problem-setting would have been less of a problem for engineers than for scientists. Engineers are trained to receive problems and solve what is given to them. See MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 25-31 (1977). But Miller found that client control over problem-setting was directly associated with alienation, and in comparable degrees, for both scientists and engineers. George A. Miller, *Professionals in Bureaucracy: Alienation Among Scientists and Engineers*, 32 AM. SOC. REV. 755 (1967).

autonomy “to classify a problem, to reason about it, and to take action on it; in more formal terms, to diagnose, to infer, and to treat.”<sup>11</sup> The lawyer claims the autonomy to set the means by which she pursues her client’s ends.<sup>12</sup>

Work performance can be controlled in various ways. Control may be exercised through command, through selection of who is to be employed, through affecting the psychology of those employed, and through structuring the incentives facing those doing the work. For example, inside counsel were once thought to be constrained in their performance of professionally independent work because of their greater attention to the commands of businessmen, weak professional background, enhanced loyalty to the corporation and dependence on long-term employment with the corporation.<sup>13</sup>

There is, however, another method of control. The task of this paper is to bring it to the center of discussions of lawyer autonomy. That method is problem-setting: How problems are set create social “framing effects.”<sup>14</sup> The effect of problem-setting is to shape decisions. Problem-setting shapes lawyer diagnoses. Problem-setting may be a “roundabout” method of control,<sup>15</sup> but it is a primary one.

It is a roundabout method of control because the work it produces appears to satisfy professional norms. Accepting problems as they have been set, a lawyer may “prematurely retreat[ ] to technology” and fail to develop the objectives to be pursued.<sup>16</sup> Yet, in performing the technical

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11. ABBOTT, *supra* note 7, at 40.

12. Although the client controls the ends (“objectives”) of the representation, Model Rule of Professional Conduct Rule 1.2 and Rule 1.4 requires only that the lawyer consult with the client as to the means to be employed in the representation. This separation of ends and means is subject to a number of criticisms. First, it is not clear that the autonomy rights of clients justifies this split. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988). Second, it is not clear that a moral agent ought to accept this split. ARTHUR APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC & PROFESSIONAL LIFE* 67-69 (1999). Third, justifying legal practice by lawyers being end-takers fails to produce a legal profession that serves equality, including access to justice. Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 U.C.L.A. L. REV. 474 (1985). Fourth, the split ignores that means sometimes are ends. My colleague Tony Alfieri has strenuously advanced this argument. See, e.g., Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L. J. 2567 (1993). In this article, I adopt another perspective: Characterizing lawyers as ends-takers may fail to protect clients.

13. Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 486 (1989).

14. This is a very “relaxed” version of how “framing effects” are discussed in behavioral law and economics. James N. Druckman, *Using Credible Advice to Overcome Framing Effects*, 17 J. L. ECON. & ORG. 62, 62 n.1 (2001).

15. ROBERT A. DAHL & CHARLES E. LINDBLOM, *POLITICS, ECONOMICS, & WELFARE: PLANNING & POLITICO-ECONOMIC SYSTEMS RESOLVED INTO BASIC SOCIAL PROCESSES* 110 (1953). See also W.E. MOORE, *THE PROFESSION’S ROLES & RULES* 88 (1970).

16. PHILIP SELZNICK, *LEADERSHIP IN ADMINISTRATION: A SOCIOLOGICAL INTERPRETATION* 75 n.9 (1957).

work, the lawyer doesn't feel that her professionalism has been constrained or that her actions are governed by anything but independent professional norms. She feels autonomous.

Problem-setting is a primary method of control because if what a lawyer takes as his problem is restricted, his abilities to apply professional standards of diagnosis, and thereafter make inferences and discuss treatment options are sharply constrained.<sup>17</sup> To control the lawyer's work agenda, the topics and program of his research, is to control the lawyer's abilities to exercise independent professional judgment.<sup>18</sup> In the tension between the client's definition of the situation and the professional's diagnosis of the problem, professional independence is exercised.<sup>19</sup>

The following discussion explores problem-setting in organizational legal work in three stages. First, I analyze the cases introducing this paper in terms of recurrent features of organizational life: bureaucratic and political pathologies. As these cases demonstrate, legal service can exacerbate these pathologies. Second, I consider recurrent features of corporate legal work: timing and fragmentation.<sup>20</sup> Their presence in the above cases should have alerted the involved lawyers to the need to consider the presence of these organizational pathologies. Finally, I consider problem-setting in terms of the legal profession's ideology and ethics. As these cases suggest, to protect their clients, lawyers must be responsive to the presence of bureaucratic and political pathologies, alert to the timing and fragmentation of their work and reset their problems when necessary.

### III. DIAGNOSIS AND ORGANIZATIONAL GOALS: BUREAUCRATIC AND POLITICAL PATHOLOGIES

Failures can be great teachers. To explore how lawyer diagnoses are shaped by problem-setting, I will develop the four cases that intro-

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17. One of the principal findings of Heinz and Laumann is that corporate clients control problem-setting, restricting the lawyer's autonomy. John P. Heinz & Edward O. Laumann, *The Legal Profession: Client Interests, Professional Roles, & Social Hierarchies*, 76 MICH. L. REV. 1111, 1125 (1978). The importance of problem-setting in other professions also has been recognized. See generally MOORE, *supra* note 15.

18. See generally Miller, *supra* note 10.

19. Professional independence, of course, is exercised elsewhere. For example, it is seen in the tension between the professional's treatment plans and the client's desired results.

20. Timing and fragmentation are not only recurrent features of legal work, but also are recurrent features in the framing of legal argument. Mark Kelman, *Interpretative Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981). While timing and fragmentation contribute to a form of indeterminacy in law, they also can signal lawyers to better protect and serve their clients. Cf. William H. Simon, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYER ETHICS* 149-56 (1998).



duced this article. I focus on how organizational problems may shape the service lawyers tender to their organizational clients. In speaking of "pathologies," I speak of a client who needs the lawyer's healing arts. If you object to the drama, think of the pathologies as difficulties in the organization-lawyer relationship.

### A. *Bureaucratic Pathologies*

The Division World case would seem to be an inappropriate one for discussing controls on lawyer problem-setting. It deals with tax practice, a specialty frequently hailed as one in which lawyers have great autonomy in recasting the problem. In tax, the open secret is that lawyers shape transaction, even inventing purposes, when they argue that "clients often need help in thinking out and articulating their own real objectives."<sup>21</sup> Yet, lawyer control in tax practice has a basic norm: minimizing client tax liability. Applying this norm at Division World wreaked havoc. Why?

The outside firm applied the norm of minimizing tax liability to each discrete inquiry. The different divisions sought and obtained advice favoring their own balance sheets. In this case, as an involved lawyer later realized, someone was needed to play a supervisory role, telling management: "We did this here, but this is happening over there. And if this is true, you have got problems and you better handle them now."

The outside counsel didn't assume that role, exercising control over how the problems were set, for at least two reasons. First, several partners at the firm "represented" Division World. The partner who initially obtained the representation, who had been a golfing buddy of the company's starting entrepreneur, had retired and passed the reins to three lawyers he had trained. These lawyers did not communicate very well with each other, perhaps because of intra-firm competition or personality differences. Second, the outside counsel thought Division World's inside counsel were "purchasing agents"<sup>22</sup> for their services: They thought inside counsel analyzed the problems before they were set and sent to outside counsel. In fact, the inside counsel merely forwarded to outside counsel requests from Division World's finance departments.

The financial manager, the inside counsel and the outside attorney formed a triangle. Each did his own work, as one put it, "without seeing the bigger problem." Everyone only grasped a piece of the structure. Each legal problem was seen as a discrete project and the outside coun-

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21. Norris Darrell, *Conscience and Propriety in Tax Practice*, in *THE LAWYER IN MODERN SOCIETY* 361, 363 (Vern Countryman et al. eds., 2d ed. 1976).

22. Rosen, *supra* note 13, at 504.

sel felt, as one explained, “no encouragement or inducement to go that further step.” They relied on the inside counsel, while the inside counsel relied on them. No one asserted that quality legal service required seeing the larger picture. No one performed the necessary coordination and the company did not survive the securities class action suit.

The outside counsel blamed “the client.” They blamed Division World’s inside counsel and managers for failing to explain that they didn’t want the norm of minimizing tax liability to be applied to each of their transactions, but rather to the entire corporate balance sheet. It was Division World’s responsibility, outside counsel claimed, to set up a relationship where the lawyers did not exacerbate the tension between the goals of individual managers and the corporation.

The outside counsel had a point. The transformation in status of inside counsel, the success of what I have termed “the inside counsel movement,” in part resulted from inside counsel’s claims to have superior ability to provide this service to corporate organizations.<sup>23</sup> As the next case, Hypertech, reveals, some inside counsel take it as part of their job to assume responsibility for such problems. How Division World’s inside counsel defined their job is part of the problem here.

Outside counsel’s total denial of responsibility, however, is too easy. Legal clients, like the clients of any professional, take cues from their lawyers to determine how to act as clients.<sup>24</sup> Lawyers are obligated to help their clients obtain the needed professional service.<sup>25</sup> Weren’t outside counsel obligated to pursue their law firm’s client’s objectives? Didn’t these include minimizing tax liability consistent with the corporation’s health?

The Hypertech case reveals another way the disjunction between the goals of corporate personnel and the goals of the corporation can affect the usefulness of legal advice. The outside patent attorneys were satisfied to satisfy the engineers. They did not question the engineers’ goals. They did not ask, “Why should the corporation want this patent?” Yet, without an answer to that question, the lawyer only can be a hired gun - a mover of the legal process.<sup>26</sup> He has no strategy except responsiveness (to the engineers) to guide his actions, and thus, regardless of the costs incurred, he cannot assess the utility of his work to the corporate client. The corporation perforce will find itself both “over-served

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23. See generally Rosen, *supra* note 13.

24. PHILIP ELLIOTT, *THE SOCIOLOGY OF THE PROFESSIONS* 104 (1972).

25. MODEL RULE OF PROF’L CONDUCT R. 1.1, 1.4 (2001).

26. See Robert A. Kagan & Robert Eli Rosen, *On the Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399 (1985).

and under-serviced.”<sup>27</sup>

The Hypertech outside counsel blamed the corporation. Hypertech should have established standards for patent work, they argued.<sup>28</sup> Yet, the company did have standards. The Vice-President of Research and Development blamed outside counsel for overriding these standards in processing the claims for their “customers,” the engineers:

[Outside counsel] have less reason to be circumspect about the breadth of the claims they file and the usefulness to the company of their time and effort. With inside counsel, the corporation is the client, not the technical people. As manager of R & D, I don't have the time to police technical people. When we used outside counsel, I saw that the filings and the extent of the claims were often not in the best interest of the company. We needed to intercept that process so we hired inside counsel. I am not suggesting dishonesty or lack of integrity. Outside counsel were satisfying the customer. But the technical people don't have the company's long-term perspective. They have a personal interest in filing a case on which they have been involved. We try to educate them about commercial considerations, but . . . Outside counsel were satisfying the customer. For our patent filings to serve the company, there can't be a lawyer-client relation. There has to be a duality of interests between the lawyer and the client.

The Hypertech case involves more than inattentiveness to corporate goals. Outside counsel undermined hierarchical control within the corporation. They neither understood the effect of their work on intra-corporate processes, nor did they work through these processes: “We need the lawyer to force the clients to document their work well. The attorney has to rake the bench chemist over the coals and make sure he has done all the right things. We have instituted forms but the lawyer must insist that these forms are filled out well. If a sloppy form triggers a patent process then the clients [the engineers] know they can get attention quickly.”

In forsaking control over problem-setting, the lawyer is assuming that the problem as set for him is the end-product of organizational decision-making. In responding to the problem as set, the lawyer is assuming that his work is a datum that will be unproblematically ingested by corporate decision-makers. Having made these assumptions, Hypertech's outside counsel misserved their client.

Hypertech ended the lawyer-client relationship described in the case. They took their patent work from outside counsel and assigned it

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27. Morgan L. Fitch, *The Role of the Outside Patent Law Firm*, in PROCEEDINGS OF WISCONSIN'S 10TH ANNUAL CORPORATE LAWYERS INSTITUTE, 1964 127, 129 (1965).

28. Fitch analyzes a similar problem in this manner: “Management doesn't know why it is taking out patents. . . the Outside Patent Counsel is left floundering. . .” *Id.*

to the corporate legal department. They turned to inside counsel to insure that the interests of technical people and the interest of the company would be conjoined. They also expected that inside counsel would set the legal problem so that it would be more consistent with corporate controls. They did not think outside counsel could move beyond the engineers' expressed interests to perceive the goals of the entire company. At Division World, outside counsel blamed inside counsel. At Hypertech, when they lost the business, outside counsel blamed the client. The client blamed them.

In both the Division World and Hypertech cases, outside counsel, as one put it, did not "go that further step." I suggest that the further step they did not go was to recognize a standard feature of organizational life: bureaucratic pathologies. Bureaucratic pathologies are displacements of organizational goals.<sup>29</sup> Goals are displaced when (1) instrumental values become terminal values,<sup>30</sup> (2) organizational goals conflict and contradictions are resolved by selective attention to a subset of the goals in particular operations,<sup>31</sup> or (3) goals of subunits control action when they diverge from the goals of the organization as a whole.<sup>32</sup>

As the two cases suggest, bureaucratic pathologies are commonplace in corporate legal practice. Lawyers know that managers may want their "pet project" to go through, no matter what. They know managers might be tempted to favor the instant customer at corporate expense. They know divisions will often be concerned with their immediate balance sheet and therefore avoid spending money now, even if it will cost them much more later. They know that satisfying organizational constituents may not satisfy their obligations to serve the organization as an entity.<sup>33</sup>

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29. Robert K. Merton, *Bureaucratic Structure and Personality*, in *SOCIAL THEORY AND SOCIAL STRUCTURE* 249 (1968).

30. *Id.*

31. RICHARD M. CYERT & JAMES G. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* 28, 35-36 (1963).

32. W. Keith Warner & A. Eugene Havens, *Goal Displacement and the Intangibility of Organizational Goals*, 12 *AD. SCI. Q.* 545 (1968); Charles Perrow, *The Analysis of Goals in Complex Organizations*, 26 *AM. SOC. REV.* 854 (1961); Philip Selznick, *An Approach to a Theory of Bureaucracy*, 8 *AM. SOC. REV.* 49 (1943).

33. Of course, these are not the only reasons for bureaucratic pathologies. Bureaucratic pathologies also stem from:

"excessive efforts on the part of persons in leadership positions to maintain aloofness from their subordinates; ritualistic attachments to formal procedures; petty insistence on the rights of one's status within the organization; insensitivity to the needs of subordinates or clients; resistance to conflict within an organization; and resistance to change."

IRA SHARKANSKY, *PUBLIC ADMINISTRATION; POLICY-MAKING IN GOVERNMENT AGENCIES* 52

Lawyers, however, may ignore what they know. An obvious indication of the problem is that lawyers, both inside and outside, will call corporate sub-units, and the managers employed by them, "my clients," even though they know the corporation "as an entity" is the client.<sup>34</sup> And lawyers prize having these sub-units and their managers call them "my lawyer." To meet their obligations to corporate clients, lawyers will argue that they need not go that further step and inquire as to how their problems have been set for them: "All I do is give advice. X told me my client was Charlie. I gave Charlie my advice and he chose to ignore it. I have discharged my responsibility." As these cases demonstrate, to protect their clients, lawyers need to understand the organizational context of their communications from and to those whom they call their "clients"—corporate employees.

Hypertech's decision to internally hire patent lawyers illustrates the most common response to bureaucratic pathologies: create a staff function.<sup>35</sup> Corporate legal departments can respond, enhancing their job, when outside law firms do not respond to their clients' bureaucratic pathologies.<sup>36</sup> Outside counsel, however, according to the organizational literature, also are able to detect and respond to bureaucratic pathologies.<sup>37</sup> From an organizational perspective, they are "marginal men" to the corporation and engage in "boundary spanning," and have the ability to engage in "communication out of channels."<sup>38</sup> Because of their relation to Hypertech's organization, outside counsel should have been able to recognize and help the organization respond to bureaucratic pathologies.

Because of the legal profession's conception of its role, outside counsel also should have been able to so act. Legal literature has long recognized that to serve clients, lawyers need to engage in "communication out of channels."<sup>39</sup> To prevent conflicts of interest, lawyers need to

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(1972). These too need to be recognized by lawyers, especially as lawyers themselves are subject to similar excesses.

34. MODEL CODE OF PROF'L CONDUCT R. E.C. 5-18 (1989). Cf. MODEL RULE OF PROF'L CONDUCT R. 1.13 (2001).

35. On the use of staff to reduce bureaucratic pathologies, see Harold L. Wilensky, *Intelligence in Industry: The Uses and Abuses of Experts*, 388 ANNALS OF THE AM. ACAD. 46, 51-53 (1970).

36. Rosen, *supra* note 13.

37. See, e.g., HAROLD L. WILENSKY, ORGANIZATIONAL INTELLIGENCE: KNOWLEDGE & POLICY IN GOVERNMENT & INDUSTRY 47 (1967).

38. See J. Stacy Adams, *Interorganizational Processes and Organization Boundary Activities*, in 2 RESEARCH IN ORGANIZATIONAL BEHAVIOR 321 (Barry M. Staw & Larry L. Cummings eds., 1980).

39. One of the great handicaps the American corporation has. . . lies in the clogging up of lines of communication. Though communication "through channels" is not the fetish it is in the military, there is a strong tendency to insist on it, and the result is

be able to recognize divergences between the objectives of the organization and those of its agents.

To aid both inside and outside counsel in being sensitive and responsive to the presence of bureaucratic pathologies, to help lawyers live up to the profession's role-conception, in part IV *infra*, I suggest cues to alert lawyers to their presence.

### B. *Political Pathologies*

In the International Chemicals and Good Labs cases there was not a split between management goals and corporate goals, as there was in the first two cases. In both, corporate goals were not fixed. International Chemicals and Good Labs are not cases of bureaucratic pathologies. But, as in the first two cases, because the lawyers failed to analyze the corporate organization and respond to how their problems were set, they misserved their clients. These cases reflect lawyer insensitivity to, what I term, "political pathologies."

At International Chemicals, salesmen are allowed, even encouraged, to discover new markets. The company grants broad discretion to its sales force. In sales, in particular, International Chemicals is a modern, chaotic corporation.<sup>40</sup> To label it a "bureaucracy," would be inaccurate. Many managers have the power to mobilize corporate resources and contribute to defining corporate policies.

The absence of hierarchical checks and balances is part of this flexibility. In particular, the International Chemicals salesman in the case did not have to convince his line-supervisors that the chemical was not defective in its proposed use. Initially, the salesman said he "didn't think the profits on this minor sale justified gearing up the whole process [of testing for defects]." After the beauty industry recognized the chemical's advantages, testing no longer seemed necessary. The salesman substituted the test of the market for medical tests.

It is worth emphasizing that no one at International Chemicals wanted to sell harmful products. The company lacked organizational

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an inevitable distortion . . . Here is a significant opportunity for real service by the lawyer. Without any threat to corporate morale, he can cut through the hierarchic lines of communication . . .

Lon L. Fuller, *The Role of the Lawyer in Labor Relations*, 41 A.B.A. J. 342, 344 (1955). Communication out of channels has been recognized as one of the strengths of inside counsel:

Free and open discussions are possible and usual between the executive personnel and inside counsel . . . In other words the inside counsel can have a kind of amalgamating effect between the divisions and units of the company and he can thus be a very positive influence far beyond his professional job.

Ruder, *A Suggestion for Increased Use of Corporate Legal Departments in Modern Corporations*, 1 *Le Juriste d' Enterprise* 281 (Comm. Droit et vie des Affaires 1968).

40. TOM PETERS, *THRIVING ON CHAOS: HANDBOOK FOR A MANAGEMENT REVOLUTION* (1987).

systems that combined the desired flexibility at the sales level with adequate safety procedures. Nonetheless, the legal personality, the corporation, did not have an objective of selling harmful products.

International Chemicals did require the salesman to contact a lawyer. The lawyer, even after being told of the manager's concerns, responded with the normal role he assumed in relation to the sales force – a contract drafter. Unconcerned about International Chemical's organizational weaknesses, the lawyer accepted the problem as one of protecting the company through contractual clauses. He saw his role only as that of being an insurance man.<sup>41</sup> This lawyer, in hindsight, can be criticized for prematurely retreating to technology.<sup>42</sup>

Unlike International Chemicals, which involves the problematic exercise of discretion at rather low levels, the Good Labs case deals with discretion at the top of the company. Unlike International Chemicals, which second guesses the work of inside counsel, Good Labs second guesses the work of outside counsel. Like at International Chemicals, the lawyer in Good Labs prematurely retreated to technology. He saw his role only as that of being a conduit.<sup>43</sup>

In asking its Washington counsel to determine whether the vitamin supplement could be marketed, Good Labs was asking its lawyer to assist it in choosing its character in the marketplace. The Washington counsel understood the problem as one of information gathering. He neither heard nor responded in relation to the divisions within the company.

The information conveyed, in one sense, was neutral with respect to the battle within the company. The sides had been formed assuming the information the lawyer tendered. Yet, the lawyer unwittingly commanded one coalition's charge. While the Washington counsel ignored the divisions within corporate management, he was being drafted. His authoritative presentation of his findings, which was scrupulously neutral with respect to the ultimate business judgment, was a powerful weapon in the "let the customers decide" coalition's campaign. The timing of his report, as well as its concentration on regulatory exposure, empowered the more "legalistic" coalition.

The battle within management demonstrates that corporations pay homage to values other than avoiding liability and consumer sovereignty. Corporate reputation concerned at least some of the managers. Why did the company's legal reputation not concern the lawyer?

As he understood the problem that was set for him, the Washington

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41. SELZNICK, *supra* note 16.

42. Kagan & Rosen, *supra* note 26, at 415-18.

43. *Id.* at 411-15.

counsel misunderstood the client's question. This misunderstanding is understandable, if unfortunately it is also commonplace. Businessmen want to be professionals, but they also don't want to appear weak. They sometimes ask their lawyers to translate their moral ideas into legal norms so that they can say, "The reason for this is supported in the law." But, to avoid appearing weak, businessmen may ask this only implicitly. If the lawyer is insensitive to this implicit request, he is doing a disservice to his client. The client is asking for more than information gathering.

In these last two cases, the lawyer saw the choice of corporate policy as a "business judgment." He claimed to be only a resource-person. He emphasized his expertise's neutrality with respect to goals. Yet in both cases, the expertise helped shape the goals. The lawyers never considered either the vast discretion the corporation delegated or the inadequacies of the corporate organization to incorporate legal information.<sup>44</sup> Both corporations had decision-making structures whose inadequacies legal service exacerbated. Not only did the lawyers misunderstand the question the corporation needed answered, but they also took inadequate steps to prevent the corporation from misunderstanding the answer they tendered.

Lawyers confront the problem of inadequate decision-making structures in other contexts. A litigator, for example, reported:

It often happens in litigation that you can't find out what happened. No one knows. We kid ourselves that when you take a deposition in a Japanese organization you can't find anyone who made the decision because it was made by consensus. But, at times in American companies, you also can't find this out. Decisions grow up like topsy. Sales are off doing this and others are over there, but all of a sudden you have a corporate decision.

This litigator also failed to confront the dilemma of corporate discretion: "I told the client I would quit unless they put in a litigation support team." The team helped the lawyer process the instant case, but it did not help the corporation make future decisions. The client continues to find itself in avoidable litigation.

I call these problems, "political pathologies." They arise because corporations continuously choose goals and policies. Clients do not

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44. Some regulators, unlike some lawyers, as the Good Labs case demonstrates, respond to the company's organizational weaknesses. According to Bardach and Kagan: "[I]nspectors. . . treat business corporations as monolithic legal entities, with a single will and an internally consistent attitude toward social and legal responsibilities." EUGENE BARDACH & ROBERT KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* 81 (1982). Bureaucratic and political pathologies may attract regulator's attention and, consequently, may be very costly to the company.



always bring set goals to their lawyers.<sup>45</sup> The lawyer may be part of the corporate goal-creating process.<sup>46</sup> Where bureaucratic pathologies displace goals, political pathologies distort goal selection.<sup>47</sup>

Organizations are systems in which goals are dynamic, structures are multi-functional and power is a shifting resource.<sup>48</sup> Instead of defining an organization only as a bureaucracy, consequently, one must also define it "as a coalition of interest groups, sharing a common resource base, paying homage to a common mission, and depending upon a larger context for its legitimacy and development."<sup>49</sup> The organization is both a bureaucracy and a political body.<sup>50</sup> Students of organizational behavior, therefore, seek to understand the frailties of not only command, but also the organization's political system.<sup>51</sup>

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45. See Charles Perrow, *The Analysis of Goals in Complex Organizations*, 26 AM. SOC. REV. 854 (1961); Philip Selznick, *Foundations of a Theory of Organization*, 13 AM. SOC. REV. 25 (1948).

46. For the centrality of the staff's political contribution to the organization, see, e.g., DANIEL KATZ & ROBERT L. KAHN, *THE SOCIAL PSYCHOLOGY OF ORGANIZATIONS* (1966).

47. Distinguishing bureaucratic and political pathologies is consistent with Samuel Huntington's distinction between "executive" and "legislative" processes. Bureaucratic pathologies plague "executive" processes. (In an executive process: "(1)[T]he participating units differ in power (i.e., are hierarchically arranged); (2) fundamental goals and values are not at issue; and (3) the range of possible choice is limited.") Political pathologies plague "legislative" processes. (In a legislative process: "(1) [T]he units participating in the process are relatively equal in power (and consequently must bargain with each other); (2) important disagreements exist concerning the goals of policy; and (3) there are many possible alternatives.") GRAHAM T. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* 156 (1971) (quoting SAMUEL P. HUNTINGTON, *THE COMMON DEFENSE: STRATEGIC PROGRAMS IN NATIONAL POLITICS* 146 (1961)). This approach reveals a weakness in Cyert and March's definition of bureaucratic pathologies as including action in the face of inconsistent goals. They claim that in such a situation, it is proper to speak of the displacement of goals. See CYERT & MARCH, *supra* note 31, at 35-36. In some instances, that may be true, such as when a minor policy displaces a major goal. But, in some instances, the supposedly inconsistent goals actually indicate that the corporation has failed to agree on a goal. In such cases, the openness of goals attests to the presence of political choice, which may or may not be adequately organized.

48. On dynamic goals see CYERT & MARCH, *supra* note 31, at 34-46; Lawrence B. Mohr, *The Concept of Organizational Goal*, 67 AM. POL. SCI. REV. 470 (1973). On multi-functional structures, see HAROLD KOONTZ & CYRIL J. O'DONELL, *MANAGEMENT: A SYSTEMS & CONTINGENCY ANALYSIS OF MANAGERIAL FUNCTIONS* (1976); Ephraim Yuchtman & Stanley E. Seashore, *A System Resource Approach to Managerial Effectiveness*, 32 AM. SOC. REV. 891 (1967). On shifting power, see ALLISON, *supra* note 47; SELZNICK, *supra* note 16.

49. Robert H. Miles, *Introduction*, in *RESOURCE BOOK IN MACRO-ORGANIZATIONAL BEHAVIOR* 1, 5 (Robert H. Miles ed., 1980).

50. [T]he experts who deal with external interests and clientele on behalf of their corporate employers. . . must perforce represent their clients within the corporation. . . The large corporation has moved very far toward a "pluralist government," representative of many constituencies, without ever really intending to. That government is not precisely democratic, but neither is it automatic or monolithic. The experts are heard - and sometimes believed after suitable deflation.

W. E. MOORE, *THE CONDUCT OF THE CORPORATION* 186 (1975).

51. The literature is reviewed in R. Noll, *Government Administrative Behavior: A*

Organizational actions are conditioned by both dependence and independence. Organizations provide bases for both cooperation and conflict. Many organizational decisions are best understood as "political resultants:" "Resultants in the sense that what happens is not chosen as a solution to a problem but rather results from compromise, conflict and unequal influence. *Political* in the sense that the activity from which decisions and actions emerge is best characterized as bargaining among regularized channels among individual members."<sup>52</sup>

Organizational decisions are subject to all the distortions of political behavior. In an organization, responsibility must be divided and consequent coordination is fragile, subject both to unforeseen demands on the system and territorial battles between groups. In other words, organizations may allocate discretion without insuring that its exercise is accountable.<sup>53</sup> Constitution writing is a precarious task. Consequently, as the International Chemicals case demonstrates, the organization's weaknesses are only exacerbated if the lawyer stops his inquiry after learning that the manager with whom he deals is authorized to make the decision.

Political systems depend not only on accountability, but also on leadership. Leadership is a challenge and can be easily subverted. As Selznick explains, guiding discretion is always problematic: "In exercising control, leadership has a dual task. It must win the consent of constituent units, in order to maximize voluntary cooperation, and therefore must permit emergent interest blocks a wide degree of representation. At the same time, in order to hold the helm, it must see that a balance of power appropriate to the fulfillment of key commitments will be maintained."<sup>54</sup>

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*Multidisciplinary Survey, in THE CHANGING BUSINESS ROLE IN SOCIETY* 97 (George A. Steiner ed., 1976).

52. ALLISON, *supra* note 47, at 162 (emphasis in original). For organizations as coalitions of groups with divergent claims and interests united in a continuous process of bargaining, see CYERT & MARCH, *supra* note 31, at 27; FREMART E. KAST & JAMES E. ROSENZWEIG, *ORGANIZATION AND MANAGEMENT: A SYSTEMS APPROACH* 42 (2d ed. 1974). For the emphasis on decision processes, as opposed to individual choice, see HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR; A STUDY OF DECISION MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION* 220-22 (1st ed. 1947); OLIVER E. WILLIAMSON, *CORPORATE CONTROL & BUSINESS BEHAVIOR AN INQUIRY INTO THE EFFECTS OF ORGANIZATION FORM ON ENTERPRISE BEHAVIOR*, Chap. 3 (1970); MICHEL CROZIER, *THE BUREAUCRATIC PHENOMENON* (M. Cozier trans., 1964); J. K. GALBRAITH, *THE NEW INDUSTRIAL STATE* Chap. 8 (1967); Paul F. Lazarsfeld & Herbert Menzel, *On the Relationship between Individual and Collective Properties, in A SOCIOLOGICAL READER ON COMPLEX ORGANIZATIONS* 499 (Amitai Etzioni ed., 1969).

53. Robert H. Miles, *supra* note 49, at 20-21. RUTH P. MARK, *PLANNING ON UNCERTAINTY: DECISION MAKING IN BUSINESS AND GOVERNMENT ADMINISTRATION* 130 (1971); Harry Cohen, *Bureaucratic Flexibility: Some Comments on Robert Merton's 'Bureaucratic Structure and Personality,'* 21 Br. J. Soc. 390 (1970).

54. SELZNICK, *supra* note 16, at 63-64. This also implies, as is well known, that corporate

When leadership is not properly exercised, organizations will have distorted decisions. They will drift from political battle to political battle. Individual strivings for power will become the imperative of decision-making. Decisions will be the result of the sheer play of power, unconnected to the organization's mission. Political pathologies, not adaptive flexibility, will result.<sup>55</sup>

To serve the organizational client, the lawyer must understand how leadership is being exercised within it. A lawyer, like Good Labs Washington counsel, seeking neutrally to supply information must understand distortions in the organization's processing of that information.<sup>56</sup> A lawyer who understands that organizational decisions are political resultants will consider how his service affects the functioning of the organizational political system and the control of employee discretion by the organization's mission.

To so act, the lawyer must be concerned with "the special requirements for authority concentrations and distributions within the corporate structure."<sup>57</sup> The lawyer must examine not only the corporation's legal environment, but also the internal environment in which corporate deci-

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boards by themselves cannot govern. For a discussion of this fact in relation to implementing corporate social responsibility, see John C. Coffee, Jr., *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct & An Effective Legal Response*, 63 VA. L. REV. 1099 (1977).

55. See SELZNICK, *supra* note 16, at 25. Of course, this is not a complete list of the causes of political pathologies. In a political system, mobilization is a problem: Issues may not be on the agenda; involvement may be unstable; the buck may be passed; or slack may be used as side-payments to demobilize challenges. In a political system, decision-making is also problematic: Actors may be obstreperous; they may make non-negotiable demands; demands may escalate, be stalemated, or be resolved by unjustified mutual adjustment; issues may not meet because of the conflict of incompatible expertises; or issues may be resolved not on their merits, but because of rivalries, coalitions, large majorities, or small minorities. Samuel P. Huntington summarizes the pathologies of political decision-making as: (1) "avoiding controversial issues, delaying decisions on them, referring them to other bodies for resolution;" (2) "compromise and logrolling, that is, trading off subordinate interests for major interests;" (3) "expressing policies in vague generalities, representing the upon assumptions which may or may not be realistic." HUNTINGTON, *supra* note 47, at 162-65.

56. Cf. JEFFREY PFEFFER & GERALD R. SALANCIK, *THE EXTERNAL CONTROL OF ORGANIZATIONS: A RESOURCE DEPENDENT PERSPECTIVE* (1978). "If organizations are constrained by their context, it is important to assess how the context becomes known, what important dimensions of the environment affect organizations, and how organizations may be managed to avoid making mistakes in attending to the environment." *Id.* at 88. "[T]he organization responds to what it perceives and believes about the world . . . (which) is largely determined by the existing organizational and informational structure of the organization." *Id.* at 89.

57. DAVID VOGEL, *LOBBYING THE CORPORATION: CITIZEN CHALLENGES TO BUSINESS AUTHORITY* 5 (1981) (quoting RICHARD EELLS, *THE GOVERNMENT OF CORPORATIONS* 10-11 (1962)). The Model Rules of Professional Conduct appears to be in accord in requiring the lawyer to consider "the responsibility in the organization and the apparent motivation of the person involved." MODEL RULES OF PROF'L CONDUCT 1.13(b) (2001). The Model Rules, however, do not help the lawyer in making this judgment. Such a judgment requires organizational analysis.

sions are made. Perforce the lawyer must engage the organization's decision-making processes. "Mending information nets,"<sup>58</sup> is important, but will only correct bureaucratic pathologies. To protect the client, the lawyer also must be able to participate in the mending of intra-corporate political processes.<sup>59</sup>

Some have gone so far to argue, as former SEC chairman Harold Williams put it, that "lawyers along with their more mundane responsibilities must be architects of the accountability process which provides the corporate structure with the discipline necessary for effective decisionmaking."<sup>60</sup> One need not go so far. We can conclude that to protect their clients lawyers must engage in political analysis and sometimes political work.<sup>61</sup> Good Labs would have been better served had its Washington counsel analyzed the organization's politics. International Chemicals would have been better served had the lawyer mobilized the resources for the corporation to determine whether safety tests were needed.

Since bureaucratic and political pathologies are endemic in corporate life, serving the corporation as an entity requires the lawyer to consider the setting of legal problems. In certain circumstances, in the face of known adverse consequences to the corporation, the lawyer has an ethical duty to move beyond the initial definition of the problem.<sup>62</sup> These four cases and organizational analysis demonstrate that this duty must be expanded if lawyers are to serve their corporate clients. In the face of endemic bureaucratic and political pathologies, it is at least reckless disregard of adverse consequences to the organization for the lawyer not to analyze the organizational agent's setting of the problem.<sup>63</sup> To

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58. CHRISTOPHER D. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* Chap. 18 (1st ed. 1975).

59. Compare the approach here with LAWRENCE W. SHERMAN, *SCANDAL AND REFORM: CONTROLLING POLICE CORRUPTION* (1978). See also JAMES D. THOMPSON, *ORGANIZATIONS IN ACTION; SOCIAL SCIENCE BASES OF ADMINISTRATIVE THEORY* 128 (1967).

60. Harold Williams, *SEC Chairman Remarks on Corporate Lawyer Responsibilities* (Aug. 5, 1980), in *LEGAL TIMES OF WASH.*, Aug. 11, 1980 at 23, 25. In another context, he stated the lawyer "should also be concerned with the process by which the company evaluates" its environment. Harold Williams, *The Role of Inside Counsel in Corporate Accountability* (Oct. 4, 1979), in George W. Coombe, Jr. *Multinational Codes of Conduct and Corporate Accountability: New Opportunities for Corporate Counsel*, 36 *BUS. LAW.* 11, 28 (1980).

61. Compare this conclusion about the nature of the lawyer's representative function to Hanna Pitkin's general conclusion about representation: "Thus the development and improvement of representative institutions, the cultivation of persons capable of looking after the interests of others in a responsive manner, are essential if the fine vision that constitutes the idea of representation is to have any effect on our actual lives." HANNA PITKIN, *THE CONCEPT OF REPRESENTATION* 239 (1967).

62. MODEL RULES OF PROF'L CONDUCT 1.13 (2001); See Rosen, *supra* note 13, at 536-50.

63. This does not deny that agent definitions of the problem are entitled to presumptive validity. Accord MODEL RULES OF PROF'L CONDUCT 1.13 cmt. (2001) ("The Entity as the Client:

serve the client as an entity, the lawyer must be sensitive to the client's organization. Otherwise, his service may exacerbate bureaucratic and political pathologies

Meeting this challenge may appear difficult because it requires lawyers to engage in organizational analysis, a discipline in which they may not have been trained. I suspect, however, that training is not a serious obstacle. Lawyers are "quick readers" and can understand the organization of their clients. The challenge is a difficult one to meet largely because, as the four cases reveal, the problems lawyers face can be set so that the lawyer is unaware of the pathologies or is not in a position to deal with them. In the next section, I explain what features of their problems should both cue lawyers to the organizational dilemmas of their clients and signal to them to confront how their problems have been set.

#### IV. CUES AND THE PROBLEMS IN PROBLEM-SETTING

To understand the setting of legal problems, talking to the involved actors might seem a logical first step. But, in interviews, the actors claim they are not involved in problem-setting.

Top management says the lawyer determines his engagement. For example, a Chief Financial Officer, when asked about his corporation's production and financial controls over outside counsel, responded, "We can't do it." When asked, "Why not? You control the work and budgets of other specialized technical services?" he responded, "We can't. Lawyers are special." Middle management says someone else has made the determination. Middle-level managers claim they use lawyers "as we are organized to use them." Going to a lawyer is simply "part of the job."

Lawyers say the client is in charge: "We are not asked about structuring our relation with the client. . . . It is given to us and we have to deal with it as it is given to us." A senior member of a large firm explained: "Many general counsel give outside counsel too much of a narrow charge. You don't get good information that way. That's a problem for the corporate law department and the corporation, not for the outside law firm!" To many lawyers, client control over problem-setting is inherent in the notion of representation: "You are hired by your client for what they see fit."

The buck passing these interviews describe may account for the cases introducing this article. No manager, no outside counsel, and even

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[T]he decisions [of corporate agents] ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful."'). But, as the next section reveals, there are indicators that contest this presumption.

many inside counsel don't appear to want to assume responsibility for organizing legal service so that it best serves the client. Given the variations in both the types of services lawyers perform and client organizations, I cannot give a complete account of the determinants of problem-setting. Yet, it is possible to notice cues whose presence should alert lawyers and clients to the need to confront the setting of legal problems.

The cues I emphasize, timing and fragmentation, are features of organizational life. These cues are ones that lawyers ought to be able to recognize because in many areas of law lawyers use them to frame arguments.<sup>64</sup> In law, timing and fragmentation make a difference. So too do they in organizational life. Protecting clients requires responding to these cues.

### (A) *The Fragmentation of Work*

The Division World case best exemplifies the fragmentation of legal advice. Legal work may become piece-work. A client need not hire just one lawyer or firm. A client need not ask his attorney to be a counselor. A client need not make it easy for the attorney to have access to necessary information. A client may see the occurrence of legal work as unpredictable, unnecessary and unimportant. A lawyer may handle "a case" as "a case." A lawyer may view her work as specialized. A lawyer may see her role as a purely formal one. A lawyer may be hesitant about expanding her task.

Given such forces at work, it is not uncommon for legal work to appear to be a fragment, unconnected to the organizational background. The work appears as a fragment both to the organizational actor, who sees it as being removed from his purposes, and to the lawyer, who sees it as a limited call on her time. Legal services may be provided by a changing cast of characters who provide complex organizations with increasingly specialized and impersonal technical services, thereby parsing both the organization and its legal problems.

Because of the fragmentation of legal work, the problem as set for the lawyer may be more or less co-extensive with the problem it purports to resolve. Furthermore, the actions lawyers take may be unrelated to actions taken by managers and other lawyers. As at Division World, unintended consequences may follow.

What is the lawyer to do? Lawyers cannot and should not demand to take control of the client's problem. Lawyers are not required to wrest the problem from others and take the helm. But, lawyers, like managers, are demanded by their loyalty to the organization to be both

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64. See Kelman, *supra* note 20.

sensitive to how their work may misserve it and alert to signals that indicate such a result. The fragmentation of legal work is such a signal. Lawyers must understand the lessons of fragmentation, develop judgment about what its appearance entails and respond to it, helping the client receive good service.

One lesson of fragmented legal service is a commonplace: Lawyers must know the law. Fragmentation challenges lawyers who seek to provide prudent work. Lawyers must be careful not to mischaracterize "the facts." Examples could be easily multiplied of the adverse consequences of "that peculiar lawyerly ability to see a legal problem without seeing to what else it is connected".<sup>65</sup>

I wish to focus on another lesson of fragmentation: Lawyers must know organizational dynamics. Providing service to organizations requires lawyers to consider information and responsibility networks within the client organization and their own. Obviously, lawyers would not give the sole copy of their work product to the valet at their client's office building. Less obvious are other ways in which organizational dynamics may frustrate the delivery of legal services. When delivering fragmented legal service, lawyers should be alert to at least four ways in which their work interacts with organizational dynamics:

(1) FRAGMENTATION AND UNDERMINING  
ORGANIZATIONAL CONTROLS

As already explained, at Hypertech, legal services unwittingly impeded the functioning of corporate hierarchical controls. When a lawyer receives a fragmented problem, loyalty demands that he consider its impact on corporate controls.

Hypertech is not a unique case: An inside counsel at Foodstuffs was contacted because of concern that the company was violating the antitrust laws by selling a product below cost. What should be included in costs is a legal question with possible alternative answers. Foodstuffs' inside counsel called an outside counsel who was put in touch with the manager in charge of the product. The outside attorney found a way to defend the manager's position, satisfying the manager who wanted to push his product.

Inside counsel refused to accept the outside counsel's conclusion. Although the inside lawyers knew the conclusion was legally defensible, they felt it did not resolve the pricing decision. Inside counsel knew this

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65. This quote is attributed to Harvard Law Professor Thomas Reid Powell. Powell was described as a legend "Known for his sardonic wit." Robert Jerome Glennon, *Theoretical and Constitutional Issues: Comment: Federalism as a Regional Issue: "Get Out! And Give Us More Money."*, 38 ARIZ. L. REV. 829, 829-30 (1996).

decision was one in a series of pricing decisions made by different product managers throughout the company. To inside counsel, the problem was a fragment of a larger problem and its solution involved the establishment and maintenance of corporate procedures for the determination of costs. Defending the manager's choice, as outside counsel concluded was possible, would have undermined corporate controls. To avoid such a result, the corporate legal department favored a different method for computing costs.

A conflict ensued between the manager, supported by outside counsel, and the corporate legal department. The manager argued that if he didn't use the method supported by outside counsel his product would get killed in the marketplace. Inside counsel admitted that there was enough slippage in the law to justify the marketer's action. Inside counsel, however, argued that there was a larger problem: Whether the corporation would be run according to "common sense"—not because common sense was just, but because internal controls required a common sense response. Inside counsel, who had a less fragmented view of the problem, recognized its connection to problems in Foodstuffs' decision-making procedures. I do not know whether the anticipated benefits from marketing the product at the manager's price outweighed the incident internal costs to the company. I do know that outside counsel never weighed the costs.

## (2) FRAGMENTATION AND INCREASING COMMUNICATION FAILURES

Although general counsel claim, "a lawyer who is asked to give an opinion in respect to one aspect of a transaction is entitled to look at anything and everything he wants to that might possibly bear on that transaction,"<sup>66</sup> this often doesn't happen. The more fragmented his work, the less the lawyer knows about the information he actually has or needs to have. As one lawyer put it, "The system is set up to keep really knowledgeable people from getting together."

Furthermore, when legal work is fragmented, managers may give lawyers only enough information for the lawyer to do a piecemeal job. Managers restrict the flow of information out of both ignorance and insecurity. When it affects the lawyer's diagnosis, restricted information is in actuality a corporate decision, which is perhaps being made at an inappropriate level.

Fragmented work also affects a lawyer's ability to verify the information he receives: "Many managers paint the rosiest possible picture. Because I am inside, I can identify such people and deal more carefully

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66. Brian D. Forrow, *Special Problems of Inside Counsel for Industrial Companies*, 33 BUS. LAW 1453, 1466-67 (1978).



with them. You know how much credit to give them and can take steps not to let them push things through. If you were outside, you would give him an opinion letter with a very limited opinion." When a lawyer hedges his bets in response to uncertain information, of course, he only increases the likelihood that his advice will be miscommunicated. Fragmentation challenges lawyers to control the information they receive and communicate.

### (3) FRAGMENTATION AND THE FRAGMENTATION OF RESPONSIBILITY

The fragmentation of legal work is based on the assumption that responsibility may be divided unproblematically: There are legal questions and there are other types of questions. In certain cases, however, responsibility is difficult to divide.

Consider what happens when a union files for arbitration of a grievance. The plant manager asks the lawyer whether he acted "properly." The lawyer has the labor-management contract and the facts. He can answer that, under the contract, the action was legally proper. But can he assess the effects on employee morale, future labor-management contracts, or even the possibility of a strike? Can he then in any but the most limited sense determine whether the manager's action was "proper"?<sup>67</sup>

The fragmentation of legal work also may affect how clients exercise responsibility over it: "During litigation, I have a great deal of contact with the responsible managers. But, there is another level of decision-making. You talk to those involved, not the VP's who can make the decision about settlement. You don't talk to the VP's with the frequency you talk to middle-level managers." Consequently, this outside counsel admits he "all too often processes the case," instead of having the client responsibly control it.

Fragmentation also limits the lawyer's ability to determine if the manager is acting responsibly. It contributes to the lawyer's inability to distinguish between the goals of the manager with whom he has contact and the goals of the corporation. The lawyer doesn't, for example, know "if the managers are cutting each other's throats" in the marketplace. The lawyer can act only as an advocate for a position. He cannot be a clearinghouse for relevant information. Consequently, when fragmentation exists, it is particularly important that the lawyer try to insure that the choice of which risks to take is being made at appropriate levels within the organization. As an inside counsel prescribed: "You make sure his supervisor knows the risks. You write letters saying, 'You need

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67. See Maddock, *The Challenge to House Counsel*, in *CORPORATE LAW: 1958, PROCEEDINGS OF THE 4TH ANNUAL HOUSE COUNSEL INSTITUTE* 1, 4 (1959).

to get these people to sign off on this.'” Fragmentation challenges lawyers to consider the fragmentation of responsibility and its relevance for the legal advice they offer.

#### (4) FRAGMENTATION AND ORGANIZATIONAL ADAPTIVITY

Fragmentation decreases a lawyer’s ability to recognize and correct deficiencies in corporate learning processes.<sup>68</sup> When a lawyer “deals with a case as a case,” he is unlikely to concern himself with the replicability of cases:

I don’t feel it is part of my job to follow up. That’s management’s decision. I don’t feel it is necessary to tell them that if they have had a thousand lawsuits it’s necessary to change the product on my thousand and one. Supposedly someone has thought about that. They know the costs and have decided not to change.

This assumes a great deal of the client. It doesn’t recognize that information might get lost. It doesn’t recognize that decisions might not be made. Furthermore, fragmentation decreases lawyers’ abilities both to detect when this assumption is misplaced and to respond by correcting deficiencies in corporate learning processes: “The tendency of litigation is to focus on each problem and not raise a problem which occurred five years previously.”

When her work is less fragmented, the lawyer can use the information she receives, as an inside counsel noted, to “see applications in other areas; I can see trends and fix them.” In fact, one of inside counsel’s supposed advantages is their ability to gather information and improve corporate learning processes: “[T]he accumulation of cases (by lawyers) concerning the activity of an operating unit can show that the management of this unit is not acting with the legal precaution that must be demanded of all operating units in a large company.”<sup>69</sup>

Even when lawyers do offer advice about trends and repetitions of problems, because of fragmentation, they tend to inform only the involved manager. Such advice is likely to be ineffective unless there is a meshing of the company’s long-term interests and the short-term interests of the manager. When a manager is asked to do something he wouldn’t do naturally, the lawyer must go outside the bailiwick he and the manager occupy.<sup>70</sup>

In response to fragmentation, the lawyer must consider the organi-

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68. For a discussion of corporate learning processes, see CYERT & MARCH, *supra* note 31, at 123-25.

69. WALTER KOLVENBACH, *THE COMPANY LEGAL DEPARTMENT: ITS ROLE, FUNCTION AND ORGANIZATION* 34 (1979).

70. Even when the lawyer influences the manager to make changes, the lawyer’s advice may be insufficient from the organization’s perspective. Even when a department re-orientes itself after

zation's learning processes and their relevance for the advice to be tendered. Consider the issue of whether a corporate client should be involved in a trade association. Given the potential antitrust liability and the difficulty of policing trade meetings, there is a tendency to advise the client to leave the trade association. Several of the outside counsel interviewed took this tack, even though trade association meetings are a useful and legal way for competitors to gather together. An alternate view, advocated by some outside counsel and all inside counsel interviewed, was to educate clients so they would be able to avoid getting into problems at the meetings. Instead of giving advice on a fragmentary basis, a bloc solution was found. Corporate learning processes were developed. This is the "preventive law" solution.

### (B) *The Timing of Work*

Donnell found role ambiguity and role conflict about "how early counsel should be consulted by the clients."<sup>71</sup> Lawyers can be consulted before a problem has emerged, while it is emerging, or after it has emerged.

The timing of lawyer involvement makes a great difference. It makes a difference for the work the lawyer does ("Corporate attorneys like to solve problems before they become problems and litigators like to solve problems after they become problems."), the extent of his work ("When you get called in early, the practice of law is like shadow boxing. You have to think of all the potential results. . . It's the difference between constructing artificial limbs and stopping flowing blood."), and the success of his work ("Lawyers can be called in too late for them to do any good.")

In a general discussion of experts in organizations, Merton examined the effects of when in "the continuum of decision" the expert is called: "The earlier in the continuum of decision that the bureaucratic intellectual operates, the greater his potential influence in guiding the decision. . . When problems reach the intellectual at. . . [a] later stage in the continuum, he comes to think largely in instrumental terms and to accept the prevailing definitions of objectives."<sup>72</sup> How does this general tendency play itself out in legal representation?

Lawyers often ask clients to call them when they have a legal problem. Less frequently do they consider the implications of the timing of when the client heeds this advice. Lawyers should be alert to at least

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getting its fingers burnt by legal processes, it may not incorporate this lesson into corporate learning processes. New routines can be formed without learning the reason for them.

71. JOHN D. DONNELL, *THE CORPORATE COUNSEL: A ROLE STUDY* 76 (1970).

72. Merton, *supra* note 29, at 270.

four ways in which the timing of their work interacts with organizational dynamics:

(1) TIMING AND THE CIRCUMSCRIPTION OF INFLUENCE

As Merton predicted, the later the lawyer is called, the more circumscribed is his influence. Although both inside and outside counsel can be consulted late in a problem's development, outside counsel more often find their influence is restricted. As an outside counsel related: "Business people don't call us in early, claiming disorganization, not enough time, this is what must be done with this customer, and so on. This gets us into a scrivener routine."<sup>73</sup>

Conversely, a key boast of inside counsel is that they get involved early in the decision continuum: "A lawyer in a corporate legal department finds himself involved in situations where the legal problems remain to be defined; it is his job to find if any legal problems do exist."<sup>74</sup> When a lawyer's involvement begins near the start of the decision continuum, problems are less routine and the work is more broad ranging. When a lawyer is called in late, loyalty to the client requires the attorney to consider the process by which his influence has been circumscribed.

(2) TIMING AND THE REDUCTION OF INFLUENCE INTO POWER

The later in the decision continuum the lawyer gets involved, the more his influence will depend on exerting power. Power is a costly method of control. Yet, it may be all that is available to the lawyer late in the game. For example, if the lawyer is brought in after a commercial is already in the can he might advise, "You can't say that," but the manager can respond, "Well, we already have. Find us a way so we can use this thing which we have spent a \$100,000 to produce." The manager is not asking for alternatives. He is telling the lawyer that the costs are sunk and the lawyer will have to test his power against that fact.<sup>75</sup>

When problems have not jelled, the lawyer also need not fight strong personal positions:

Managers don't want their "big enchilada" to be wrong. If the lawyer gets in early, it's not a test of wills or ego. By the time things normally get to outside counsel, resources have been invested, many departments have been involved, and consultants have been called. If

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73. Litigators have a defense mechanism in such situations. They claim that the fun of litigation is taking a set of facts cast in stone when you arrive and making the best of it.

74. Scott Hand & Effie Gang, *The Practice of Law in a Corporation*, in *PRACTICING LAW IN NEW YORK CITY* 111, 112 (John J. Fishman & Anthony S. Kaufmann eds., 1975).

75. Put another way, early in the continuum, you influence decisions. Late in the continuum, you have to control actions.

the outside counsel then says that doing it is a violation of something obscure, the client says, "Change the law or get us another partner who will say it's fine." At that time, there is a lot of pressure on the outside counsel to go back and research it and find a few cases in our favor or at least come up with a grey area opinion letter.

This does not mean that a lawyer who is called in late can't meet this pressure. It does mean that he must exert power to do it.

The relationship between timing and the lawyer's need to exercise power has not escaped managerial notice. A typical way clients seek to evade legal constraint is by casting the decision as an "emergency." Emergencies are a regular feature of organizational life. Managers, like lawyers, are always responding to fires that need to be put out immediately.<sup>76</sup> But, emergencies also can be created. The manager may purposefully sit on a problem, passing it to the lawyer only when the lawyer would have to stop many spinning wheels to halt the process.<sup>77</sup> In emergency situations only immediately realizable costs and benefits are considered relevant. "If you are brought in late, it goes from being a give and take to an all or nothing situation." Rather than an equal partner in the relationship, the lawyer is subservient unless he chooses to exercise power. "When there is a full court press on to do something and legal is the hold-up, everyone knows it." To resist conformity, the lawyer must be willing and able to exert power.<sup>78</sup> A lawyer alert to how organizational dynamics can determine the timing of legal work will examine the uses being made of the emergency. Late involvement ought to alert the lawyer that the organization may need to consider why its legal problems are emergencies.<sup>79</sup>

### (3) TIMING AS AN EXTERNAL SIGNAL

Managers know that when they involve their attorneys they are signaling something to the other side. For the most part, what they are signaling is either indistinct or too peculiar to the situation to be general-

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76. See STANLEY YOUNG, *MANAGEMENT: A SYSTEMS ANALYSIS* 146 (1966).

77. In one sense, emergencies defuse conflicts. In emergencies, the lawyer and manager may assume they share the same expectations about how the lawyer should perform his service and what the service entails. In emergencies, the conflict between what is expected and what is provided appears to be transient: The corporation in this instance lacks sufficient resources to fulfill these assumptions. Defusing the conflict, emergencies reduce the likelihood that the lawyer will try to exert power. He may let the manager "get away, this time."

78. Compare this analysis of organizational action to the strategy of totalitarian regimes to cast all situations as emergencies. See Isaiah Berlin, *Does Political Theory Still Exist?*, in *PHILOSOPHY, POLITICS & SOCIETY* 79 (Peter Laslett & W.G. Runciman eds., 1972).

79. Like the child who will keep on spilling his food until he learns the concept of volume, the corporation may keep on putting out fires without understanding why the fires ignited. Cf. SELZNICK *supra* note 16, at 25.

izable. When transactions are regular and routine, however, the signal of lawyer involvement may affect the nature of the relationship.

Consider, for example, the relationship between the corporation and its regulators. When lawyers are involved early, government regulators usually don't perceive the corporation as stiff-necked<sup>80</sup> and don't adopt a guards-up and "going it by the book" approach: "If you assume basic integrity, you can work things out. If not, you get bars raised you can't cross." Having lawyers involved early in this process is an external signal of corporate integrity. As a manager noted:

With a new product, the people at the regulatory agencies have a hard time figuring out what standards to impose. Some are very conscientious and others say, 'Let me see everything so that nothing will come back to haunt me,' thereby artificially screening out good things. The solution is to work openly with the agency. The lawyers are independent and objective voices in this process. They are better able to communicate with the agency people because they are closer to them in terms of background attitudes and interests. The lawyers don't take a sow's ear and turn it into a silk purse. But they can make it understandable to the regulatory people. They can tell the regulators, 'Sure the people who are making it have self-interest in it, but I can tell you that you can trust them. I'm on the job.'

A lawyer who does not ignore what is being signaled by the timing of his involvement will be alert to the responsibilities being imposed on him.

#### (4) TIMING AND INTRA-ORGANIZATIONAL POLITICAL PROCESSES

When a lawyer tackles a case in its early stages, he becomes involved in planning. At a minimum, a lawyer's involvement in planning provides the company with more information. It thus creates the possibility of decisions more in keeping with the law. But only the possibility. Information is only one aspect of planning. Information also must be filtered and alternatives selected.

Where lawyers only contribute information to the planning process, their early involvement may work against corporate legal compliance. For example, a Good Labs' inside counsel argued that lack of information is essential for the lawyer to render an independent judgment:

As an inside counsel, I will understand better than outside counsel why the client wants to violate the regulations. I will find the extra amount of wobble. More information gives you more considerations, more alternatives. Inside counsel can get talked into interpretations because they know the client's competitors. I can open my drawer

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80. Notice how this differs from one-shot transactions. If I bring my lawyer along when I file a complaint at the department store, they are likely to think I am stiff-necked.

and see the competitors' products. So I can seek the wobble they use to make their products and feel justified in so doing. It's information about our competitors that make me want to play with the law.

In this argument the lawyer's ethical behavior depends on transaction costs. It is a perverse argument for ethical behavior, but a recurrent one. The argument, however, only applies if information is the only contribution the lawyer makes to planning. Then, the lawyer may become merely the source for the wobble. At Good Labs, lawyers only report information. Although it is a highly politicized corporation, lawyers are not involved in conflicts between units. Once they make their report, they opt out of the goal-setting process. Even though they are "present at the creation," they still "think largely in instrumental terms and . . . accept the prevailing definitions of objectives."<sup>81</sup>

Early involvement, however, should signal to lawyers that their work is neither the end-product of corporate decision-making nor a datum that will be unproblematically ingested by corporate decision-makers. Lawyers should be alert to their role in corporate goal-creation.<sup>82</sup> To protect the client, lawyers must be sensitive to how problems have been set for them, how their work is incorporated into corporate decision-making and alert to signals that suggest problems in these regards. The timing of legal work is such a signal. Lawyers must understand the lessons of timing, develop judgment about what its appearance entails and respond to it, helping the client receive good service.

## V. PROBLEM-SETTING AND PROFESSIONAL IDEOLOGY AND ETHICS

Like other professionals, lawyers need not accept problems that are pre-set.<sup>83</sup> They can respond to signals the setting of their problems sets off. They can openly negotiate and bargain about what their work requires. With non-professional workers, such negotiation is often covert. At stake for them is merely "convenience and ease on the job." For the professional, however, "self-respect, reputation, and career are at stake . . . [T]he negotiation takes place from a position of professional

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81. Merton, *supra* note 29, at 270. Inside counsel's limited role at Good Labs is a reason the Board went outside in the problem at the beginning of this Article. Unfortunately, the outside counsel acted like the weak inside counsel

82. The relation of timing to intra-corporate political processes is an application to organizational behavior of a truism of litigation practice. Everyone knows that having a lawyer involved early can help prevent and settle lawsuits, both by steering the company away from problems and by defining the client's objectives. In litigation the parties often only see what is really at stake very far down the road. Although legal rights are frequently tossed back and forth in the litigation process, they may be tangential to the settlement posture. Compromise and settlement will not occur until the parties decide what the case is really worth to them.

83. See *supra* notes 9-12.

worth and values and involves a whole rhetoric of professional claims.”<sup>84</sup>

The first level for analyzing the insensitivities attested to by the cases introducing this article, therefore, must be at the level of professional values and claims. Why doesn't building a practice mean creating a relation in which the lawyer can give the client more than the client immediately wants? How do lawyers with good judgment recast the problems given to them? What are a lawyer's duties in investigating a problem? Why are the elite lawyers involved in the cases introducing this article satisfied with saying "It's not my job"?

In the profession's role-concept, the lawyer's independent judgment does set the problem on which he works: A client in need contacts a lawyer. The lawyer learns the facts of the case as the client understands them. The lawyer then searches for other facts to diagnose the true problem. He deposes and interrogates. He filters out distortions, probing to the heart of the matter. Then, based on his training, the lawyer diagnoses.<sup>85</sup> As the ABA once put it: "One who undertakes the practice of a profession cannot rest content with the faithful discharge of duties assigned to him by others."<sup>86</sup>

Yet in practice, lawyers do not always set the problems on which they work.<sup>87</sup> They may accept client control over the definition of the problem, the lawyer's access to the facts, and the choice of remedies.<sup>88</sup> Or, lawyers may not consider redefining the problem, finding it undesirable to invest too much effort on it.<sup>89</sup>

This gap between ideology and practice is reflected in lawyer self-consciousness. When corporate lawyers talk about their work, they oscillate between asserting the transcendental independence of a lawyer's role, deciding power balances and helping individuals out of deep

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84. Rue Bucher & Joan Stelling, *Characteristics of Professional Organizations*, in *COLLEAGUES IN ORGANIZATION: THE SOCIAL CONSTRUCTION OF PROFESSIONAL WORK* 121, 125 (Ralph L. Blankenship ed., 1977).

85. See, e.g., American Bar Association, Code of Professional Responsibility DR 5-1, EC 5-24 (1969).

86. A.B.A. Joint Conference of Professional Responsibility, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1159 (1958).

87. Interestingly, in one study, conducted before the upgrading of corporate legal departments, see Rosen, *supra* note 13, no difference was found between inside and outside counsel with respect to bureaucratic controls on their work. Richard H. Hall, *Professionalization and Bureaucratization*, 32 AM. SOC. REV. 92, 103 (1968); Richard H. Hall, *Some Organizational Considerations in the Professional-Organizational Relationship*, 12 AD. SCI. Q. 461, 473 (1967).

88. Ignoring their duties to protect their clients, see note 82 *supra*, lawyers may too readily accede to clients who say "I pay you for what I want you to do, not what you want to do," or "When I want you to turn on your meter, I'll tell you."

89. The provision of non-customized legal services was Justice Powell's concern in *Bates v. State Bar of Arizona*, 433 U.S. 350, 389-90 (1977).



trouble, and the mundane servility of their work, greasing corporate wheels and following the dictates of the market. Lawyers try to repress this fundamental contradiction by telling war stories and by stressing the dollar value of the problems they handle. But practicing attorneys know their situation often is an ironic one. All too often each of them is like the clown at the circus who, by waving his arms, seeks to convey that he is the master of the ceremony. There is a defensiveness in the lawyer's "kiss-off," "It's not my job." The "kiss-off" attempts to repress the fact that a lawyer's role is not the same as the work he does.

Roles are not totally defined by how they are played.<sup>90</sup> While it is true that the actor makes the role, it is also true that the role tests the actor.<sup>91</sup> Roles include generalized expectations that serve as reference points for actors' performances. Professionals, whose attitudes, in part, are formed and maintained by professional schools and organizations, are keenly aware that they have a role they may not play well.<sup>92</sup>

The gap between the profession's role-concept and the ways lawyers act evidences the fact that a profession is composed of both attitudinal and structural components and these "do not necessarily vary together."<sup>93</sup> A profession has attitudinal components that affect how a professional views his own work. A profession instills beliefs and generates a sense of calling in its practitioners. A profession idolizes exemplars to whom individuals compare their work. A profession also has structural components which affect how a professional works. A profession sanctions a division of labor and rules governing work. A profession authorizes controls on its practitioners' work. A profession's attitudinal and structural components may have different sources and supports. These components are relatively independent of each other.

The relative independence of the profession's attitudinal and structural components explains why the legal profession's view of itself vacillates between the cynical and the optimistic.<sup>94</sup> The structural components of the legal profession appear to contradict the profession's attitudinal components, its role-concept. Others have seized this appar-

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90. ROBERT A. DAHL & CHARLES E. LINDBLOM, *supra* at 15.

91. See TALCOTT PARSONS & EDWARD A. SHILS, *TOWARD A GENERAL THEORY OF ACTION* 23 (1951).

92. See TALCOTT PARSONS, *THE SOCIAL SYSTEM* 38-40 (1951).

93. Richard H. Hall, *Professionalization and Bureaucratization*, 32 AM. SOC. REV. 92, 103 (1968).

94. Simon, *supra* note 2, at 29; Robert W. Gordon, "The Ideal and the Actual in the Law": *Fantasies and Practices of New York City Lawyers 1870-1890*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 61 (Gerard W. Gawalt ed., 1984); Rayman L. Soloman, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in *LAWYER'S IDEALS/LAWYERS PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* (Robert L. Nelson et. al. eds., 1992).

ent contradiction, concluding that the role-concept's only function is to merchandize the lawyer's importance and morality to attain and maintain the legal profession's monopoly status.<sup>95</sup> This conclusion incorrectly assumes that the legal profession is internally static. The apparent contradiction arises because of the relative independence of the profession's attitudinal and structural components. But, these components are not totally independent. They challenge each other.

Admittedly, too often the challenge is blunted. Today the primary function of the role-concept appears to be to prevent lawyers from becoming disenchanted with their work by making their structural subservience appear transient.<sup>96</sup> But, thus the mandarin is defeated. When systematic discrepancies with the professional role-concept are taken as transient exceptions not worth confronting, lawyers tend to conform to the structural setting of their problems and claims of professional independence merit cynical responses. When attitudinal components of the profession do not challenge its structural components, the lawyer's only refuge is irony.

The relative independence of the profession's attitudinal and structural components, however, provides some reason for optimism. The attitudinal components of the legal profession can be the basis for change. Expansive role-concepts can challenge current work agenda and their structural determinants.<sup>97</sup> Expansive role-concepts can facilitate role-taking.<sup>98</sup> The profession's concept of its role can inspire lawyers to fight externally set agenda and structure their role to allow for autonomy.<sup>99</sup> Lawyers can be responsive to, not directed by, contexts.

The profession's role-concept, while relatively independent from the profession's structural components, however, has responded to them. While the dominant professional image stresses the lawyer's independence, there is a counter-image that encapsulates the structural servility of practice. In this image, lawyers are hired guns or resource-persons obeying client directions.<sup>100</sup>

There is a truth in this counter-image. Lawyers are client-serving professionals who must not dominate their clients. Consequently, the Model Rules of Professional Conduct stipulates that "[a] lawyer shall

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95. See, e.g., Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981).

96. Cf. ELIOT FRIEDSON, *PROFESSIONAL DOMINANCE: THE SOCIAL STRUCTURE OF MEDICAL CARE* 93-102 (1st ed. 1970).

97. See A.M. CARR-SAUNDERS & P.A. WILSON, *THE PROFESSIONS* 403-04 (1933); RONALD M. PAVALKO, *SOCIOLOGY OF OCCUPATIONS AND PROFESSIONS* 101 (1971).

98. SELZNICK, *supra* note 16, at 3.

99. *Id.* at 121-22.

100. Kagan & Rosen, *supra* note 26.

abide by a client's decisions concerning the objectives of representation,"<sup>101</sup> and comments that "[t]he client has ultimate authority to determine the purposes to be served by legal representation."<sup>102</sup>

The norms of professional independence and of client service are in tension. The counter-image too quickly resolves this tension by retreating to client dominance. Instead of an expansive role-concept, it imposes a restrictive one. It fails to recognize that lawyers can be persuasive, that they can lead while being led.<sup>103</sup> It reduces proper respect for clients into servility.<sup>104</sup> The counter-image has led even those concerned with legal ethics to flirt with what the dominant image casts as an unprofessional stance. For example, an analyst of conflicts of interest in legal work adopts the following definition of the lawyer's principal duty: "The lawyer should take that action that is best calculated to advance the client's interests, *as the client defines them*."<sup>105</sup> Does this analyst mean that the client, like the customer, is always right?<sup>106</sup>

The dominant-image resolves the tension between independence and client service by stressing the lawyer's duty of loyalty to the client. But by characterizing the client as a customer, the counter-image eschews the dominant image's understanding of the fidelity lawyers owe to their clients. Loyalty is not obedience. Loyalty to the client may require the lawyer to transcend the problem as set by the client. Legal ethics does emphasize client control over choices within a problem. But, this is not identical to control over the scope of the problem.<sup>107</sup> Diagnosis is a professional art. In the language of organizational analysis, the client controls vertical but not necessarily horizontal specialization. In other words, an ethical lawyer in the dominant-image is required to exercise some control over problem-setting. The lawyer tends to the "whole" client, probing problems.<sup>108</sup>

101. MODEL RULE OF PROF'L CONDUCT R. 1.2 (2001). Cf., MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1969).

102. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmtt. (2001) ("Scope of Representation").

103. Robert Eli Rosen, *Persuasion: The Art of Leading While Being Led*, 16(2) Law Practice Mgmt. (ABA) 30 (1990).

104. ROBERT ELI ROSEN, *On the Social Significance of Critical Lawyering*, LEGAL ETHICS (forthcoming) (reviewing CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1998)).

105. Note, *Developments Conflicts of Interest*, 94 HARV. L. REV. 1244, 1255 (1981) (emphasis added). The Note then restricts this duty by the lawyer's duties to the legal system and the public. *Id.* at 1260.

106. *Contra* Marshall, *supra* note 9.

107. Compare MODEL CODE OF PROF'L RESPONSIBILITY EC 3-5 (1969) with MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1969).

108. This analysis explains why a lawyer may not represent adverse clients in unrelated actions. See *Fund of Funds, Ltd., v. Arthur Anderson & Co.*, 567 F.2d 225, 232-33 (2d Cir. 1977); *Grievance Comm. v. Rottner*, 203 A.2d 82, 84 (Conn. 1964). The problems may be different, but the lawyer's loyalty extends to serving the whole client. Loyalty requires an

Whatever is the general salience of the counter-image, its pervasiveness in corporate work is surprising. Corporate lawyers typically pride themselves on their autonomy. They demand and receive high fees supposedly because of their independent judgment. Furthermore, to render professional service in the corporate context, the lawyer cannot quickly retreat to servility. As the Code of Professional Responsibility explains: "A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization."<sup>109</sup> Because the lawyer's true client is the corporate entity, the interests and problems as defined by agents of the corporation need not always be served. The lawyer's loyalty is to the entity. In organizational work, in a practical sense, the customer — the organization agent — is not always right.<sup>110</sup> In organizational work, the lawyer ought not be simply an ends-taker.

Part of the reason why today the profession's role-concept fails to challenge the work lawyers perform is that the profession has failed to detail the requirements of the duty of loyalty, especially when serving the "client as an entity."<sup>111</sup> This paper has attempted to develop the duty of loyalty through organizational analysis. There are organizational reasons why the interests of corporate agents may differ from the interests of the corporation "as an entity:" Bureaucratic and political pathologies require the lawyer in being loyal to the entity to exert control over the setting of the problems on which he works.

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expansive horizontal conception of the lawyer's work. That the horizontal demands of loyalty can be waived by client consent does not contradict this interpretation. Such a waiver should occur only after full discussion of the client's entire legal picture. This discussion is precisely what is missing when the client sets the problems for the lawyer.

109. MODEL CODE OF PROF'L RESPONSIBILITY, EC 5-18 (1969). Cf. MODEL RULES OF PROF'L CONDUCT, R. 1.13(a) (2001): "A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents."

110. See MODEL RULES OF PROF'L CONDUCT, R. 1.13 cmmt. (2001):

In transactions between an organization and its lawyer . . . the organization can speak and decide only through agents, such as its officers or employees. In effect, the client-lawyer relationship is maintained through an intermediary between the client and the lawyer. This fact requires the lawyer under certain conditions to be concerned whether the intermediary legitimately represents the client.

111. See GEOFFREY C. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 43-68 (1978); Ronald D. Rotunda, *Law, Lawyers and Managers*, in *THE ETHICS OF CORPORATE CONDUCT* 127 (Clarence Walton ed., 1977); Carl A. Pierce, *The Code of Professional Responsibility in the Corporate World: An Abdication of Professional Self-Regulation*, 6 U. MICH. J.L. REFORM 350, 352, 354, 356 (1973); American Bar Association, Committee On Professional Ethics, Formal Opinion 202 (May 25, 1940).

Instead of an organizational analysis, a consequentialist analysis is used by the Model Rules of Professional Responsibility to elaborate the duty of loyalty: "[W]hen the lawyer knows that the organization may be substantially injured by action of an officer or employee,"<sup>112</sup> loyalty requires the lawyer to transcend the customer's definition of corporate interests and problems. This analysis is incomplete. As the cases introducing this paper reveal, lawyers can be blinded to the consequences of their actions. When lawyers do not actively control how problems are set, they need not confront the adverse consequences of their representation. Thereby, they may misserve their clients.

Although Parsons and Blau and Scott have shown that professionalism and bureaucratization share similar normative orientations,<sup>113</sup> one similarity these scholars failed to pinpoint is that both professionals and bureaucrats can be blind to the substantive goals and consequences of their work. "Bureaucrat" is a pejorative because a bureaucrat simply follows orders without analyzing them in relation to underlying purposes. As Merton puts it, a characteristic pathology of bureaucracies is that means displace ends.<sup>114</sup> Similarly, a characteristic pathology of one set of professional choices is that professionals emphasize their tools over the actual dimensions of the problems on which they work. Lawyers can adopt the worst aspects of bureaucrats and choose to blind themselves to the consequences of their actions. When lawyers say, "This is what the client gave me to do," they might be denying responsibility for the consequences of problem-setting. As the cases introducing this paper demonstrate, lawyers thereby may misserve their clients whose welfare they supposedly serve by rejecting control over problem-setting.

A restrictive view of lawyer duties with respect to problem-setting does not only misserve clients. When the SEC tried to make lawyers responsible for the consequences of their work, one outside counsel interviewed said the typical response of his colleagues was, "Let's find out what makes us guardians of the public interest and write it out of our retainer agreement." Although lawyers also should be faithful to public interests, this paper has questioned the central rationale for the "kiss-off," serving client goals.

Another frequently invoked explanation for the limited scope of a lawyer's problems is that the law itself determines how the problems a

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112. MODEL RULES OF PROF'L CONDUCT, R. 1.13 cmtt. (2001) (emphasis added).

113. They share orientations to rationality, universality, affective neutrality and achievement. Talcott Parsons, *The Professions and the Social Structure*, in *ESSAYS IN SOCIOLOGICAL THEORY*, (2d ed. 1954); PETER M. BLAU & W. RICHARD SCOTT, *FORMAL ORGANIZATIONS: A COMPARATIVE APPROACH* 60 (1962).

114. See Merton, *supra* note 29.

lawyer works on are set. This argument, however, depends on a naive formalism. One seeks a good lawyer precisely because the law doesn't totally determine the scope of a lawyer's work.<sup>115</sup> Yet, elite lawyers at times profess such a naive formalism. Lawyers work on cases, they say, but do not generate cases. Lawyers are merely reactive and are not responsible for the situations leading to legal problems. Lawyers are not responsible for the context. They merely operate independently within the context.<sup>116</sup> As the cases introducing this paper reveal, this is sometimes true. But it is not always true. A lawyer can be proactive. Legal work can generate other legal work. And lawyers and clients may differently define the context of legal service.

Lawyers have opportunities and responsibilities for serving their clients that are not realized when lawyers respond, "This is what my client gave me to do." By recognizing that problem-setting is a dependent variable affected by choices both the lawyer and client make, we can move away from a self-serving professional ethic to an ethic of responsibility.<sup>117</sup> To be loyal to the client "as an entity," lawyers must be both sensitive and responsive to recurrent problems in serving organizational clients. They must be alert to signals that indicate the need to confront the setting of their problems.<sup>118</sup>

## VI. CONCLUSION

Like other workers, lawyers have jobs that are conditioned by occupational, organizational, client and social control systems.<sup>119</sup> In this article, I have explored ways in which organization lawyers' jobs are constituted. By examining problem-setting, I have suggested ways in which the profession's role-concept can support individual lawyers being responsive to, not controlled by, their client's organization.

Arguing that lawyers shouldn't take problems as set for them by their clients might appear ill-timed and naive given current dissatisfaction with the legal profession. One prong of the current critique of the professions is directed at the professions' claims that they are capable of

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115. David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990).

116. Robert W. Gordon, *The Independence of Lawyers*, 68 B. U. L. REV. 1 (1998).

117. Cf. Luban et. al., *supra* note 8.

118. Cf. ABA Joint Conference of Professional Responsibility, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958): "Whether he considers himself a conservative or a liberal, the lawyer should do what he can to rescue that discussion [of public issues] from a world of unreality in which it is assumed that ends can be selected without any consideration of means." "The practice of his profession brings the lawyer in daily touch with . . . the problem of implementation as it arises in human affairs." *Id.* at 1217.

119. See PHYLLIS L. STEWART & MAURIEL G. CANTOR, *VARIETIES OF WORK EXPERIENCE: THE SOCIAL CONTROL OF OCCUPATIONAL GROUPS & ROLES* (1974).

formulating client interests.<sup>120</sup> Professionals can create demand.<sup>121</sup> And corporate control of the legal services they receive is increasing.<sup>122</sup>

Yet, I have argued, that reconstructing lawyers' work is necessary to strengthen, not undermine, the ability of organizations to direct lawyers to serve the organization's interests. Bureaucratic and political pathologies are ever-present possibilities in organizational life. The way legal problems are set often fuel, rather than dampen, such pathologies. Organizational supervision of the work lawyers do for them is inadequate and organizations often inadequately process lawyer reports. As a result, lawyers are likely to misserve their organizational clients.

The conclusions of this article may seem to expand a lawyer's duties. If they do, it is important to understand that these additional duties do not derive from the lawyer's duty to serve the public. To assist the lawyer in role-taking, I have emphasized client service. Mending information nets and engaging intra-organizational political processes are required to serve organizational clients' interests. Many would be troubled to recognize that lawyers are organizational actors. They would be troubled especially to recognize that lawyers are political actors within the organization. But, as we have seen, organizational analysis reveals that lawyers perforce must perform such roles to be loyal to their clients.

So understood, for lawyers to be responsible they need not be paternalistic. As any student of organizational behavior knows, the question is not whether lawyers give corporations goals. The proper question is what goals do lawyers advance?<sup>123</sup> Serving organizational clients requires lawyers to confront that question.

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120. For the legal profession, see John Leubsdorf, *Three Models of Professional Reform*, 67 CORNELL L. REV. 1021, 1023, 1027 (1982); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977). For the professions generally, see Bernard Barber, *Control and Responsibility in the Powerful Professions*, 93 POL. SCI. Q. 599, 609 (1978); IVAN ILLICH, *DISABLING PROFESSIONS* (1977).

121. Leubsdorf, *supra* note 120, at 1027 n.3 (citing Robert G. Evans, *Professionals and the Production Function: Can Competition Policy Improve Efficiency in the Licensed Professions?*, in *OCCUPATIONAL LICENSURE & REGULATION* 225 (Simon Rottenberg ed. 1980)).

122. Rosen, *supra* note 13 at 503.

123. See generally *id.* Organization theory requires this perspective. Organization theorists dwell at length on the mistaken conception of organizational goals embodied in the traditional notion of professional autonomy. Casting lawyers as only conduits of established corporate goals is based on a misunderstanding of corporate processes. "It seems to me perfectly obvious that a description that assumes goals come first and action comes later is frequently radically wrong. Human choice behavior is at least as much a process for discovering goals as for acting on them." James G. March, *The Technology of Foolishness*, in *AMBIGUITY AND CHOICE IN ORGANIZATIONS* (James G. March & Johan P. Olsen eds., 1971). Hence, lawyers must follow organizational theorists and take the position that "[i]nstead of asking, Do organizations have goals? we will ask the questions, Who sets organizational goals, and How are organizational goals set?" W. RICHARD SCOTT, *ORGANIZATIONS: RATIONAL, NATURAL, AND OPEN SYSTEMS* 264 (1981).