



HARVARD LAW SCHOOL

Center on the Legal Profession

“Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century” Commentary

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Commentary

By Roger Meltzer, Global Co-Chairman, DLA Piper LLP

The collaborative effort of the authors Heineman, Lee and Wilkens to tackle the complex topic of the lawyer’s responsibilities as professionals and citizens in the 21st Century is to be commended. The topic is plainly at the center of academic discourse, as well as among members of corporate legal departments and law firm management. It reflects, not surprisingly, a broad industry shift of what the legal profession must do to respond to changes in the global economy and the cultural demands of society in general. The authors have contributed significantly to these discussions. However, as the Co-Chairman of a leading global business law firm, I believe that the four ethical responsibilities that the authors contend are “central to what it means to be a lawyer” in the face of that paradigm shift suggest that lawyers walk above the ground, not on it, which only perpetuates the “better than others” arrogance and an unfounded sense of self-importance that have been, at least in part, the cause of the public’s declining respect for lawyers and the legal profession.¹

Society has put the law profession well down the barrel since the dawn of time². So, while I admire the aspirations set forth in the article and agree that lawyers should be expert technicians, wise counselors and effective leaders, the practice of law, especially in connection with providing clients top-tier legal services in a global “free market” economy, is not properly charted only by ethical or moral imperatives, which ought to be axiomatic, but business acumen and sound practical judgment exercised within the applicable rule of law, rules of professional responsibility and one’s own moral compass. The article suggests that, in today’s world, lawyers can hold themselves separate from their clients, as if that retains for the profession protection through independence. I think quite the opposite is true – we need to be more shoulder-to-shoulder with clients and acknowledge more of the risk profile of the representation. The clients want us to be their commercial partners, not just their advisors. Without the acceptance of these fundamental changes, I am afraid, as with many professions (medicine, for example) once held in almost inestimable high esteem, practitioners will continue to believe in their immunity and the glass jaw already built into the foundation of the profession will be broken (if not shattered) by the leverage of market forces.

The Framework And Context

Changes to legal markets will increasingly be driven by organizations’ collective ability to produce disruptive innovations and through the creation of new revenue verticals monetizing intellectual assets, in addition to an individual lawyer’s skills and experience. We live in a network economy, and the traditional units of strategic analysis may move from firms to

¹ Ref: Pew Research Center survey on Professional Public Esteem - Survey published on Jul. 11, 2013.

² “The first thing we do, let’s kill all the lawyers” – William Shakespeare, Henry VI, Part 2

networks, to the extent reputational and existential risk can be monitored and contained. It is important for a business law firm to extend its network to provide proactively (that is materially before the client's request) more value to its clients and stakeholders. Global firms will need to evolve further to meet the challenges of a changing legal market and focus on strong business development efforts, meeting clients' expectations regarding the delivery of consistent quality and timely service that come along with the law firm being an international business. To prosper, global businesses, and thus, global law firms, must think about the larger world, embrace the fundamental strategic shift in the way they operate, accept the failures that are a natural part of success, assume greater risk with their clients and be willing to experiment. Simply speaking, business law firms of any size must be able to adapt rapidly to changing markets, cultures and personalities and pivot quickly when markets and behavior change. Indeed, this is probably the key to success of any business in a "free-market" economy and consequently, the key to success for a law firm. If we have learned anything from the financial crisis, we now know how deeply embedded in the economy we are, not above it, and certainly not immune to it.

In this challenging legal and business environment, the mere suggestion that there is an "ethical" vision of lawyering consisting of four core duties that serve as a compass to guide lawyers facing changing global markets and actively interacting with lawyers, businesspersons and others from diverse cultures in transactional and litigation matters is not credible today and, even though, unquestionably, a core principle, it does seem, at the very least, overly simplistic. This is not to suggest that there are not ethical choices to be made and questions of legal compliance within the relevant canons. No doubt, today's best lawyers are not simply providing technical expertise to the question – "is it legal?" but are "wise counselors" that should contribute to the corporate or institutional discussion of whether a course of action is "right." To a large extent, however, the question of "is it right?" is not solely a question of a "moral" or "ethical" sort at all. A lawyer's input as a lawyer should not be exalted, bringing with it the arrogance and false sense of self-importance that has caused society to resent lawyers bitterly. Instead, when the questions "is it right?" and "what should we do?" are asked of a lawyer, they should be understood as really nothing more than the question "does the decision make good business sense?" when considered in the context of the client's objectives, stewardship for its stakeholders and, ultimately, long term-viability and the law. Indeed, when the lawyer as "wise counselor" considers the question of what is "right" and looks at the institutional, political, economic, policy, reputational, ethical, geopolitical, or reputational factors to inform what "ought" to be done, the ought is not a moral or ethical imperative cloaked for protection in terms of the "client's *enlightened* self-interest." Nor need the lawyer's reasons for recommending such actions to a client be based solely on fundamental moral concepts such as "loyalty or transparency or fiduciary duty or respect for individual dignity" as the authors suggest. Instead, the lawyer's recommendation is multi-dimensional and can be fully articulated demonstrating that the action is not only legal but also serves the client's objectives and sustains its long-term viable future. Simply speaking, to be most effective, the recommendations must still make good practical business sense.

For example, just twenty years ago, lawyers were not expected to know how to protect confidential information from cybersecurity threats, use the Internet for marketing and investigations, employ cloud-based services to manage a practice and interact with clients, implement automated document assembly, install expert systems to reduce client costs and facilitate client billing, or engage in electronic discovery. Today, lawyers must master all of

these things and more if they are to satisfy their obligation to be minimally competent and to do so within the boundaries of the profession and the law.³ Such mastery has little to do with moral or ethical imperatives. Instead, a lawyer should keep abreast of changes in the law and his practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject to retain one's license to practice. Consequently, whether you are a managing partner of a global law firm, the general counsel of a multinational corporation, or a partner in a small law firm, it is incumbent on you to train and educate junior lawyers to sustain your practice and serve your clients, not because of an "ethical" obligation, but to improve and expand the legal services you can offer to existing and new clients or provide to your company. Indeed, there is no alternative from a business point of view, because incompetence exposes the lawyer, the client and the corporation not only to liability for negligence and malpractice, but also to reputational damage, or worse, existential risk, from which a services business, such as a law firm, is likely never to recover.

Thoughts On Major Law Firms

With respect to their "Thoughts on Major Law Firms," the authors suggest that major law firms need to find a new balance between the "business" of the firm and the "service" that a major law firm should offer. To find that balance, the authors suggest that firm leadership establish a "strong firm culture" that focuses less on short-term profits and money and encourage partners to renew their "commitment to ethical and policy issues that can inspire lawyers and benefit society." To do so, the authors suggest that firm leadership move away from touting their firm's annual profits per partner, and instead acknowledge the lawyer's "obligations ... to multiple constituencies ... [including] clients' economic and ethical concerns, the profession, the underrepresented and the disadvantaged, and society in general." While laudable objectives for any individual, the authors provide no clear reasons as to why a major law firm, as opposed to public or private corporations, government entities or other institutions, are obligated or better suited to advance ethical values and public policy. Is it that the authors think that lawyers know better than others? In any event, I am quite sure that many non-lawyers, and certainly some lawyers, think that major law firms already wield too much political and social influence.

Leaving aside the question as to whether and why a major law firm should have greater obligations to ethical values and public policy than other institutions, there are certain indisputable facts that cast serious doubts on a firm management's ability to reset a major law firm's culture in the ways that the authors suggest. More importantly, it is not clear whether a major law firm's management should do so.

It cannot be forgotten that law firms are partnerships in which all partners share in the firm's annual profits. These partners work in practice groups or industry sectors that are discrete economic units within the law firm, the partners are encouraged to be "entrepreneurial", they are competitive by nature, and their "success" is rewarded, in large part by the profitability of the firm and their allocated year-end distribution. Critically, these same partners are rarely bound by contract, especially one that contains any material provisions precluding competition. Thus, today, partners are, in every sense of the phrase, "free agents" open to be drafted at almost

³ American Bar Association Model Rules of Professional Conduct

anytime of the year by a firm looking for an individual or group that diversifies the firm's offerings and brings enhanced ability to attract premium work, the resulting fees less subject to rate pressure and, ultimately, greater profits to its bottom line.

This situation is exacerbated by the fact that we live in an age when information about global markets, corporate profitability and individual income are readily available to anyone with a computer. Nor can anyone reasonable deny that for most people financial success is at least one measure of personal success. This is not a trait unique to successful lawyers. Moreover, over the last ten years, the global economy is open to more businesses that now have available to them far more diverse and sophisticated providers of capital that can react quickly and move money freely in and out of markets. So, it should not be surprising at all that these fundamental changes in the way business is conducted and financed have resulted in more specialized law practices, some legal services becoming commoditized and deep segmentation in the market.

Thus, major law firms are simply suppliers of legal services in an extremely competitive global free market with few barriers to entry and significant lateral mobility. Competitive advantages, such as specialized skills or technical expertise are extremely portable. Moreover, while law firms seek to have a long-term existence, their ability to do so is necessarily dependent on short-term profits. Indeed, with each year, the law firm and its partners must begin again, and no one wants to make less the following year.

It is absolutely critical for law firm management to appreciate these facts, but with them comes a certain practical reality. No matter what efforts are expended by a firm's management to instill a sense of loyalty to the firm, a commitment to the profession or a duty to train junior lawyers, lawyers in major law firms are economic creatures that will seek to maximize their financial reward and it is only their own moral codes and character that will have them forego further economic rewards for ethical values, public policy and the good of society.

Concluding Remarks

Lawyers are not warriors or political leaders deserving of Homeric epithets. The legal profession is, and should be, a profession of advocacy, tempered by morality and humility with responsibility to a wide array of constituencies, informed by a sophisticated understanding of business and practiced by individuals guided by their own moral principles and sense of social responsibility. No matter the geography or practice context, the rule of law – while obviously different in various parts of the world – needs not only to be supported but promoted – because it is right and provides stability, allowing for expanded commerce and other initiatives that enhance the common good. If these lawyers are firm leaders or the profession's leading lights, those values will naturally find themselves as fundamental to an entity's culture and, indeed, community-based association tying lawyers and clients to a common social good will likely have positive economic ramifications as well. As a result, during this time of great change in the legal job market and in the way law is practiced, the profession must not only better prepare these newly minted students and lawyers to be expert technicians, but also provide them with the necessary skills to become wise counselors and effective leaders in a global economy. Although teaching students how to think and analyze issues as a lawyer remains the bedrock of a sound legal education and the practice of law, law school should also lay the foundation for their graduates to be able to adapt to a rapidly changing legal landscape that varies across cultures and

their related ethical values and social goals. These are skills that all lawyers need, whether they ultimately practice in a corporate law department, a major law firm or as a sole practitioner. Consequently, the profession, through education, should provide an opportunity to explore other disciplines and participate in externships that allow for the acquisition of a far broader range of skills and knowledge, without becoming a turbo-charged liberal arts program. By providing this diversity of experience, lawyers will become freer, more creative and independent thinkers more capable of adjusting to economic cycles that are shorter and more volatile. The days of a slow-paced immersion into the profession allowing for philosophical debate on other than “bet-the-ranch matters” that go to questions as to how we govern ourselves and property rights in a free society seem, in my opinion, to be over, or at least, significantly on the wane. Those leaders, in whatever institutional context, that fail to see this and do not remain acutely aware on a granular level of the needs of their constituencies and communicate their relevance are now deeply out of touch with the profession and the practice, and run the quite substantial risk of becoming dinosaurs.



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