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Corporate Governance and a Business Lawyer's Duty of Independence*

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I. INTRODUCTION

This short essay addresses a topic important to both corporate governance and, perhaps more importantly, vital to the satisfaction that we lawyers can draw from our professional lives: our conception of the duties of a lawyer when she engages in advising and assisting corporate clients. While the topic is a bit abstract, it has large practical implications.

For more than two years newspapers and television news programs have been rich in stories about corporate abuse, about repeated failures in our system of corporate governance, and, more positively, about attempts to improve the quality of controls that we deploy to assure that business corporations operate responsibly within the law. Financial scandals are, of course, a more or less permanent feature of our market economy. They wax and wane, fed by cycles of manic enthusiasm and suppressed by periods of listless stock prices. But while financial fraud is neither new nor surprising, the U.S. public was nevertheless deeply shocked by the sudden implosion of Enron Corporation and the unmasking of massive fraud at WorldCom. These were not only huge and important companies; they were taken to be prototypes of modern business enterprise. Each company was a growth-oriented innovator. Each company

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had spectacular success and was closely monitored, if not lionized, by Wall Street and the financial press. But the journalists and financial analysts had it all wrong. In fact, these firms were paragons of deception. The scale of the deceptions and the breadth of the individuals who seemed complicit in them—from corporate directors to auditors, from bankers and analysts to lawyers—was very alarming. To many, these shocking events looked uncomfortably like systemic failure of one of the core legal institutions of our capitalist economy.

The major reform step was Congress' enactment of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley). Sarbanes-Oxley was wide-ranging, but largely targeted two groups: corporate directors and auditors. Its major thrusts were, first, to restrict the range of services that audit firms may offer to their audit clients and to subject auditors to regulatory oversight by a new agency, the Public Company Accounting Oversight Board. Secondly, Sarbanes-Oxley created substantive federal regulation of some elements of corporate governance and mandated financial certification obligations of senior corporate officers. These are significant changes in corporate law. In addition, the major stock exchanges responded to the public crisis in confidence by creating new listing standards that strengthen independence requirements for outside directors of public firms.

In these reforms, substantial attention has been paid to the independence of auditors and corporate directors. This short essay will not address these changes, although they are important and in some respects capable of sustaining real debate as to whether we are imposing excessive costs on America's business enterprises.

Instead, this essay will focus on another profession that had an important role in facilitating the transactions that brought about these corporate failures: business lawyers. This essay does not intend to indict the lawyers at the law firms that facilitated the Enron transactions or the in-house lawyers at Tyco International Ltd. Nor will it address whether the lawyers for Adelphia Communications Corporation were complicit in the nondisclosure of the unusual joint borrowing that led to the bankruptcy of that firm. The careful review of the particulars of any case is a task better suited to other forums. In addressing the important role of lawyers in corporate governance, this essay is limited to the *conception* of the role of business lawyers. To whom do business lawyers owe duties and what is the nature of those duties? Rather than discussing external controls of the legal profession, such as licensing and lawyer disciplinary rules or processes, the topic of this essay is the *internal or personal* controls that a business lawyer may or should feel. In addressing the conceptions that lawyers hold of their professional identity and loyalties, the topic, in some respects, appears ephemeral. But while discussion of ideals may appear abstract and even ephemeral, it is certainly not unimportant. The ideal of our role in society that we lawyers choose to embrace will affect our behavior.

II. THE INCREASING DOMINATION OF THE ZEALOUS ADVOCACY IDEAL

The loyalty that a lawyer owes extends beyond the duties to keep client's confidences, to give honest, competent advice unaffected by conflicting interests, and to exercise energy and imagination in pursuit of clients' lawful ends. Certainly these are a lawyer's core obligations in representing a client. But there is another aspect of a lawyer's duty that we do not much notice and have not for a long time—the duty of independence. The duty of independence is the lawyer's duty *to the legal system itself and to the substantive values that it incorporates*. This duty has its greatest role not in the defense of clients in court, but when business lawyers advise their clients with respect to prospective compliance with regulatory or private law and in structuring and disclosing material transactions.

The value of professional independence of judgment has always been reflected in our professional identity, but it has never been central to it. As lawyers, our main and favorite identification is as the loyal, energetic, and imaginative defender of clients: as zealous advocate.

Our role as zealous advocates is the root of our claims to nobility as a profession. We reserve our greatest public admiration for the defenders of the innocent in the face of popular hysteria or hatred. It is the willingness of John Adams to risk the hostility of his neighbors in defending the British soldiers who fired on Americans at Bunker Hill or the risks assumed by the heroic defenders of the Scottsboro Boys that earn respect for all lawyers. Atticus Finch, of *To Kill a Mockingbird*, is a hero because he was willing to bear the burden of animosity from his townspeople as the price of vigorously defending the helpless outsider Bo Radley. These zealous advocates are a major source of pride to lawyers.

The zealous advocacy ideal envisions the lawyer in a litigation setting. That setting, however, builds in powerful checks on the costs of the advocacy ideal. An adversary is represented by a lawyer. There are mandated discovery rights provided to both sides. Truth is tested by cross examination and a disinterested and expert judge will decide disputed questions. These factors make the costs of the zealous advocacy model in the litigation setting reasonable. But when the zealous advocacy mentality is adopted by business lawyers advising on law compliance, transaction planning, disclosure, and other advisory matters, none of these counter-balancing forces are present. In the business context, adoption of the zealous advocacy ideal is likely to give rise to unacceptable social costs.

In the short run, at least, a skilled lawyer who is willing to facilitate advantageous transactions that do not clearly and unarguably violate the law is useful to some clients. But the relative indeterminacy of many legal commands creates a very broad range over which a lawyer's imagination can roam. Unless legal advice and advocacy are rooted in *principles finer than zealous advocacy*, that conception can easily degenerate into socially wasteful conduct.

Once upon a time, a clearer vision of the lawyer as public citizen constrained the excesses of zealous advocacy. But the balance between the professional roles of advocate and responsible moral actor—as an independent counselor—has atrophied. The social forces shaping the environment in which lawyers now practice have reduced their capacity to act as independent counselors. Similarly, the willingness of the legal profession—as expressed through its official organs (mainly the bar associations)—to give meaningful support to a duty of moral autonomy or independence has declined.

III. THE HISTORICAL CONCEPT OF LAWYERS AS INDEPENDENT ACTORS

Dominated as we are today by the advocacy conception of what loyalty to clients means, it probably seems strange to consider the nature or scope of a business lawyer's duty of independence. But it was not always so. The old Canons of Professional Ethics of the City Bar Association of the City of New York, for example, reflected the value of a lawyer's moral autonomy quite explicitly. They stated, for example, that "[t]he office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicanery."¹ And, in the next sentence: "[A lawyer] *must obey his own conscience and not that of his client.*"² Under this principle, a lawyer's moral scruples *should* affect the decision to deploy a legal strategy. It is the lawyer's moral judgment, not that of the client, that acts as the final safeguard against lawyer involvement in socially destructive activity. In the end, clients may do as they choose. They may risk breaking the law. They may engage in action that violates the discernable spirit of the law, while arguably keeping to the letter. But business clients do not deserve the assistance of a lawyer in accomplishing such actions. Of course, lawyers owe loyalty to clients. They must be kept fully informed. Client confidences must be kept inviolate. They may at any time discharge a lawyer. But, in the vision that underlies the old City Bar Association code, lawyers are seen not as amoral tools of their clients, but as professionals who are morally responsible for the results that their actions help to bring about.

This is a morally attractive view of professional responsibility. It is reflected quite powerfully in the text of Canon 32 of the original 1908 Canons of Ethics of the American Bar Association:

No client, corporate or individual, however powerful, nor any cause, civil or political, however important is entitled to receive, nor should any lawyer render, any service or advice *involving disloyalty to the law* . . . or deception or betrayal *to the public* . . . [T]he lawyer . . . advances the honor of his profession and the best interest of his client when he renders service or gives advice

1. PROFESSIONAL RESPONSIBILITIES OF THE LAWYER: THE MURKY DIVIDE BETWEEN RIGHT AND WRONG 246 (Nina Moore Galston ed., 1977) (quoting Canon 15).

2. *Id.* (emphasis added).

tending to impress upon the client, *his undertaking exact compliance with the strictest principles of moral law*. He must also observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and entitled to advise as to its validity and as to what *he conscientiously believes to be its just meaning and extent*.³

This statement envisions lawyers who are not simple zealous advocates of their clients' legal interests, limited presently only by a command not to take frivolous positions. It calls upon lawyers to exercise independent judgment concerning the detectible spirit animating the law (that is, "what he conscientiously believes to be its just meaning and extent").⁴ It also encourages a lawyer to "advance . . . the best interest of his client" through impressing upon the client "exact compliance with the strictest principles of moral law."⁵ Clearly, lawyers who satisfy these ideals were seen as independent actors: counselors who conceptualized their mission as guiding clients to comply with what these experts understood to be the best interpretation of the law.⁶

Thus, the assertion that lawyers have a duty to substantive legality that should act as a constraint upon the advice that they give has an impeccable pedigree. Today, however, the formal organs of the profession fail to recognize this history or to acknowledge a professional duty of independence. The American Bar Association (ABA) has recently reconsidered and revised its Model Rules of Professional Conduct. Rule 5.4 deals explicitly with the "Professional Independence of A Lawyer."⁷ But instead of grappling with the subtleties of a duty that requires loyalty to clients *and* to substantive law, this rule addresses the cartel issue of a lawyer's ethical obligation not to share fees with a non-lawyer.⁸ The ABA's Rule 2.1 does state that when advising a client

3. CODE OF PROF'L ETHICS Canon 32 (1908) (emphasis added); *see also* Susan D. Carle, *Lawyer's Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1, 18-26 (1999).

4. CODE OF PROF'L ETHICS Canon 32 (1908).

5. *Id.*

6. Robert W. Gordon, *A New Role for Lawyers? The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1209 (2003). Professor Gordon refers to this model of the business lawyer as the wise-counselor model, and about it correctly says:

The "wise-counselor" vision of the lawyer's role found its way into the Joint Report prefacing the ABA's 1969 Model Code of Professional Responsibility and portions of the Code itself; and according to Erwin Smigel's 1964 Study of Wall Street law firms, had been completely internalized by partners of those firms.

Id. (citations omitted). Since the 1970s, this conception of the wise-counselor, lawyer-statesman has been in decay. It is no longer recognized by most corporate lawyers as a norm. It has almost no institutional support in the rules and disciplinary bodies that regulate the profession. Some academic lawyers still support some version of it, and so too do some judges and regulators. It resurfaces on occasion after business disasters such as the savings and loan and Enron scandals. The SEC, IRS, banking regulators, and the courts have sporadically revived it and brought enforcement actions in its spirit. Yet, even where it still has some residual influence there are no effective sanctions behind it.

7. MODEL RULES OF PROF'L CONDUCT R. 5.4 (2003).

8. *See id.*

a lawyer “may refer not only to law, but to other considerations, such as moral, economic, social and political factors that may be relevant to the clients situation.”⁹ But compare this empty permission with the statement of the 1908 Canons just mentioned: “The lawyer . . . advances the honor of his profession and the best interest of his client when he renders service or gives advice *tending to impress upon the client, his undertaking exact compliance with the strictest principles of moral law.*”¹⁰

Closer to the subject of our concern is new Rule 3.1 which mandates that a lawyer shall not bring or defend a proceeding unless there is a non-frivolous ground upon which to make the assertions that are required in such proceeding.¹¹ This rule relates to litigation and thus falls outside of the scope of my concerns, which are with advising clients with respect to legal compliance and transaction facilitation. But, even as a litigation constraint, it is pretty thin gruel. To advance a “frivolous” position is simply an admission of failure of professional imagination and skill.¹² Such an argument can gain nothing, except sometimes delay. The substantive commitment the legal system should seek and expect from lawyers, certainly in the advisory role, is a commitment not to aid clients in defeating or evading the reasonably discernable intent of law.

Thus, the modern rules reflect our modern perspective. Lawyers are seen as zealous advocates with few duties to the public other than refraining from deceiving the court, lying on behalf of clients, or violating or facilitating the violation of law.

IV. THE CHANGING CONDITIONS OF LEGAL PRACTICE

How do we explain this movement from the bar’s acknowledgement in the early and mid-twentieth century of the moral autonomy of lawyers as a condition that co-existed with a lawyer’s status as a loyal agent of her client? The answer lies not in the profession itself and its organization, but in the social conditions in which lawyers practice their craft. These circumstances differ vastly from those of forty or fifty years ago. Today, lawyers in private practice are more dependent upon their corporate clients and do not typically possess the leverage that lawyers previously had with such clients. The private practice of law has been reshaped by changes in technology and ideology.

It would be difficult to exaggerate the impact of changes in information, computation, and communication technologies over the last thirty years. These are primary drivers of change. In large measure, for example, information processing and telecommunications technology account for the restructuring of

9. *See id.* R. 2.1.

10. CODE OF PROF’L ETHICS Canon 32 (1908) (emphasis added).

11. MODEL RULES OF PROF’L CONDUCT R. 3.1 (2003).

12. *See id.*

the legal profession into one dominated by the national and even global firms. These mammoth law firms, in turn, account for a great deal of the changed incentive structures that face business lawyers in their daily professional lives today. While in an earlier age partners tended to personally know the work of other partners in their firm, for many firms that is not possible today. Formal, and sometimes flawed, techniques must be devised to link pay to some measure of productivity among partners. Thus, in part because of changes in technology that permit huge firms to be managed by more impersonal systems, the modern business lawyer is often more dependent upon the clients that produce his billings than was his predecessor of a generation ago.

But technology is not the only fundamental force that has created a radically different environment for the business lawyer today. The ideology that shapes our institutions has changed too. Over the last forty years a remarkable evolution across the spectrum of our economic activities has propelled a move towards ever greater reliance on market forms of regulation. The expansion of market relations—and the concomitant erosion of regulatory or other non-market means of structuring or constraining voluntary human interactions—has doubtlessly been of elemental importance. It affects the practice of law because it affects almost everything we do.

Thirty years ago a great chunk of our economy was subject to pervasive legal regulation, often including regulation of entry and price. The oil and natural gas industry, electrical utilities, air transportation, truck and rail transport, telecommunications, and financial services, from stock brokering to the acceptance of demand deposits, all were subject to fairly pervasive regulation. Government regulation *sought* to protect the public interest, but often had the *effect* of limiting price competition and innovation.

Towards the epicenter of the old-regulated economy sat professional service firms. These firms, usually relatively small and local in character, tended not to be defined as businesses at all, but rather as professional firms. With their specialized knowledge, licensing requirements, and self-governing apparatus, professions enjoyed the greatest protections against market competition. Professional organizations, or in the case of the law, the courts, could and did limit entry and competition. Those offering services were “members” of the bar who could be disciplined and even expelled from membership. Competition was real but muted. It was, for example, not uncommon for local bar associations to publish suggested professional fees for simple services—a will, conveyance or divorce, for example—thus enabling the local professional community to moderate, if not avoid, price competition. Advertising by lawyers, another form of competition, was generally prohibited. Competition, to the extent it existed, was local. Very few firms had offices outside of the jurisdiction of their founding.

In this world, lawyers’ professional relationships with their clients tended to be more stable. There were benefits to lawyers and to clients in this stability.

Lawyers had specific information about their clients that was useful in rendering legal advice efficiently and effectively. They had relationships with client personnel that, because they were long-standing, involved bilateral trust. In this world, private practice lawyers often had greater influence with their clients than they tend to have today. Clients were more stable as well. They too existed in a less competitive world and one in which lifetime employment was widely an expectation.

Of course, wherever there is trust there is a possibility of abuse. In the case of the lawyer-client relationship, greater client dependency could be used by lawyers to extract higher fees. But the relationship-based system also created incentives for moderation in billing. A client was a long-term source of revenue that should not be endangered by short-term excess. Importantly, the relationship between lawyers and their corporate clients also provided a basis for counsel to help shape the conduct of his client in ways that offered greater assurance of compliance with legal standards.

In the public discourse of the 1960s and 1970s, the socially unattractive features of the regulatory system—price fixing, rent extraction, and competition restriction—came to dominate its attractive features. Beginning then, and accelerating with the 1980 presidential election, our view of good public policy increasingly shifted toward a more market-centered view. All of the huge regulated industries mentioned above—telecommunications, banking and finance, transportation, oil and gas, and even power generation and distribution—gradually became subject to free-market competition, including takeovers and restructurings.

While professional firms were not the main targets of reformers, the “debunkers view” of professions (as chiefly a conspiracy to extract benefits) has become more widely accepted, especially by academic economists and sociologists. In law, too, more competition seemed like a good thing.

The shift to a market ideology impacted business lawyers within their profession and indirectly through its effects on clients. Clients faced what seemed like ever more competitive markets and were managed by people who, once the mid-1980s and early 1990s arrived, enjoyed stock price-based incentive compensation. More competitive markets and more highly incentivized corporate officers might, all else remaining constant, be expected to lead to greater pressure on business lawyers to facilitate legally marginal transactions if those transactions might increase stock price or otherwise benefit managers. Of course, the zealous advocacy conception of the lawyers’ role could provide cover for such help, so long as some cockamamie story could be dreamed up. Thus, in the Enron case, for example, lawyers were apparently able to take the view that a transaction that in economic substance plainly constituted a borrowing, nevertheless could be treated as a sale.

Finally, the growth of “in-house” legal departments since 1965 contributes to the radical transformation of the conditions of business lawyers’ professional

lives. This build-up within a client of specialized legal expertise, for which clients traditionally had depended upon private practice lawyers, had the inevitable effect of reducing client dependency and eroding relationships. Business clients began to bring to the purchase of legal services the market rationality that we expect business purchasers to bring to the acquisition of all required inputs. In the new world that evolved—of transaction-based assignments, beauty contests, and litigation budgeting—the incentives of lawyers, as well as the incentives of clients, have been altered.

Equally important, except in special cases, is that inside counsel has often come to fill the role of senior advisor to management that in the traditional system was filled by the senior-most partner of the corporation's regular outside counsel. These senior lawyers, with long institutional connection to the corporate client, wide experience in business and law, and personal relationships not only with senior officers but with board members, were uniquely situated to influence clients on significant matters with legal compliance implications. Their incentives to counsel moderation were strong. They were nearing the end of a successful career. They were not compensated with stock options. Their interest was in maintaining the long term health of the enterprise so that it would continue as an important and stable client of the law firm. Except in rare instances, these senior statesmen with institutional intimacy with the client are gone from the scene. They have been replaced by the inside general counsel as the primary legal advisor to the chief executive officer and to the board of directors. But general counsels are members of the management team and thus, while they may have better access to information than earlier advisors, they are typically less independent.

V. THE DANGER OF LEGAL PRACTICE AS COMMERCIAL ENDEAVOR

Responding to the fundamental forces of change mentioned above, the legal profession has evolved into a more thoroughly commercial endeavor than it was forty years ago. No doubt much has been gained, but certainly at a cost.

We do not have to speculate to see where a profession committed only to facilitating private advantage, under even implausible interpretations of ambiguous law, might take us. Even before Enron and its complex bank-assisted financing showed us where mere technical compliance with accounting and disclosure standards could get us, the business scene provided good examples. No example is clearer or more painful than the practice of lawyers and accountants creating tax shelter "products" within large accounting firms. Congressional pressure has caused most, but not all, of these firms to finally withdraw from this business. Nevertheless, the practices that evolved in the creation and marketing of tax shelters demonstrates the kind of advice that can be expected when professionals lack a commitment to substantive legality and have an economic incentive to be "imaginative."

The major accounting firms and some investment banks created Research & Development departments to discover and exploit every ambiguity or technical flaw in the tax law in order to generate tax advantages. In principal, this is not a questionable activity. Creating securities, for example, that are tailored to the clients funding needs in a tax efficient way is productive work. What is questionable is the willingness to make extreme substantive judgments. These judgments appear sometimes to be hyper-technical and literalistic, even when it is readily apparent that the literalistic interpretation is inconsistent with the intent of the statute or regulation derived from the body of law taken as a whole. Once such a new “product” is designed by the firm, it is then actively marketed, often on a contingency fee basis.

A couple of years ago I was told by the general counsel of a Fortune 500 company that one of the then “Big 5” accounting firms had approached her firm to offer a new tax shelter opportunity with the following surprising sales pitch:

We have developed a tax loss opportunity. We can arrange for a legal opinion that this transaction qualifies as a legitimate business loss. We will allow you to participate only for a fee that involves our sharing a very substantial percentage of all tax savings you realize (with a minimum). We must price this product aggressively because we believe that we can only sell a few of these as the IRS can be expected to close this opportunity down once it learns of it.

The firm wisely declined to participate in a tax shelter that it had reason to know was not intended by law and was inconsistent with the discernible policies upon which the law was based. But in doing the right thing, the firm was putting itself at a competitive disadvantage to others who were willing to act as amoral technicians.

Missing from this activity is any notion of the professional as possessing an element of loyalty to the law itself, or to the discernible spirit of the law. Abusive tax shelters result because the professionals involved exercise too little *self-restraint* in deploying their skills. In this instance it is not difficult to see why a lawyer might be tempted to endorse unreasonable interpretations of law. The firms that design and market these devices are *financial partners*, not independent professionals. Their professional judgment is subject to the extreme gravitational stress of a proprietary share of the money that the most extreme deployment of imagination can generate at whatever risk.

VI. THE LAWYER’S DUTY OF INDEPENDENCE

Generally, the stories of abusive tax shelters with their legal opinions designed to deflect criminal prosecutions may seem an unlikely future scenario for the business lawyer. Established law firms have been far more responsible in passing upon the legality of tax shelters than have auditing firms. But recent experiences at Enron, Adelphia, HealthSouth Corporation, and others certainly

suggests that the commercial world in which lawyers operate today too often creates incentives for business lawyers to allow themselves to become enablers of their clients' marginal activities. Of course, no internal conception of social role will affect the behavior of a lawyer who decides to engage in fraud or to assist in it. The very vast majority of lawyers, however, will not knowingly abet a fraud. They will do the right thing if two conditions are present: they know what constitutes right behavior and it is not excessively costly to do the right thing. What constitutes excessive cost is of course a very personal and complex question, but knowing what constitutes the right action is foundational.

The conception of a lawyer independence is not canonical. It is the result of individual consideration. It is for everyone to formulate the principles that define the outer limits of your zealous advocacy. Personally, I define my conception through three chief attributes.

First, a lawyer's personal commitment to the law and to a just legal system should restrain him from giving his assistance to a project that appears to him substantially more likely than not to violate the requisites of law, even though some non-frivolous argument to the contrary may be made. As we have acknowledged, the choice to act or not belongs to the client, but at some point the independent lawyer must disassociate himself from action that he believes, in the exercise of his informed professional judgment, is quite likely to violate the applicable legal standard. Professor Geoffrey Miller and I, in some joint work undertaken with the American Academy of Arts & Sciences, have posited a test previously referred to: the discernable spirit animating ambiguous law. An independent legal professional's primary commitment should be to this discernable spirit that animates the law.

Second, because an independent legal counselor, while an agent of others, is also an autonomous moral being, she ought not associate herself with legal action that constitutes unduly harsh or oppressive behavior. It is not the office of a lawyer to be an instrument of repression, even when it is a legal right that is used to oppress. The whole of equity jurisprudence can be cited for the proposition that a legal right is not in all circumstances the ultimate value of our legal order.

Third, professional independence requires that a lawyer counsel her client on ways and means to advance their interests while satisfying the underlying goals of the law or seeking an efficient adjudication of a dispute. A lawyer exercising sound independent professional judgment, for example, will not use the machinery of law for the purpose of imposing costs on an adversary.

VII. ACHIEVING PROFESSIONAL INDEPENDENCE

If the competitive pressures of the last forty years have indeed forced the ideal of lawyer professional independence to the deep, almost unseen,

background, why should we care? And if we do care, what steps, if any, can we take? Lawyers ought to care about our ability and willingness to give independent legal advice to business clients for two reasons. First, legal advice that goes through the discipline of an independent counsel's self-critical evaluation is likely to be better legal advice to the corporate client. Second, the life of a lawyer who subjects her legal practice to this discipline will be a more satisfying and worthwhile professional life.

First, and most basically, what arguments can support the happy thought that lawyers who subject their work for business clients to the discipline of their own independent review, will, if all other factors are held constant, tend to give more useful advice to their clients? Business clients are repeat players in most of the important contexts in which they have significant legal problems. They have ongoing relationships with government regulators, customers, suppliers, partners, joint-venturers, capital markets, etc. These relationships and the firm's reputation are valuable assets. Every action or dispute that affects the future of these relationships is likely to be optimally resolved only when appropriate weight is given to that fact. The zealous advocate can get in the way of a productive long-term relationship.

A legal counsel who views herself as an independent professional adds utility by helping her client see the reasonable limits of ambient legal ambiguity so that mutual satisfaction from important relationships can be achieved. An independent counselor never abandons a commitment to substantive legality. She will therefore ask what client action would most advantageously conform the client's activity to the principles underlying the relevant legal rule and protect future utility from the legal relationship at risk. The zealous advocate, on the other hand, asks whether there is any colorable argument that can be made to support an advantageous action. This approach—call it a litigators stance—is shared, for example, by the accountant who invents abusive tax shelters, the lawyer who satisfies the aggressive opinion shopper, or the corporate lawyer who is willing to follow accounting technicality to call a loan a sale. This kind of advice may be an unavoidable stance in the one-shot litigation context, but it is dangerous to a business client in other settings.

In many instances, zealous advocacy attitudes will destroy or at least threaten states of mind that allow client firms to make relationship specific investments that produce value over time. To a substantial extent, large business corporations function on trust as well as on crisply defined legal rights. Trust is a *valuable asset* that emerges from a perception of shared norms of fair dealing, from patterns of prior fair practice, and from an expectation of future interactions. The diffusion of a zealous advocate mentality *within* a business firm, for example, would certainly erode trust and, in the long run, generate large increases in the costs of operating the firm. The detriments to the firm's relations with outside parties are not fundamentally different.

Think about what the zealous advocacy mentality might do in the context of a corporate crisis. In light of the Federal Organizational Sentencing Guidelines, every large firm, from securities firms to chemical companies, must now be intensely concerned, not with stout resistance to law under every colorable theory clever counsel can imagine, but with compliance with regulatory law, with candor, and with voluntary remediation of violations. But corporate crisis are not unique settings in which independent legal counseling will be valuable. In a business world in which all parties believed that their dealings were governed by the standards of zealous advocacy representation, sharply higher costs could be expected all over the place: in regulatory interactions, in commercial dispute resolution, and even in public product markets. Imagine, for example, the consequences of a zealous advocacy response to a product tampering scare.

Thus, except for the unfortunate pathologies that will arise in the one-shot litigation context, the world offers plenty of evidence that, for business clients, there is greater long-term value in legal services provided by lawyers whose zealous and loyal representation is constrained by a fundamental commitment to the finer ideals of the profession.

If the advice of talented lawyers with a developed sense of their own responsibilities as members of the bar will give more effective advice, why do we observe great demand for zealous advocacy-inspired business advice? The problem lies largely in the "agency problem." The client of a corporate lawyer is the corporation, but the voice of the client is a human agent for the corporation. These officers inevitably have a shorter time horizon than the organization considered as a whole, and they have a set of incentives that are imperfectly matched with those of the firm. This disjunction in incentives is most obvious when we look at the incentive pay structures of senior management, but it is far more pervasive than that. Thus, while some business clients may sometimes appear to seek out lawyers without a commitment to independent professional judgment, not all corporations do, and it is plausible that those that seek aggressive or accommodating lawyers are not accurately expressing the best choice for the corporation.

In satisfying its fiduciary duty of care, the corporate board of directors has special need for the advice of dispassionate and independent business lawyers. If it is the general counsel to whom the board looks, then the board must take an interest in factors affecting the independence of that lawyer's judgment. The board must carefully consider any incentive compensation for the corporation's chief legal officer to assure that, in creating incentives for diligence, the board has not permitted incentives to unwisely increase the legal risk that the firm will take. The board should also have open and confidential discussions with the chief legal officer regularly. It should insist that the general counsel acknowledge his professional obligation to report directly to the board. More than that, the board should require her personal commitment

to assuring compliance with the discernable spirit animating the law in those instances where legal obligations are unclear and there is, in her view, such a discernable spirit. In default of the board electing another independent channel, the outside leadership structure of the board should normally be the channel through which regular confidential communications occur.

VIII. CONCLUSION

Putting aside the possible debate about the effectiveness of alternative conceptions of a lawyer's duties, different and important reasons to keep alive the self-critical capacity that an independent attorney possesses concern the personal satisfactions drawn from our lives as lawyers.

The model of an independent professional comes closer than the dominant zealous advocacy model to actually describing the greatest lawyers of this or earlier ages. Consider, for example, the case of Louis D. Brandeis. I refer not to the great Justice Brandeis but to the earlier, spectacularly successful practitioner. Brandeis' life in the law reminds us that a great business lawyer need not act as a tool of any private interest that seeks his assistance. Brandeis was committed in his work to advancing the common good of the parties and the public good. Controversially, he sometimes acted as "counsel for the situation." He undertook to counsel his clients, not to act as a mere implement in their hands. He refused to have his professional skills used in ways or for ends that he, as a citizen interested in the common good, could not endorse. Brandeis is especially eminent, of course, but the model he followed was one adopted by other great lawyers. Whether at the head of great Wall Street firms, or as trusted long-term advisors on Main Street, the role of independent counselor, not zealous advocate, is the role in which those who practice today are most likely to add value to their clients and to achieve the deeper satisfaction that seems absent from the lives of many lawyers.

Among the important sources of satisfaction that a lawyer experiences from his work is the belief that his work adds meaning to his life because it contributes to the welfare of others. Both as a judge and as a professor, I experienced the gratification that follows from a belief that one is, however modestly, advancing the cause of justice according to law.

Other lawyers should be able to derive from their work in representing others some sense that they too are contributing to the achievement of the deeper purposes of the justice system. We are too greatly invested in our professional lives to permit ourselves to merely be clever amoral agents. Certainly, we are not law enforcement officials; we serve a different role. But if we are to find our professional lives satisfying, our role as zealous advocates and loyal facilitators of legal transactions must be consistent with our role as independent professionals and moral actors dedicated to the achievement of the higher goals of the legal system. This role gives dignity and a sense of deeper

meaning to our work as business lawyers.

The recognition, or more correctly, the hope, that we will be better and more satisfied lawyers if we act as self-consciously independent but loyal business lawyers will not, of course, simplify our lives. The life of a self-consciously independent lawyer will be more difficult and more ambiguous than that of the zealous advocate. But today we can offer the observation that the corporate board, energized by new expectations and more aggressive law enforcement, is more likely than ever before to be supportive of such a lawyer.

There is no easy rule book for working out the complexity that professional life presents. In this respect professional life is no different from any other aspect of our lives. But there is no hiding from complexity if we are to engage life fully and responsibly. Coherence is possible but simple clarity is often a delusion.

The point of this essay is not to convince you that we need to return to the past. Returning to the past is never an option. There are values that should sometimes inform, shape, and constrain our zealous advocacy and that those values relate to fundamental considerations of who we are and who we want to be. Embracing the values summarized in this essay under the word independence will improve our professional lives and our professional value.