



REMARKS

THE NEED TO CHANGE THE WAY WE TRAIN LAWYERS

WILLIAM B. LYTTON

CONFERENCE

**“HOW TO REDUCE CORPORATE COSTS AND
STILL WIN YOUR CASE”**

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Introduction of William B. Lytton

Bill Lytton is so very well equipped to address a concern that has become central to the client-lawyer relationship and the theme of our conference: effective lawyering to advance the clients' interests in a day of spiraling legal costs. He serves as Senior Counsel at Dechert LLP and his practice focuses on corporate governance issues.

His experience is deep and varied. He has served as an Assistant U.S. Attorney in Chicago and from 1978 to 1983 was an Assistant U.S. Attorney in the Eastern District of Pennsylvania, serving as Chief of the Criminal Division and First Assistant U.S. Attorney.

Prior to joining Dechert, Bill served from 2002 to 2007 as the executive vice president and chief legal officer of Tyco International Ltd., where he was also chief compliance officer and had responsibility for the Corporate Secretary's office, the Environment, Health and Safety organization, the Public Affairs group, and the Global Security team. He also previously served as senior vice president and general counsel for International Paper, the world's largest forest-products company, where he was responsible for all legal and compliance matters affecting the corporation. Bill worked for Lockheed Martin Corp. as Vice President and Associate General Counsel for the Electronics Sector. Prior to this, he served as vice president and associate general counsel for Business Operations and International Law at Martin Marietta. He joined Martin Marietta as part of a merger with General Electric Aerospace, where he served as vice president and general counsel beginning in 1989.

In addition to his corporate experience, Bill served as staff director and chief counsel in 1985 for the Philadelphia Special Investigation (MOVE) Commission. In 1987, he

served for six months as deputy special counselor to President Ronald Reagan, where he coordinated the White House response to congressional inquiries and an independent counsel investigation of the Iran-Contra matter. He also served as special counsel to President George H.W. Bush on issues relating to the Iran-Contra matter.

He is a former Chairman, American Corporate Counsel Association Board of Directors and currently serves as a Director of the Atlantic Legal Foundation.

Bill Lytton's observations regarding the way lawyers are trained — or not trained — deserve our attention.

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The Need To Change The Way We Train Lawyers

William B. Lytton¹

It is appropriate that we are meeting today at the City Bar Center for Continuing Legal Education because there has been a very significant shift in the way we think about how the law is taught and how the continuing education of lawyers can and should focus on – and provide an opportunity to think about – some of the toughest legal, practical and ethical issues that practicing lawyers have to deal with. I want to focus on these issues in the context of “The Organization Lawyer.”

The Business of Law

First, let’s look at the business of law. The consumption of all types of legal services has boomed with the most recent figures showing that over \$265 billion are spent every year. In 2007, the top 200 firms — known collectively as The Am Law 200 — had combined gross revenue of \$72.5 billion and employed a total of 100,523 lawyers. Average profits per equity partner at the top 50 firms was \$1.379 million, compared to \$926,000 at firms 51 through 100, and \$672,000 at firms 101 through 150. At Am Law 100 firms, average compensation for all partners grew 10.7 percent in 2006. In the period from 2006 to 2007, Am Law 100 firms posted increases of 11.4 percent in gross revenue, about twice the GDP, 7.3 percent in revenue per lawyer, and 13.4 percent in profits per equity partner. These are statistics that almost any business in this country would be proud to claim as their own.

Not surprisingly a lot of people want to become lawyers. But the number of applicants to law schools in the United States has decreased by 22 percent over the past five

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years, from 98,000 to 76,000, while the total number of law schools has increased by about 5 percent. The ABA approved eleven new schools in the past four years, including three in 2008. Many anticipate that law school applications will most likely rise as a result of the reality that investment banking may not be as attractive a career choice as it was just a few months ago.

The Graduates

When they leave law school, and finish with the ancient ritual of the bar examination, law school graduates are distinguished by two characteristics. First, they have amassed huge debt. The nearly 44,000 law students set to graduate in 2009 will have an average of \$73,000 in loan debt from law school and face a grim hiring market. In 2004, the typical total educational debt for both undergraduate and law school was about \$95,000. In 2008, that total debt averaged about \$120,000. With debt like this, it is harder to go to work for low paying jobs that may provide great practical experience. So, the economics often become a powerful incentive to go to work for large law firms that offer large salaries, rather than start in the type of government service jobs that allow young lawyers to get practical experience and significant responsibility early in their careers.

That leads me to the second distinguishing characteristic of recent law school graduates. As they begin their first job as lawyers, and notwithstanding having passed the bar exam, most are professionally unqualified to engage in the practice of law. To be accredited by the American Bar Association, law schools are required to teach certain courses. As a result, law schools focus on “input” measurements, e.g., have the students taken specific courses in torts, contracts etc.? Law Schools also must focus on the pass rate of their graduates who take the bar exam. If the pass rate falls below a certain percentage, the law school risks losing its ABA

accreditation. Other than the ability of the law school graduate to pass a bar examination, most of our law schools, unlike many graduate schools that train other professionals, do not focus enough on “outcome” measurements, e.g. can someone actually integrate all the skills and substantive information taught at law school and effectively counsel and advise a client with real legal issues.

The Report Card

A 2007 study by The Carnegie Foundation for the Advancement of Teaching, entitled “Educating Lawyers - Preparation for the Profession of Law,” was critical of the way that Law Schools are training law students. Their basic criticism was that legal education focuses disproportionately on developing the academic knowledge base, to the exclusion of developing necessary practical skills and professionalism, describing this as a seriously unbalanced learning experience for the student. *“Most law schools give only casual attention to teaching students how to use legal thinking in the complexity of actual legal practice. Unlike other professional education, most notably medical school, legal education typically pays relatively little attention to direct training in professional practice. The result is to prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner, conveying the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of clients.... Law schools face an increasingly urgent need to bridge the gap between analytical and practical knowledge and a demand for more robust professional integrity.”*

The ABA is reviewing their standards for accrediting law schools and is focusing on the way law schools train their students. The ABA Council on Legal Education has organized a Special Committee on Outcome Measures in an effort to refocus law schools from looking exclusively at input meas-

ures and to spend more time and effort on outcome measures. That Special Committee issued a report in July of 2008 in which it acknowledged this “input measures” criticism and examined how other professions train their professionals, as well as how other countries train their lawyers. It concluded that US legal education has lagged behind these others professional fields and countries in using outcome measures.

The Clinical Legal Education Association (CLEA) represents professors who teach clinics and skills courses, and thus whose teaching agenda focuses squarely on the preparation of students for practice. In CLEA’s statement in August 2008 commenting on the ABA’s Special Committee Interim Report, it said law schools at present fall short in preparing students for the practice of law. *“Professional licensure and job placement are certainly measures of a law school’s performance. However, these measures incompletely assess the ability of a school’s graduates to engage in effective law practice. The ability to pass the bar exam reflects only the examinee’s ability to master and apply ‘academic knowledge’ in a traditional testing setting. ...As the Interim Report notes, accreditation of other professional schools involves the assessment of competencies that require different kinds of evaluation, over a longer period of time, in a variety of performance contexts and with several different kinds of record-keeping. Law School accreditation should involve similar evaluations.”*

The Real World

Our practical experience supports these concerns and conclusions. There is general agreement among practitioners that most law school graduates are not professionally competent to actually practice law after they graduate from law school and pass the bar exam. They can certainly be a part of a larger team working on behalf of a client, but rarely would

any law firm allow a newly minted lawyer to sit alone with a client, analyze the complex legal issues and provide sophisticated advice on how to proceed. They simply have not been given the practical skills they need to do the job. Likewise, it is the rare corporate law department that will hire a new law school graduate. Tellingly, many corporate law departments are balking at paying law firms for work done by first year associates

An Academic Solution

Law schools are beginning to reevaluate the way they train their students and there are some notable examples of efforts to provide more practical legal training. Northwestern University Law School is now requiring two years post graduate experience before being accepted into law school. The dean, David van Zandt, is very focused on the Kellogg Business School model and its success. Beginning in 2009, Northwestern law School will also offer a 2 year JD program. I submit that this is partially a recognition of the lack of value in the third year of law school, as well as the heavy extra cost and debt incurred during that third year by many law students.

Vermont Law School is considered either number 1 or number 2 in environmental law studies and energy law studies. I serve on that school's Board of Trustees. While providing its students with the traditional "input" courses, the law school has an intense focus on hands-on training so that their graduates can add value from day one after they pass the bar. This is especially true in the area of energy law.

New York University Law School has a "Lawyering" course that tries to simulate real life practice experiences.

Clinical programs are very helpful, but often seem more like an afterthought rather than part of a fundamental

commitment to train all law students in the practicalities and realities of counseling a client with real and complex issues. Moreover, one of the problems with even these efforts is that many law professors have little or no real life professional experience in the modern practice of law. Indeed, tenure as a professor of law is rarely available to lawyers who have chosen a career in the active practice of law as opposed to the scholarly pursuit of an academic career.

This raises the question of how realistic clinical programs, as well as other courses offered in many law schools, are in training law students for what the folks who actually practice law do every day. But it also points to the opportunity for lawyers in practice to become more involved in law schools to help provide that type of real world experience and training. At a “Town Hall” meeting that I moderated for the Association of Corporate Counsel in October of this year, the Dean of Stanford Law School lamented the lack of involvement of his alumni in the law school curriculum. I suggest there is both an opportunity and a responsibility to become involved.

Law Schools and the ABA are in the midst of trying to figure out whether they should remain centers for scholarship, training the next generation of law school professors and people who bring a well honed analytical skill to academic issues, or whether they should be more like business schools or, dare I say it, vocational education schools, turning out practitioners who can hit the professional ground running.

The Corporate Context

Let me put this in the context of the realities of the modern practice of law. The individual human being who is “the client” is an increasingly rare creature. We used to see them a lot. We could sit across the table and talk to them, find

out what their goals were, find out what they wanted to do, and have them tell us their decisions after we presented to them our advice and their options.

More typically these days, the client is an organization. These organizations can take the form of a government entity, an NGO or a publicly traded corporation. More and more, lawyers will at some point in their career be employees of as well as lawyers for an organization. The rest of us will probably have as a large part of our practice the counseling of clients who are organizations.

The corporate context presents challenges that the lawyer with a human being as a client may not face. Organizations are incorporeal legal fictions. You can't sit across the table and have a conversation in which the client tells you what he wants to do. Someone may be empowered to speak on behalf of the organization, but often that person has other people in the organization who are at a superior position, and who are also empowered to speak on behalf of the client. Sometimes people empowered to speak on behalf of the client want to do things that the lawyer may not think are in the best interests of the client. This presents new challenges for the organization lawyer when the person making the decision is also your boss or someone who can have a major impact on your future career, opportunities, assignments and salary. The problem is that reasonable minds — or powerful people — may honestly differ as to what in fact is in the best interests of the client.

An organization lawyer not only has different responsibilities and risks than other non-lawyer employees, but also they have increased personal liability precisely because they are lawyers. In-house counsel have realized their aspirations and have become an integral part of the management team. At the same time, and very likely as a result, they have become

the focus of media, congressional and even regulatory and prosecutorial interest when things go wrong in their companies. Over the past decade or so when a variety of corporate scandals filled first the news media, and later the courtrooms, the question was often asked by commentators, regulators, prosecutors and judges, “Where were the lawyers?” The underlying assumption was that lawyers owed a professional and a legal duty to have prevented the things that went wrong. And, if things did go wrong and lawyers were in the organization, the harsh light of scrutiny turned towards them. If the lawyer is in the room when the finance team is discussing and makes a decision on an accounting issue, and even though the lawyer may not have been an expert or even very knowledgeable in the area discussed, the lawyer may be held legally accountable. The defense that he was merely an ignorant bystander rather than a decision maker on a non-legal issue is unlikely to be viewed after the fact as very persuasive when the decision has resulted in financial losses, media attention, congressional hearings and prosecutorial action.

Lawyers have become the focus more and more of enforcement actions, civil law suits and criminal prosecutions relating to their jobs as in-house counsel. In the six years immediately prior to Sarbanes Oxley being enacted, DOJ brought only five criminal actions against in-house counsel. Since SOX, and as of July 2007, there had been 1,236 corporate fraud convictions — including 23 corporate counsel or attorneys.

An organization lawyer may be called upon to give legal advice in a variety of situations — or he may need to give legal advice even if no one asks his opinion. If the issue is possible illegality, that’s usually pretty easy to spot and pretty clear that he must take the issue higher within the organization. But, it is more difficult when it is a question of how much legal risk to accept. It then becomes a matter of

judgment as well as experience and training, while weighing competing and legitimate interests. How and when do you decide that your judgment and opinion are superior to that of your boss or other people who may have more experience and who can control your income and your future?

The easiest counseling is at the beginning of a proposed deal or action. Someone comes to you and asks you to draft a document, or structure a deal, or simply asks your advice, with the implicit understanding that it be done in compliance with the law. It will be the very rare case indeed where you will be asked to or expected to violate the law. It is the cases of alleged criminal activity that get the most attention in the press and in the courtrooms, but they are very much the extraordinary exception to the day-to-day challenges that an organization lawyer faces. In the careers of most lawyers, wherever you serve — unless you are consigliere to the Corleone Family — you will not come upon a client who intentionally and knowingly decides to violate the law.

More common are two situations. First, the client does not know what the law requires, and because of that ignorance, may propose an action that could violate the law or a regulation, or otherwise put the company at some legal risk. This is especially true in the area of complex regulation, such as environmental regulation (17,000 pages in the CFR), the tax code (12,000 pages) and the area of government contracting. The actual statutes involved in each of these areas are complex enough, but the regulations implementing them have grown to gargantuan proportions and are typically non-intuitive. As someone trained in the area, say, of environmental law, you may often find that it is ignorance of the law that you are dealing with — not folks intent on poisoning the air or water and knowingly and intentionally risking jail in the process.

A second common situation is one in which the client wants to do something perfectly legal, but perfectly stupid. Usually, the short term ease of the proposed solution ignores the long term risk to the organization of the decision. Even worse, what today may be a dumb but legal decision may be viewed many years from now as not just dumb but illegal as well — as perceptions and attitudes change, public and media pressure shift focus or intensify, and prosecutors, regulators and courts discover new theories by which administrative, civil or criminal responsibility may be alleged and prosecuted. For example, the headline in *The Wall Street Journal* on September 24th of this year in the midst of the failures of some large banks and institutions, reflecting the impact of public opinion on the decision of whether to charge someone with a crime, said, “Pressure is on FBI, Regulators to Hold Executives Accountable.” Translation: prosecute executives and send them to jail.

It is in these situations that most lawyers will find themselves needing to provide counsel, guidance and alternative solutions to their clients that may — within an organizational structure — be both personally and professionally challenging. First, the client needs to feel comfortable and confident that his conversation with his lawyer will be confidential and protected by the attorney client privilege. If he fears that what he says may become public and expose him to public ridicule, or possibly worse, then he will be much less likely to have a candid and timely conversation with his lawyer to make sure that any proposed action is lawful and does not expose the organization to unacceptable risk. Second, many of these situations will occur in the context of pressure to meet internal corporate budgets or profit goals, and publicly announced earnings targets for the stock. It is not uncommon for managers in a company to be told to “make your numbers.” That can be a typical and perfectly appropriate and lawful directive that assumes that everyone will act in a way that will not place the company at legal risk.

Of course, context is everything. If someone asks you to go to the bank and get some money, are you being asked to use your ATM card — or a gun — to get the cash? When Bernard Ebbers was being prosecuted in January of 2005 for crimes connected to his role as CEO of WorldCom, the federal prosecutor in his opening statement said of Ebbers, “When he said ‘hit the numbers,’ it was a command to commit fraud.”

The organization lawyer has to understand that context, anticipate what is really behind the corporate directive, comprehend the motivations, understandings and plans of those who are trying to carry out the corporate directive, and be sensitive that whatever he does may be viewed years later in a different context if things do not go well. The success of an organization lawyer will be measured by how well he can function — as a lawyer with special responsibilities — within the culture of the organization, how he navigates the politics that exist in any group larger than one person, and, his judgment, integrity, and sometimes courage, as he determines when and how — not whether — to fulfill the unique responsibilities as a lawyer.

With all of this in mind, let me offer a couple of hypothetical situations that would not be unusual for an organization lawyer. First, you are sitting in a senior management meeting and something about which you don’t know much of anything about is being discussed — financial issues, accounting issues or engineering issues — do you stay silent? leave the room? ask that someone explain what they are talking about? Second, your boss asks you advice about a proposed action — the action is not illegal; but, you think it exposes the client to too much risk; you advise against it; your client decides to go forward notwithstanding your advice; what do you do? Write a memo to the file about how your boss did not follow your advice? Volunteer the information to a member of the board? Seek the opinion of outside counsel? What if outside counsel agrees with you? agrees with your boss? Does it

make a difference if your concern and advice were based upon your analysis of the law, the business consequences, or corporate social responsibility issues?

These are difficult questions and there may be no clear answers, but they are the types of the challenges you may face working as an organization lawyer that you would not face if your client were a real human being sitting across the table from you. And, these are the type of real life examples that our law schools should be training the new crop of lawyers how to analyze and answer. And they are appropriate topics for CLE programs as well.

Lawyers Should Train Lawyers

As this brief review of the realities of practice that many lawyers face everyday demonstrates, the practice of law continues to evolve, and the education of our lawyers must evolve as well. I do not think that the law firm community or the law departments of corporations — as the customer of the law schools — are as actively engaged in this rethinking of legal education as they need to be. Law firms and corporate law departments, as well as government agencies, NGOs and other practitioners are the customers of our law schools. We buy their products — their graduates. There seems to be a general agreement that the product that the law schools turn out is not meeting our requirements. As consumers, we would not accept the idea of buying a car or a computer that still needed significant work before it would function at an acceptable level.

In any commercial enterprise, the “voice of the customer” is an important element in deciding what product to make and provide. My message today is to encourage all of us — the customers — to become more involved and to let our voice be heard as the law schools retool their manufacturing processes. We should be providing to the law schools the type

of real world hypotheticals that the new lawyers will face and for which they need to be prepared. We should also be in the law schools, providing real life hypotheticals and practical counseling situations that the students will face in their careers. The worst and thorniest problems that they will have to deal in the real world should already have been discussed and considered within the law school curriculum. The viability of the law schools' products is critical to the success of our enterprises and our customers — the clients. Our CLE programs likewise need to continue to tee up the most difficult issues that the practice of law presents to us every day. Our training can be input focused, such as explaining what types of payments are not allowed under the Foreign Corrupt Practices Act (FCPA). But it also needs to be heavily geared to output issues such as what you do in tough, real world situations. Anyone involved in doing business outside the United States, and especially in countries like China where most enterprises may be considered part of the government, can come up with nightmarish scenarios and real life examples that their business people have had to deal with on the ground as they try to navigate the shoals of the FCPA. To be taught what the law prohibits barely scratches the surface of the real life issues that living within the law can present in the modern global business world.

All of us need to be aware of and thoughtful and active contributors to that movement, that discussion and the new approaches that will evolve.

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