

Faculty Scholarship

2008

Preventive Law: A Strategy for Internal Corporate Lawyers to Advise Managers of Their Ethical Obligations

Z. Jill Barclift

Mitchell Hamline School of Law, jill.barclift@mitchellhamline.edu

Publication Information

33 *Journal of the Legal Profession* 31 (2008)

Repository Citation

Barclift, Z. Jill, "Preventive Law: A Strategy for Internal Corporate Lawyers to Advise Managers of Their Ethical Obligations" (2008). *Faculty Scholarship*. Paper 341.

<http://open.mitchellhamline.edu/facsch/341>

This Article is brought to you for free and open access by Mitchell Hamline Open Access. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

Preventive Law: A Strategy for Internal Corporate Lawyers to Advise Managers of Their Ethical Obligations

Abstract

This article examines the efficacy of Preventive Law jurisprudence to internal corporate law practice. The article compares internal corporate law practice to the practice approach of Preventive Law. The article explores the benefits of Preventive Law jurisprudence to internal corporate law practice. Part I discusses the history and various vectors of Preventive Law. Part II examines the responsibilities of corporate law departments. Part III compares Preventive Law practice skills to internal corporate law practice, and explores the utility of Barton's problem solving approaches to internal corporate law practice. Finally, the article concludes arguing internal corporate law practice is Preventive Law practice. This article suggests an understanding of the role of internal corporate lawyers as practicing Preventive Law in the context of Preventive Law jurisprudence.

Keywords

Legal ethics

Disciplines

Business Organizations Law | Legal Ethics and Professional Responsibility

PREVENTIVE LAW: A STRATEGY FOR INTERNAL CORPORATE LAWYERS TO ADVISE MANAGERS OF THEIR ETHICAL OBLIGATIONS

Z. Jill Barclift¹

INTRODUCTION

The jurisprudence on Preventive Law traces its origins to the scholarship of Louis M. Brown and Edward A. Dauer.² Preventive Law is a legal approach in which the lawyer is proactively involved managing client legal affairs.³ Brown and Dauer argue that clients and lawyers benefit from the practice skills of Preventive Law.⁴ Clients benefit because the client maximizes structures to achieve goals and sets strategies for legal risks, and lawyers benefit because lawyers and clients work together to identify future legal risks.⁵

1. Associate Professor, Hamline University School of Law. The author thanks Yoonjo J. Lee for her research assistance. The author also expresses her gratitude to Thomas D. Barton for his helpful comments and assistance.

2. Edward A. Dauer, *Preventive Law Before and After Therapeutic Jurisprudence: A Forward to the Special Theme Issue*, 5 PSYCHOL. PUB. POL'Y & L. 800, 801 n.2 (1999) (describing Louis M. Brown as "the father of preventive law." Brown is credited for authoring one of the first publications in the field of preventive law in 1952, entitled PREVENTIVE LAW. He also personally researched, wrote, printed, and distributed the *Preventive Law Newsletter* to a still-growing list of lawyers, legal academics, and scholars. Currently, the newsletter is published by the University of Denver College of Law); Winick et al., *infra* note 10, at 796; see Jeffrey W. Stempel, *TheraLaw and the Law-Business Paradigm Debate*, 5 PSYCHOL. PUB. POL'Y & L. 849, 849-50 (1999) (focusing on advancements in therapeutic jurisprudence and preventive law during the 1990s. Although preventive law jurisprudence had grown from early works by Louis M. Brown in the 1950s and later influenced by Edward A. Dauer in the 1970s, there was a "renewed interest" during the 1990s in preventive law, its connection to therapeutic jurisprudence, and a return to the foundational teachings of Brown and Dauer).

3. Stempel, *supra* note 2, at 849 (citing LOUIS M. BROWN & EDWARD A. DAUER, PERSPECTIVES ON THE LAWYER AS PLANNER (Foundation Press 1978) and defining preventive law as proactive lawyering that "emphasizes the lawyer's roles as a planner and proposes the careful private ordering of affairs as a method of avoiding the high costs of litigation and ensuring desired outcomes and opportunities."); see also Daicoff, *infra* note 12, at 815-16 (explaining that preventative law traces its origin to the work of Winick et al., *infra* note 10. In the 1950s preventive law was introduced as a way of practicing law, but it has not been affirmatively adopted by the majority of practicing lawyers. This is perhaps due to the belief by some lawyers that clients are unwilling to pay for preventive lawyering, or that it is not the kind of lawyering that is traditionally emphasized in law school. Perhaps, lawyers also perceive preventive law practices to be not as rewarding as pursuing a lawsuit).

4. Dauer, *supra* note 2, at 801.

5. Daicoff, *infra* note 12, at 815-16.

This article examines the efficacy of Preventive Law jurisprudence to internal corporate law practice.⁶ The article compares internal corporate law practice to the practice approach of Preventive Law. It suggests, because internal corporate lawyers are employees of the corporation and embedded with the client, they are able to deliver more effectively the proactive legal services advocated by Preventive Law.

Internal corporate lawyers describe their benefit to corporate clients as the ability to engage in proactive legal risk management.⁷ The general counsel (or chief legal officer) reports that the job of internal corporate lawyer is to work collaboratively with clients, to design creative solutions to legal challenges, and to understand the client's business and legal needs in assessing legal risk.⁸ In other words, internal corporate lawyers already use Preventive Law skills and yet few commentaries assess the benefits of Preventive Law jurisprudence to the internal corporate law practice.⁹

Thus, this article explores the benefits of Preventive Law jurisprudence to internal corporate law practice.¹⁰ Such an exploration serves two goals. First, it provides context to the meaning of internal corporate lawyer as proactive advisor, problem solver, compliance manager, and legal gatekeeper. Second, by exploring the work of Thomas D. Barton, it provides a platform for analysis of the role of internal corporate lawyer as an accommodation style of problem solver, thus, providing a framework for internal lawyers to counsel corporate agents on their ethical and moral obligations.¹¹

Part 1 discusses the history and various vectors of Preventive Law. This part looks at the meaning of client and attorney collaboration, lawyer as a creative problem solver, and the intersection of Preventive Law and Therapeutic Jurisprudence.¹² In particular, Part 1 explores the work of

6. See, e.g., ROBERT A. HARDAWAY, *PREVENTIVE LAW: MATERIALS ON A NON ADVERSARIAL LEGAL PROCESS* (Anderson Publishing Co. 1997); 1 CAROLE BASRI & IRVING KAGAN, *CORPORATE LEGAL DEPARTMENTS* §§ 1-1, 1-2 (3d ed., Practising Law Institute 1990).

7. Nelson & Nielsen, *infra* note 54, at 466; 1 BASRI & KAGAN, *supra* note 6, § 2-1.

8. 1 BASRI & KAGAN, *supra* note 6, § 2-7.

9. *Id.* at § 5-1; Miller, *infra* note 61, at 1226. See Gary W. Boyle, *The Foundation of Preventive Law in Corporate America* (1998) from the National Center for Preventive Law, available at <http://www.preventivelawyer.org/main/default.asp> (last visited: March 31, 2008)(follow "Essays" hyperlink); MICHAEL GOLDBLATT ET AL., *PREVENTIVE LAW IN CORPORATE PRACTICE* § 1.01 (2000).

10. See Bruce J. Winick et al., *Preface, A New Model for the Practice of Law*, 5 PSYCHOL. PUB. POL'Y & L. 795, 796 (1999); GOLDBLATT, *supra* note 9, § 1.01.

11. Thomas D. Barton, *Therapeutic Jurisprudence, Preventive Law, and Creative Problem Solving*, 5 PSYCHOL. PUB. POL'Y & L. 921, 921 [hereinafter *Therapeutic Jurisprudence*] (1999); Thomas D. Barton, *Conceiving the Lawyer as Creative Problem Solver: Introduction*, 34 CAL. W. L. REV. 267 [hereinafter *Conceiving the Lawyer*] (1998); Thomas D. Barton, *Creative Problem Solving: Purpose, Meaning and Values*, 34 CAL. W. L. REV. 273 [hereinafter *Creative Problem Solving*] (1998).

12. Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15 (1997); see, e.g., Susan Daicoff, *Making Law Therapeutic for Lawyers: Therapeutic Jurisprudence, Preventive Law, and the Psychology of Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 811, 816-18 (1999) (suggesting the integration of therapeutic jurisprudence and preventive law to a client's problems by first identifying the "psycho-

Barton on the three styles of lawyer problem solving: restructuring, accommodating, and judging.¹³

Part 2 examines the responsibilities of corporate law departments. This part identifies proactive legal planning, collaboration, and problem solving as key skills for internal corporate lawyers. This part addresses various duties of internal corporate lawyers, including compliance program management and legal gatekeeper responsibilities. Part 2 also explores internal corporate lawyers' obligation to prevent corporate agents' misconduct.

Part 3 compares Preventive Law practice skills to internal corporate law practice, and explores the utility of Barton's problem solving approaches to internal corporate law practice. This part recommends corporate lawyers embrace the accommodation style approach to problem solving espoused by Barton.

Finally, the article concludes arguing internal corporate law practice is Preventive Law practice. The practice skills of internal corporate lawyers align with those of Preventive Law jurisprudence. Moreover, demands on internal corporate lawyers to serve as legal gatekeepers and prevention of future corporate misconduct requires a broader perspective on how internal corporate lawyers can meet these expectations.

This article suggests an understanding of the role of internal corporate lawyers as practicing Preventive Law in the context of Preventive Law jurisprudence. This offers an approach which goes beyond professional rules, and provides guidance to internal corporate lawyers on how to counsel corporate agents on moral and ethical obligations. Corporate clients and internal lawyers benefit when lawyers embrace their obligations to advise corporate agents of the broader impact of their decisions in a societal context and their role in preventing corporate misconduct.

I. PART ONE

A. What is Preventive Law?

Preventive Law encourages lawyers to embed themselves into client matters, intervene before a crisis arises, and map a plan for legal risk.¹⁴ Preventive Law jurisprudence encourages lawyers' active engagement with

legal soft spots" in a client's affairs and evaluating the psychological impacts of certain legal maneuvers or decisions made by clients); *see, e.g.*, Dauer, *supra* note 2, at 801 (describing the underlying objective of preventive law practicing lawyers as the need "to help their clients achieve their personal or organizational or familial or corporate goals, by optimizing the arrangements that are relevant to those goals and by minimizing the chance that the purpose is confounded with unnecessary legal risks").

13. *Therapeutic Jurisprudence*, *supra* note 11, at 923.

14. *See* Winick et al., *supra* note 10, at 795-99; Daicoff, *supra* note 12, at 815; Stolle et al., *supra* note 12, at 16-17.

clients¹⁵ in contrast to traditional law practice which is sometimes referred to as “legal triage for acute legal problems.”¹⁶ Brown’s work on Preventive Law emphasizes that lawyers must do more than predict the outcome of litigation.¹⁷

Preventive Law is not a drastic or radically different approach to law practice but redirects the focus from litigation to risk management.¹⁸ Additionally, under a Preventive Law approach, the lawyer must not only counsel clients on not violating the law but must also work closely with clients to understand those risks not identified or articulated by the client.¹⁹

It is the need to understand human nature and client motivation where Preventive Law and Therapeutic Jurisprudence intersect.²⁰ Many attributes of Preventive Law may be useful to internal corporate lawyers; however, this article examines three core themes:²¹ (1) collaboration, (2) creative problem solving, and (3) the intersection of Preventive Law and Therapeutic Jurisprudence.²²

B. Collaboration

Preventive Law avoids the common approaches to litigation practice and instead focuses on planning and collaboration.²³ Preventive Law emphasizes the lawyer as counselor devoted to working closely with a client to go beyond what the client asks for to discover the reasons behind the client’s legal issues.²⁴

15. Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventive Law: A Combined Concentration to Invigorate the Practice of Law*, 39 ARIZ. L. REV. 25 (1997); an up-to-date bibliography on preventive law from the National Center for Preventive Law is available at <http://www.preventivelawyer.org/main/default.asp> (last visited Mar. 31, 2008).

16. Stempel, *supra* note 2, at 850, n.4 (referencing numerous works by Louis M. Brown and Robert A. Hardaway. When lawyers and clients underuse preventive law there is a consequential tendency to overuse legal triage. “For example, instead of having affairs in order and ironclad documentation of a plan for distribution of an estate, individuals frequently are involved in will contests and related litigation.” Preventive law jurisprudence has at least unveiled the problems with lawyering that focuses on legal crisis management but only minimally on planning and protection of clients).

17. Dauer, *supra* note 2, at 802.

18. Stempel, *supra* note 2, at 851; Donald C. Langevoort, *Someplace Between Philosophy and Economics: Legitimacy and Good Corporate Lawyering*, 75 FORDHAM L. REV. 1615, 1616, 1620 (2006) (proposing that in the corporate context lawyers have different professional responsibilities when it comes to risk calculation because corporate clients tend to have differing attitudes toward the laws that govern business entities than a client who is a natural person. Many businesspeople genuinely believe that “ill-conceived or mediocre laws” are quite frequent and this perception creates challenges to lawyers who must advise these clients).

19. Dauer, *supra* note 2, at 803.

20. Stempel, *supra* note 2, at 852.

21. Susan Daicoff, *Brief Description of the Vectors of the Comprehensive Law Movement—and their Points of Intersection*, <http://www.fcsl.edu/faculty/daicoff/vectors1.htm> (last visited Apr. 2, 2008).

22. Stolle et al., *supra* note 12, at 19-20; Daicoff, *supra* note 12, at 816-18.

23. Stolle et al., *supra* note 12, at 16.

24. Dauer, *supra* note 2, at 805.

A goal of Preventive Law is to redirect the emphasis of legal counsel from crisis management to planning.²⁵ Working collaboratively requires that lawyers not only embrace the current legal goals of clients but also plan for future legal risks.²⁶ Lawyers and clients work together to anticipate future legal problems and design a plan to manage legal risks.²⁷

Collaboration requires the proactive involvement of the lawyer by counseling clients on the long-term risk of current decision-making.²⁸ Therefore, Preventive Law skills encourage planning for future legal risk and creative problem solving in managing those risks.²⁹

C. Creative Problem Solving

Preventive Law stresses the role of lawyer as problem solver.³⁰ In contrast to the role of lawyer as the zealous advocate, the problem solver lawyer not only operates proactively but also relies on a keener understanding of client issues and the conditions that influence resolution of client issues.³¹ Creative problem solving relies on the lawyer's ability to deliver legal services multi-dimensionally.³²

The multi-dimensionality of creative problem solving invites lawyers to draw on a variety of humanities disciplines in the delivery of legal ser-

25. Stempel, *supra* note 2, at 850-51 (quoting Edward D. Re, *The Lawyer as Counselor and the Prevention of Litigation*, 31 CATH. U. L. REV. 685, 692 (1982) and defining preventive law as a "branch of law that endeavors to minimize the risk of litigation or to secure more certainty as to legal rights and duties.") and 851 (connecting therelaw to the law-business paradigm); *see also, e.g.*, LOUIS M. BROWN & EDWARD A. DAUER, PERSPECTIVES ON THE LAWYER AS PLANNER (1978); Daicoff, *supra* note 12, at 811; Dauer, *supra* note 2, at 801; Kimberlee K. Kovach, *Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards*, 39 IDAHO L. REV. 399, 411 (2003). For traditional law practice, Preventive Law's most influential advancement is to "minimize the risk of litigation or to secure more certainty as to legal rights and duties." Re, *supra*, at 692.

26. Stolle et al., *supra* note 12, at 16-17.

27. Dauer, *supra* note 2, at 801; Kovach, *supra* note 25, at 406-08.

28. Dauer, *supra* note 2, at 804.

29. Stempel, *supra* note 2, at 851.

30. Dauer, *supra* note 2, at 801; *see Therapeutic Jurisprudence, supra* note 11, at 939-41 (emphasizing the lawyer's role in actively giving information tailored to the particular client, encouraging the client to play a more active role in planning and solving problems, and empowering the client to make informed decisions); *Creative Problem Solving, supra* note 11, at 288

31. *Conceiving the Lawyer, supra* note 11, at 269-70; *Therapeutic Jurisprudence, supra* note 11, at 940 (advising that dialogue and conversations between lawyer and client, much like between doctor and patient, should be "particularized to the individual circumstances of the client, rather than abstract discussion of principles").

32. *Therapeutic Jurisprudence, supra* note 11, at 923 (advocating three different styles of problem solving—restructuring the environment, accommodation, and judging); Kovach, *supra* note 25, at 408-09.

vices.³³ Creative problem solving encourages “interactive” listening skills, dialogue, consensus, and relationship building.³⁴

Defining lawyers as creative problem solvers requires lawyers to respect the context of legal problems and encourages lawyers to consider not only legal issues but also non-legal issues in resolving client matters.³⁵ Yet, Preventive Law is more than a client centered approach to legal practice, it also encourages lawyers to use their ability to understand the psychology of client management for problem solving.³⁶

D. Therapeutic Jurisprudence

Rooted in law and psychology jurisprudence, Therapeutic Law traces its origins to the work of Bruce J. Winick, David B. Wexler, and Edward A. Dauer.³⁷ Therapeutic Jurisprudence examines the “therapeutic or countertherapeutic consequences of the law.”³⁸ Therapeutic Jurisprudence examines the law’s impact on the psychological well-being of clients.³⁹

Although Preventive Law and Therapeutic Law initially emerged as separate fields of study, some commentators argue in support of merging the two fields.⁴⁰ Proponents of Preventive Law contend because it relies on understanding the psychology of clients it intersects with Therapeutic Jurisprudence.⁴¹ Supporters of a merged model argue the lawyer’s role as counselor and planner to avoid legal problems combines with the lawyer’s “delivery of legal services in a manner sensitive to client and social well being.”⁴² The term “theralaw” describes the integration of Preventive Law and Therapeutic Law.⁴³

33. *Creative Problem Solving*, *supra* note 11, at 288-90; James M. Cooper, *Towards a New Architecture: Creative Problem Solving and the Evolution of Law*, 34 CAL. W. L. REV. 297, 312 (1998).

34. *Creative Problem Solving*, *supra* note 11, at 288.

35. *Id.*; Cooper, *supra* note 33, at 312-13.

36. Dauer, *supra* note 2, at 805; Daicoff, *supra* note 12, at 815-16.

37. Stolle et al., *supra* note 12, at 18; David B. Wexler, *Therapeutic Jurisprudence: An Overview*, <http://www.law.arizona.edu/depts/upr-intj/intj-o.html> (last visited Apr. 4, 2008) (providing a modified version of a public lecture on October 29, 1999, at Thomas Cooley School of Law for the Thomas Cooley Law Review Disabilities Law Symposium); Winick et al., *supra* note 10, at 796; Daicoff, *supra* note 12, at 813.

38. Daicoff, *supra* note 12, at 813.

39. Stolle et al., *supra* note 12, at 18; Winick et al., *supra* note 10, at 796; Wexler, *supra* note 37.

40. Stempel, *supra* note 2, at 853-54; Stolle et al., *supra* note 12, at 19.

41. *Therapeutic Jurisprudence*, *supra* note 11, at 928; Dauer, *supra* note 2, at 803-04.

42. Stempel, *supra* note 2, at 850, 854; Stolle et al., *supra* note 12, at 19; Winick et al., *supra* note 10, at 797 (focusing on family law and criminal law practice. For example, modern understandings of cognitive and behavioral psychology and recidivism prevention practices can be used by criminal lawyers to secure favorable outcomes for their clients, while also aiding their client with psychological or behavioral issues that could affect their criminality); Daicoff, *supra* note 12, at 816-17.

43. Stempel, *supra* note 2, at 853-54.

Advancing the scholarship on Therapeutic Law, Barton argues that a combination of Preventive Law and Therapeutic Law leads to a new approach to creative problem solving by lawyers.⁴⁴ Barton suggests an approach to lawyering using three kinds of problem solving: (1) restructuring, (2) accommodating, and (3) judging.⁴⁵

Restructuring involves removing barriers, accommodating involves working with others to solve problems either individually or as a group, and judging involves comparing actions against certain norms.⁴⁶ Barton argues for improvements in the delivery of legal services when lawyers embrace an accommodation style of lawyering in which lawyers actively engage with clients for a deeper understanding of client needs.⁴⁷

Others, such as Susan Daicoff, suggest a merging of Preventive Law and Therapeutic Law requires that the lawyer consider the psychological impact of the law on clients.⁴⁸ Daicoff calls for lawyers to explore the psychology behind a client's decisions to plan for future legal consequences.⁴⁹

Critics of Preventive Law and Therapeutic Jurisprudence argue such approaches to practice require lawyers to go beyond their training in understanding client needs.⁵⁰ Further, lawyers worry clients will not want to pay the additional costs for proactive advice and prefer to pay for legal services as problems arise.⁵¹ Others argue transactional lawyers have always practiced a form of "theralaw" and that it is nothing more than outstanding client service skills.⁵²

Although Preventive Law critics question its benefits to traditional law practice, internal corporate law practice and Preventive Law share many similarities.⁵³ Recent commentaries on the role of internal corporate lawyers suggest they are proactive advisors whose responsibilities include preventive lawyering.⁵⁴

44. *Therapeutic Jurisprudence*, *supra* note 11, at 921.

45. *Id.* at 923. The restructuring approach involves manipulating the surrounding environment "to become compatible with some frustrated human purpose." *Id.* at 924. When the environment is less malleable, a problem holder under the accommodation approach may team up with another to gain power or tools to restructure the environment physically or socially. *Id.* at 925. The judging style is a normative approach where some behavior or event is judged against a norm and deviations from the norm are sanctioned. *Id.*

46. *Id.* at 924-26.

47. *Therapeutic Jurisprudence*, *supra* note 11, at 936.

48. Daicoff, *supra* note 12, at 817.

49. *Id.* at 818-19.

50. *Id.* at 816; Dauer, *supra* note 2, at 804; Langevoort, *supra* note 18, at 1621-22.

51. Daicoff, *supra* note 12, at 816; see JOHN C. COFFEE JR., *GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE* 226 (Oxford University Press 2006).

52. Stempel, *supra* note 2, at 851; see Stempel, *supra* note 2, at 850 n.2 & 4; Daicoff, *supra* note 12, at 816

53. Stempel, *supra* note 2, at 870.

54. COFFEE, *supra* note 51, at 195; Robert L. Nelson & Laura B. Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 *LAW & SOC'Y REV.*

Internal corporate lawyers define their role as counselors working with clients to provide legal risk assessments by combining legal and business acumen.⁵⁵ According to corporate lawyers, the attraction of corporate law practice is the ability to be proactive and collaborate with clients to structure business deals and prevent future legal problems.⁵⁶

II. PART 2

A. *Internal Corporate Law Practice*

The primary responsibilities of internal corporate law departments are to provide legal advice to corporate managers and to monitor compliance with laws.⁵⁷ The general counsel or chief legal officer's job is to manage the legal department and counsel executives and the board on legal risks across the entire enterprise.⁵⁸ Business managers look to the corporate law department and the general counsel to solve legal problems, and they expect corporate lawyers to serve as both "cop" and "counselor."⁵⁹

Relying on their knowledge of the business and close working relationships with business managers, internal lawyers are proactive and structure transactions using both legal and business acumen.⁶⁰ Corporate law

457, 457, 464-65 (2000); *but cf.* Stempel, *supra* note 2, at 850-51; John Flood, *Doing Business: The Management of Uncertainty in Lawyers' Work*, 25 LAW & SOC'Y REV. 41, 42-43 (1991); Thomas D. Barton, *Preventive Law for Multi-Dimensional Lawyers*, from the National Center for Preventive Law, available at <http://www.preventivelawyer.org/main/default.asp?pid=essays/barton.htm> (last visited Apr. 6, 2008).

55. COFFEE, *supra* note 51, at 195; Nelson & Nielsen, *supra* note 54, at 462, 472 (discussing how internal lawyers defer to business executives on whether to assume a legal risk); E. Norman Veasey & Christine T. Di Guglielmo, *The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation*, 62 BUS. LAW. 1, 25 n.81 (2006).

56. Nelson & Nielsen, *supra* note 54, at 462, 464; COFFEE, *supra* note 51, at 223-24; GOLDBLATT ET AL., *supra* note 9, § 1.03.

57. 1 BASRI & KAGAN, *supra* note 6, § 3-2; Veasey & Di Guglielmo, *supra* note 55, at 25 n.81; Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 770-71 (Nancy B. Rapoport & Bala G. Dharan eds., Foundation Press 2004); *see* Nelson & Nielsen, *supra* note 54, at 462; GOLDBLATT ET AL., *supra* note 9, § 1.05.

58. 1 BASRI & KAGAN, *supra* note 6, § 2:1; Veasey & Di Guglielmo, *supra* note 55, at 7 n.11 (quoting Howard B. Miller, *Law Risk Management and the General Counsel*, 46 EMORY L.J. 1223, 1223 (1997) ("General counsel are managers of law risk. Law risk is a kind of commercial risk, similar to credit risk, interest rate risk, currency risk, or market risk faced by modern businesses. What distinguishes and obscures law risk is the extent to which it is composed of transactional and dispute resolution inefficiencies . . . The general counsel, comfortable in the worlds of business management and law, can translate and mediate between the concepts of business risk and the vocabulary of the law.")).

59. Nelson & Nielsen, *supra* note 54, at 460; 1 BASRI & KAGAN, *supra* note 6, §§ 2-5, 10-1.

60. 1BASRI & KAGAN, *supra* note 6, §§ 1:5, 5:12; Veasey & Di Guglielmo, *supra* note 55, at 23; Nelson & Nielsen, *supra* note 54, at 465, 474-75.

practice also includes communication of legal risk, compliance management, and gatekeeper responsibilities.⁶¹

B. Proactive Advisors and Problem Solvers

Internal corporate law practice is proactive.⁶² In their role as proactive advisors, internal corporate lawyers work with managers to design business transactions for legal compliance.⁶³ As employees of the corporation, internal corporate lawyers have direct, regular communication with managers and play a pivotal role in structuring corporate transactions for legal compliance.⁶⁴ In addition to evaluating the legal issues in a business transaction, internal corporate lawyers assist clients in assessing the feasibility of a business deal in light of legal obstacles and work to design solutions.⁶⁵

The internal corporate lawyer must appreciate human nature and the corporate culture.⁶⁶ To accomplish these tasks, internal corporate lawyers must understand client goals and the motivation for business decisions.⁶⁷ Thus, internal corporate lawyers must work collaboratively and proactively to identify legal risks and design a plan for managing such risks.⁶⁸ A challenge for internal lawyers is not only the identification of legal risk but also the communication of legal risk to corporate managers.⁶⁹

C. Communicators of Legal Risk

In many corporate law departments, internal corporate lawyers evaluate and communicate legal risk assessments to senior officers on day-to-

61. Howard B. Miller, *Law Risk Management and the General Counsel*, 46 EMORY L.J. 1223, 1223 (1997); Michele M. Hedges, *General Counsel and the Shifting Sea of Change*, reprinted in, ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 539 (Nancy B. Rapoport & Bala G. Dharan eds., Foundation Press 2004); 1 BASRI & KAGAN, *supra* note 6, §§ 11:3, 11:11.

62. 1 BASRI & KAGAN, *supra* note 6, at § 10:1; Carl D. Liggio, *The Changing Role of Corporate Counsel*, 46 EMORY L.J. 1201, 1214-15 (1997).

63. 1 BASRI & KAGAN, *supra* note 6, §§ 3:4, 3:5.

64. *Id.*; Veasey & Di Guglielmo, *supra* note 55, at 13; David M. Stuart, *The Changing Role of the In-House Compliance Lawyer*, 1623 PLI/Corp 207, 211-12 (2007); see Richard S. Gruner, *General Counsel in an Era of Compliance Programs and Corporate Self-Policing*, 46 EMORY L.J. 1113, 1113 (1997); Nelson & Nielson, *supra* note 54, at 464-65.

65. Nelson & Nielson, *supra* note 54, at 466-68.

66. Veasey & Di Guglielmo, *supra* note 55, at 13-14.

67. *Id.*; Nelson & Nielsen, *supra* note 54, at 464; 1 BASRI & KAGAN, *supra* note 6, §§ 2-1, 2-2.

68. Miller, *supra* note 61, at 1226; 1 BASRI & KAGAN, *supra* note 6, § 5-12; see generally Carolyn K. Brancato & Christian A. Plath, *Corporate Governance Best Practices: The Blueprint for the Post-Enron Era*, The Conference Board 2002, available at http://www.heidrick.com/NR/ronlyres/1E2D60F0-14B3-47AC-8AC6-227F2850095C/0/TCB_BestPracticesPostEnron.pdf (last visited: April 14, 2008).

69. 1 BASRI & KAGAN, *supra* note 6, § 5-12; Veasey & Di Guglielmo, *supra* note 55, at 7, n.11 (footnote 11 quoting from Stephen J. Friedman & Evan Stewart, THE CORPORATE EXECUTIVE'S GUIDE TO THE ROLE OF THE GENERAL COUNSEL 1).

day matters by directly advising business unit managers.⁷⁰ Each business unit manager assesses the scope of legal risk for a particular group or product and makes a decision whether to accept legal risks.⁷¹ If warranted, corporate hierarchy protocol elevates legal risk decision-making to upper levels of management.⁷² Evaluation of the broader consequences of a business unit manager's decisions for enterprise-wide legal risk is often left for the general counsel or chief legal officer to communicate across business units to executive management and the board.⁷³

Although internal corporate lawyers view their role as central in assisting corporate clients in assessing and evaluating legal risk, corporate lawyers report that they analyze legal issues in a business transaction but typically defer to business executives' decisions to assume legal risk.⁷⁴ For instance, in the case of Enron, executives relied on lawyers' legal advice to make decisions on corporate legal risk but sought board approval only of the underlying business transaction.⁷⁵

In addition to advising management on legal risk, internal corporate lawyers design and manage compliance programs.⁷⁶ Recently, as public companies comply with the requirements of the Sarbanes-Oxley Act, corporate legal compliance programs are now a critical part of a public corporation's plan for good corporate governance in assessing code of ethics violations, procedures for monitoring internal financial controls, and reports to audit committees.⁷⁷

70. Nelson & Nielsen, *supra* note 54, at 472.

71. *See id.* at 472-73 (discussing how internal lawyers defer to business executives on whether to assume a legal risk).

72. *Id.*

73. *Id.*; Michele D. Beardslee, *If Multidisciplinary Partnerships are Introduced into the United States, What Could or Should be the Role of the General Counsel?*, 9 FORDHAM J. CORP. & FIN. L. 1, 21 (2003).

74. Nelson & Nielson, *supra* note 54, at 472-73 (discussing how internal lawyers defer to business executives on whether to assume a legal risk); *See also* Milton C. Regan, Jr., *Professional Responsibility and the Corporate Lawyer*, 13 Geo. J. Legal Ethics 197, 199-200 (2000).

75. W. Amon Burton, Jr. & John S. Dzienkowski, *Reexamining the Role of In-House Lawyers After the Conviction of Arthur Andersen*, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 711-14 (2004); Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097, 1109-10 (2003).

76. 1 BASRI & KAGAN, *supra* note, § 11:2; Preventive law in Corporate Practice Goldblatt lexis/nexis book 2.15; Business Roundtable, Principles of Corporate Governance 2005, available at: <http://www.businessroundtable.org/pdf/CorporateGovPrinciples.pdf> at 11.

77. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-04, §§ 401-09, 116 Stat. 745, 785-91 (2002) (codified as 15 U.S.C. §§ 7201-7266 and scattered sections of 15 U.S.C.); Rebecca Walker, *The Evolution of the Law of Corporate Compliance in the United States: A Brief Overview*, Practising Law Institute, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES, Mar.-June 2008) at 40. Richard S. Grumer, *General Counsel in an Era of Compliance Programs*, 46 EMORY L.J. 1111, 1116 (1997); *See generally* Brancato & Plath, *supra* note 68.

D. Compliance Management

Lawyers in corporate law departments regularly monitor the legal landscape and use audit procedures to assess corporate compliance with laws and regulations.⁷⁸ Internal corporate lawyers use corporate compliance programs to advise management on the legal issues by explaining the laws applicable to the company's business.⁷⁹ Corporate managers embrace compliance programs as central to a public corporation's plan for risk management and governance.⁸⁰

Generally, corporate compliance programs detect and correct a company's non-compliance with laws and regulations and focus on non-compliance by employees with identified laws and regulations.⁸¹ Compliance programs vary in scope by company and industry; however, most compliance programs include a system of oversight, processes for accountability by employees' compliance with laws and regulations, and are part of an overall plan for practicing preventive management and law.⁸²

In addition to compliance management, internal corporate lawyers mediate disputes among corporate constituencies and negotiate with regulators or other external constituencies.⁸³ In their capacity as a voice to the company's external monitors, internal corporate lawyers also serve as legal gatekeepers for the corporate entity.

78. Gruner, *supra* note 77, at 1116; 1 BASRI & KAGAN, *supra* note 6, §§ 11-2, 11-3. The primary goals of compliance programs are to detect and correct corporate misconduct in order to receive possible lenient treatment for violations of law. *Id.* Corporate compliance programs began in the 1970s and proliferated during the 1990s in response to the mandates of the U.S. Federal Sentencing Guidelines. See Rebecca Walker, *The Evolution of the Law of Corporate Compliance in the United States: A Brief Overview*, 1595 PLI/CORP 15, 19-21 (2007); Lynn S. Paine, Christopher M. Bruner, *Legal Compliance Programs*, Harvard Business School Note 306-14 (2006); U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (2007), available at <http://www.ussc.gov/2007guid/TABCON07.ht ml>.

79. 1 BASRI & KAGAN, *supra* note 6, § 11-2; GOLDBLATT ET AL., *supra* note 9, § 2.15; Business Roundtable, *Principles of Corporate Governance 2005*, available at <http://64.203.97.43/pdf/Corporat eGovPrinciples.pdf> at 11 (last visited Apr. 9, 2008).

80. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-04, §§ 401-09, 116 Stat. 745, 785-91 (2002) (codified as 15 U.S.C. §§ 7201 -7266 and scattered sections of 15 U.S.C.); Walker, *supra* note 77, at 40; Gruner, *supra* note 77, at 1113; Paine & Bruner, *supra* note 78, at 1; see also Brancato & Plath, *supra* note 68.

81. 1 BASRI & KAGAN, *supra* note 6, §§ 11-1, 11-2; Paine & Bruner, *supra* note 78, at 1-2; see also, Brancato & Plath, *supra* note 68, at 54.

82. GOLDBLATT ET AL., *supra* note 9, § 2.01; Paine & Bruner, *supra* note 78, at 1-2; Thomas F. O'Neil III & Debra S. Rade, *Designing and Advancing Effective Compliance Programs*, in CORPORATE COMPLIANCE AND ETHICS INSTITUTE 2007 51 (2007); Paul E. McGreal, *Corporate Compliance Survey*, 61 BUS. LAW. 1645 (2006). Some compliance programs include a values or ethics assessment in monitoring compliance. *Id.*

83. Veasey & Di Guglielmo, *supra* note 55, at 6, 13-15; Nelson & Nielsen, *supra* note 54, at 465; Langevoort, *supra* note 18, at 1624, 1625 ("That the law itself, at least that regulating business behavior, is so often the product of compromise and flawed processes simply underscores that perception, leading to strongly held doubts that merely because something is the law, it has particular virtue. These doubts, rather than anything about the nature of the corporation, tempt corporate lawyers to adopt a Holmesian posture.").

E. Gatekeepers

An overall dissatisfaction by Congress with the perceived role of lawyers in failing to prevent corporate misconduct led to federal regulations requiring corporate lawyers to take a more active role in managing corporate clients' conduct.⁸⁴ The Securities and Exchange Commission's attorney professional regulations, which were implemented to comply with the Sarbanes-Oxley Act, require the general counsel or chief legal officer to report certain matters to the board.⁸⁵ These same rules also mandate that lawyers function as legal gatekeepers, which has led to the increased commentary on the role of internal corporate law departments and the general counsel (or chief legal officer) in preventing future corporate malfeasance.⁸⁶

The SEC requires internal corporate lawyers to function as legal gatekeepers called upon to counsel corporate officers and the board, not only of corporate legal obligations but of their fiduciary duties, and develop a process for reporting any lapses in compliance.⁸⁷ There is some debate over the propriety of internal corporate lawyers serving as legal gatekeepers for the public corporation to external constituencies such as securities markets.⁸⁸ Nonetheless, federal professional rules require the general counsel to consider the corporation's obligations for accurate financial reporting and ethical conduct a paramount responsibility of corporate agents.⁸⁹

A gatekeeper serves as an independent evaluator of corporate actions.⁹⁰ In the role of legal gatekeeper, the internal corporate lawyer's primary responsibilities are to identify, manage, and communicate corporate legal risks to managers, executives, and the board—in other words to police business transactions.⁹¹

84. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-04, §§ 401-09, 116 Stat. 745, 785-91 (2002) (codified as 15 U.S.C. §§ 7201-7266 and scattered sections of 15 U.S.C.); see also Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L. J. 1521 (2005); Gordon, *supra* note 57, at 1188; Fisch & Rosen, *supra* note 75, at 1098.

85. 17 CFR § 205.3 (2003).

86. See generally Romano, *supra* note 84; Gordon, *supra* note 57, at 1188; Fisch & Rosen, *supra* note 75, at 1098; Veasey & Di Guglielmo, *supra* note 55, at 19; COFFEE, *supra* note 51, at 195; Lyman P. Q. Johnson & Robert V. Ricca, *(Not) Advising Corporate Officers about Fiduciary Duties*, 42 WAKE FOREST L. REV. 663, 679-80 (2007); see generally Nancy B. Rapaport & Bala G. Dharan, ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 569-873 (2004).

87. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-04, §§ 401-09, 116 Stat. 745, 785-91 (2002) (codified as 15 U.S.C. §§ 7201-7266 and scattered sections of 15 U.S.C.); Veasey & Di Guglielmo, *supra* note 55, at 19.

88. Veasey & Di Guglielmo, *supra* note 55, at 28.

89. 17 CFR § 205.3; Fisch & Rosen, *supra* note 75, at 1100.

90. COFFEE, *supra* note 51, at 2; Johnson & Ricca, *supra* note 86, at 679-80.

91. Veasey & Di Guglielmo, *supra* note 55, at 6-7; Nelson & Nielsen, *supra* note 54, at 463; Gordon, *supra* note 57, at 769.

Internal corporate lawyers often serve as decision makers on the legality of business transactions.⁹² Consequently, internal lawyers report they often feel pressure from management not to be the deal breaker while still advising on legal issues.⁹³ The gatekeeper role creates a difficult professional challenge for the internal corporate lawyer.⁹⁴

F. Challenges for the Internal Corporate Lawyer

Internal corporate lawyers face professional challenges that differ from external counsel because they are employees of the corporate client and rely on a single client for employment.⁹⁵ Internal corporate lawyers must be corporate team players while also providing independent legal advice.⁹⁶ Additionally, internal corporate lawyers must advise corporate agents on their legal obligations while also taking active measures to prevent agents' misconduct.⁹⁷

1. Independence

Because internal corporate lawyers must manage the professional challenge of representing an entity only capable of acting through its corporate agents, the need for independent legal advice is paramount.⁹⁸ Further, because of the close working relationships with corporate managers, internal corporate lawyers must be vigilant to maintain professional independence in rendering legal advice.⁹⁹

Internal corporate lawyers' financial dependence on the corporation endangers the ability to challenge certain management conduct when the consequences are loss of employment.¹⁰⁰ Professional ethics rules do not offer specific guidance to internal corporate lawyers.¹⁰¹ The potential for a conflict of interests raises concerns about the ability of internal corporate lawyers to satisfy professional rules for independence and meet corporate management's expectations.¹⁰²

92. Nelson & Nielson, *supra* note 54, at 470.

93. *Id.* at 471; Veasey & Di Guglielmo, *supra* note 55, at 13-14.

94. Nelson & Nielson, *supra* note 54, at 471; Veasey & Di Guglielmo, *supra* note 55, at 13-14.

95. Veasey & Di Guglielmo, *supra* note 55, at 10, 11; Burton & Dzienkowski, *supra* note 75, at 712.

96. Burton & Dzienkowski, *supra* note 75, at 713.

97. Gordon, *supra* note 57, at 784-87; Fisch & Rosen, *supra* note 75, at 1104.

98. Veasey & Di Guglielmo, *supra* note 55, at 8-12; Rhode & Paton, *infra* note 109, at 641.

99. Burton & Dzienkowski, *supra* note 75, at 713-14; Veasey & Di Guglielmo, *supra* note 55, at 8-10.

100. Veasey *supra* note 55, at at 11

101. Burton & Dzienkowski, *supra* note 75, at 712-13; Regan, *supra* note 74, at 200-01; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.13 (2002).

102. Veasey & Di Guglielmo, *supra* note 55, at 12-13.

Critics of corporate law departments argue internal corporate lawyers aligned themselves too closely to client goals and thus worked creatively to skirt legal boundaries.¹⁰³ By having intimate knowledge of corporate culture, internal corporate lawyers immersed themselves with corporate managers, thus, failing to exercise their independence in advising corporate clients.¹⁰⁴ Consequently, some argue internal lawyers have been complacent and enablers of corporate misconduct.¹⁰⁵

2. Prevention of Misconduct

The SEC's attorney professional rules require internal corporate lawyers take active responsibility for mitigating corporate misconduct.¹⁰⁶ Internal corporate lawyers must do more than design compliance programs; they must also advise managers of their fiduciary duties to the corporation and provide an ethical voice to legal compliance.¹⁰⁷

Managers rely on legal approval of business deals as blessings and expect corporate lawyers to design business transactions around legal obstacles.¹⁰⁸ For instance, in some corporate fraud scandals, corporate lawyers (internal and external) played a pivotal role in structuring legal aspects of business transactions presented to the board for review and approval.¹⁰⁹ In many cases of corporate malfeasance, corporate officers either failed to understand the scope of legal risk or structured business transactions using legal approval as a guise to sanction business transactions in which the true legal risks were unknown to the board.¹¹⁰

A corporate culture of risk taking in which personal goals trump corporate goals is a factor in understanding the reason for corporate fraud.¹¹¹ In corporate cultures in which risk taking is highly rewarding in the form of bonuses and stock options, executives take corporate legal risk that ben-

103. Burton & Dzienkowski, *supra* note 75, at 711-14; Gordon, *supra* note 57, at 779; COFFEE, *supra* note 51, at 191-95; Fisch & Rosen, *supra* note 75, at 1104.

104. Burton & Dzienkowski, *supra* note 75, at 711-14; Gordon, *supra* note 57, at 779; COFFEE, *supra* note 51, at 191-95.

105. Gordon, *supra* note 57, at 774; Fisch & Rosen, *supra* note 75, at 1110.

106. Johnson & Ricca, *supra* note 86, at 664; Fisch & Rosen, *supra* note 75, at 1112.

107. *See generally* 17 CFR § 205.3; Veasey & Di Guglielmo, *supra* note 55, at 7; Gordon, *supra* note 57, at 786.

108. Burton & Dzienkowski, *supra* note 75, at 711-14; Gordon, *supra* note 57, at 774; COFFEE, *supra* note 51, at 191-95; Fisch & Rosen, *supra* note 75, at 1104.

109. Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics & Enron*, 8 STAN J.L. BUS. & FIN. 9, reprinted in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 637 (2004); *see also* Hedges, *supra* note 61, at 553.

110. Burton & Dzienkowski, *supra* note 75, at 711-14; Gordon, *supra* note 57, at 779; Hedges, *supra* note 61, at 564.

111. Johnson & Ricca, *supra* note 86, at 666-67, 678-82.

efits the executive over the corporation.¹¹² Corporate officers who lack knowledge of their legal fiduciary duties blur the distinction between personal and corporate financial goals.¹¹³

3. *Legal Context of Ethical Advice*

Corporate lawyers disseminate ethical advice to corporate agents in the context of explaining their fiduciary duties.¹¹⁴ However, a recent study suggests senior corporate officers, unlike directors, receive little counsel on their corporate fiduciary duties and fail to understand the duty of loyalty prohibits putting personal interests above corporate interests.¹¹⁵ Consequently, there is an increased legal risk tolerance when the personal gain to the executive is likely to outweigh the legal risk to the corporate entity.¹¹⁶

In the wake of criticism of corporate management misconduct and the role of lawyers as enablers of corporate agent misconduct, internal corporate lawyers increasingly describe their responsibilities to include counsel on moral advice.¹¹⁷ To render effective ethical or moral advice, internal corporate lawyers must satisfy professional obligations of independent legal advice and responsibilities to protect the corporate entity from the misconduct of its agents.¹¹⁸

112. Fisch & Rosen, *supra* note 75, at 1179; Johnson & Ricca, *supra* note 86, at 687-88; Daniel T. Ostas, *When Fraud Pays: Executive Self-Dealing and the Failure of Self-Restraint*, 44 AM. BUS. L.J. 571, 574-80 (2007).

113. Johnson & Ricca, *supra* note 86, at 666-67, 687; Ostas, *supra* note 112, at 585-87; Gordon, *supra* note 57, at 768; Milton C. Regan, Jr., *Teaching Enron*, 74 FORDHAM L. REV. 1139, 1154-1156 (2005).

114. See Veasey & Di Guglielmo, *supra* note 55, at 28; Langevoort, *supra* note 18, at 1620-21; Johnson & Ricca, *supra* note 85, at 670-75; Lyman P. Q. Johnson, *Having the Fiduciary Duty Talk: Model Advice for Corporate Officers (and other Senior Agents)*, 63 BUS. LAW. 147, 152 (2007).

115. Johnson & Ricca, *supra* note 86, at 663 (quoting the deposition testimony of Stephen Bollenbach, Chief Financial Officer and Director of the Walt Disney Company, "I was not aware that it was a breach of the duty of loyalty to place one's own interests ahead of the interests of shareholders.") According to a survey and questionnaire of corporate lawyers regarding how they give advice regarding fiduciary obligations, many reasons were identified as to why corporate managers fail to understand the duty of loyalty: little law or guidance on the subject matter from caselaw, lack of lawyers giving officer-specific advice, and differing views among lawyers as to whether there should be a dichotomy between officer and director fiduciary duty and their importance. *Id.* at 670-75. Accordingly, there is a need for lawyers to advise officers on how the corporation can comply with the law but also how the officers themselves can comply with fiduciary obligations to the company. *Id.* at 689; Z. Jill Barclift, *Senior Corporate Officers and the Duty of Candor: Do the CEO and CFO Have a Duty to Inform?*, 41 VAL. U. L. REV. 269, 270 (2006).

116. Fisch & Rosen, *supra* note 75, at 1177; Rapaport & Dharan, *supra* note 86, at 192-94.

117. Veasey & Di Guglielmo, *supra* note 55, at 6-7; Langevoort, *supra* note 18, at 1622-23; Nelson and Nielsen, *supra* note 54, at 463.

118. Veasey & Di Guglielmo, *supra* note 55, at 6-7; Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1190-91 (2003).

The rules of the legal profession do not account for the special circumstances of the corporate attorney.¹¹⁹ Such a gap in professional rules creates a need to expound on the role and responsibilities of internal corporate lawyers to give context to the meaning of the lawyer as ethical advisor or counselor.¹²⁰

Preventive Law is a way to fill the gaps in professional rules and provides a platform for additional exploration of the professional challenges facing the internal corporate lawyer.¹²¹ There is a need to provide context to the multi-dimensional role of internal corporate lawyers and recommend ways for internal lawyers to manage the professional tension of serving as independent legal, business, and ethical advisor. Preventive Law jurisprudence provides a framework for internal corporate lawyers to disseminate legal and ethical advice—to counsel.

III. PART THREE

A. *Preventive Law Jurisprudence and Internal Corporate Law Practice*

The similarities of Preventive Law and internal corporate law practice are many. Preventive Law jurisprudence encourages lawyers to be proactive problem solvers working cooperatively with clients. Internal corporate lawyers rely on collaboration and problem solving skills to design solutions to legal issues.

As communicators of legal risk, internal corporate lawyers work with clients to identify current legal risks by monitoring compliance programs and assist clients in planning to manage future legal risk. Such skills align with Preventive Law's approach of planning for legal risk.

Preventive Law encourages the lawyer to have a keener understanding of client needs and motives. Internal corporate law practice is particularly suited to Preventive Law because the lawyers are embedded into the client's corporate culture.¹²² Their knowledge of corporate culture assists in understanding client needs, motives, and in the broader development of legal strategies.¹²³

However, the benefits of Preventive Law jurisprudence to internal corporate law practice are deeper than the many similarities they share. Preventive Law jurisprudence provides a framework to advance the dialogue on how internal corporate lawyers prevent future misconduct of cor-

119. Regan, Jr., *supra* note 74, at 201.

120. Gordon, *supra* note 57, at 784.

121. Veasey & Di Guglielmo, *supra* note 55, at 35.

122. 1 BASRI & KAGAN, *supra* note 6, §§ 2-1, 2-2; Veasey & Di Guglielmo, *supra* note 55, at 11, 23; Liggio, *supra* note 62, at 1208.

123. Stolle & Wexler, *supra* note 15, at 28.

porate agents.¹²⁴ As gatekeepers, internal corporate lawyers protect the legal interests of the corporate entity by advising managers of their fiduciary duties, ethical obligations, and moral obligations.

The gatekeepers' duties of internal corporate lawyers align with "theralaw" aspects of Preventive Law in which the lawyer provides multi-dimensional advice helping the client see the impact of their decisions in a societal context. The "theralaw" jurisprudence provides a platform for internal lawyers to integrate their multi-dimensional adviser obligations to render independent legal advice with their responsibilities to provide ethical advice.¹²⁵

Barton's work on creative problem solving can benefit internal corporate lawyers. Barton's theories on the use of Preventive Law as a tool for lawyers to become better problem solvers add a richer understanding to internal corporate lawyer's role as a multi-dimensional advisor to corporate agents.¹²⁶ By aligning the work of internal corporate practice with the range of Preventive Law jurisprudence, we broaden the scholarly insights on the role of internal corporate lawyers as counselors in two ways. First, such insight offers deeper personal meaning for internal corporate lawyers to satisfy their duty to provide independent legal advice, and second, such insight provides a strategy for internal corporate lawyers to have meaningful conversations with corporate agents on their fiduciary obligations to the corporate entity.¹²⁷

B. Barton's Accommodation as Problem Solving

Barton's work on defining the problem solver role of lawyers provides useful guidance for internal corporate lawyers advising corporate agents of their fiduciary duties. Barton's analysis on the accommodation style of problem solving provides a framework for internal corporate lawyers to advise their corporate clients not only of their legal obligations but also their ethical or even moral obligations to the corporation and society.¹²⁸ The accommodation style of problem solving invites individual or group cooperation to solve problems. Accommodation moves beyond a discussion of how lawyers satisfy professional rules of conduct to an exploration of how lawyers communicate ethical choices to corporate agents.

Barton explains that unlike the practice of psychology in which practitioners use the accommodation style of problem solving, lawyers use a

124. *Therapeutic Jurisprudence*, *supra* note 11, at 922.

125. *Id.* at 935.

126. *Id.* at 933.

127. *Creative Problem Solving*, *supra* note 11, at 282-83; Johnson & Ricca, *supra* note 86, at 687 (discussing the need for lawyers to advise corporate officers of their fiduciary duties).

128. *Therapeutic Jurisprudence*, *supra* note 11, at 934-35; Johnson & Ricca, *supra* note 86, at 687 (discussing why advising on fiduciary duties is good legal advice not just moral advice).

judging style of problem solving.¹²⁹ Barton argues that lawyers can benefit from the accommodation style of problem solving.¹³⁰ Accommodation operates and presumes a certain familiarity between the parties allowing for a history through which the parties are comfortable discussing matters outside of a defined norm.¹³¹

Barton encourages lawyers to embrace the accommodation style of problem solving to advance conversation with clients beyond the law to include such topics as personal responsibility and civic duty.¹³² Barton hopes such a role for lawyers reclaims the role of the law and lawyers as moral guides or facilitators.¹³³

Barton's arguments on the role of accommodation for lawyers have potential to provide context to the obligations of internal corporate lawyers as legal gatekeepers responsible for protecting the corporate entity from the misconduct of its agents. To carry out their obligations to prevent corporate agents' misconduct and root avarice out of corporate cultures, internal corporate lawyers must embrace a multi-dimensional approach to dispensing legal advice.¹³⁴

Internal corporate lawyers have a built in advantage in dispensing ethical advice because of their close working relationships with corporate agents and obligation to advise them of their fiduciary duties. Internal corporate lawyers have a legitimate legal context for advising on ethical matters.¹³⁵ By virtue of their regular, familiar working relationships, internal corporate lawyers can cultivate relationships that endue trust and respect.¹³⁶ Close working relationships set the foundation for the accommodation style.¹³⁷

Barton recommends three principles to guide the accommodation style of problem solving for lawyers: (1) facilitate understanding through sharing of information, (2) facilitate "cognitive restructuring," and (3) give clients choice and responsibility.¹³⁸ Each of Barton's principles provides an appropriate conceptual framework for the internal corporate lawyer to advise corporate managers of their fiduciary and ethical obligations to the corporation.

129. *Therapeutic Jurisprudence*, *supra* note 11, at 928.

130. *Id.* at 931.

131. *Id.*

132. *Id.* at 934-35.

133. *Id.* at 935-36.

134. *Therapeutic Jurisprudence*, *supra* note 11, at 933.

135. *Id.*

136. *Id.* at 938-41.

137. *Id.*

138. *Id.* at 938-40.

1. *Facilitate Understanding Through Sharing of Information*

Barton encourages lawyers to give legal information to clients in more than a conclusory manner.¹³⁹ As compliance managers, internal corporate lawyers must do more than identify legal rules and ways to satisfy or avoid the rules; they must communicate the meaning of the rules and the impact of corporate agents' decisions.¹⁴⁰ Johnson and Ricca explain in a recent article that corporate officers receive very little advice on their fiduciary obligations to the corporation.¹⁴¹ Internal lawyers must do more than explain to corporate managers or officers that they owe fiduciary duties—including identifying fiduciary obligations and what corporate agents must do to satisfy their duties.¹⁴²

2. *Facilitate "Cognitive Restructuring"*

Barton explores tools to assist clients in understanding their personal circumstances and avoiding cognitive dissonance.¹⁴³ Clients experience cognitive dissonance when they experience anxiety or denial about legal choices.¹⁴⁴ An example of such cognitive dissonance is when a corporate senior officer fails to realize it is a breach of the duty of loyalty to place personal interests ahead of corporate interests.¹⁴⁵ For internal corporate lawyers, cognitive restructuring means engaging clients in conversation so that they understand the impact of personal choices on the corporate entity. Cognitive restructuring also means internal corporate lawyers must assume the role of counsel and understand the multi-dimensional aspects of human decision-making.¹⁴⁶ The internal corporate lawyer must help corporate agents understand their obligations to protect the interests of the legal entity when making decisions on its behalf.

3. *Give Clients Choice and Responsibility*

Barton advocates giving clients a choice and role in solving their problems by engaging in dialogue particularized to the client rather than broader dialogue on abstract legal risks.¹⁴⁷ Internal corporate lawyers must remind corporate agents of their fiduciary duties to the corporate entity and ensure corporate officers recognize when their personal interests may not

139. *Therapeutic Jurisprudence*, *supra* note 11, at 938-39.

140. *See* COFFEE, *supra* note 51, at Part 2.

141. Johnson & Ricca, *supra* note 86, at 663.

142. *Id.* at 687.

143. *Therapeutic Jurisprudence*, *supra* note 11, at 939.

144. *Id.*

145. Johnson & Ricca, *supra* note 86, at 663.

146. *Id.* at 686-89.

147. *Therapeutic Jurisprudence*, *supra* note 11, at 940.

align with corporate interests.¹⁴⁸ Internal corporate lawyers can supplement broad legal fiduciary requirements with a direct conversation of a corporate officers' conduct in the context of societal norms and moral choices.¹⁴⁹ For instance, internal corporate departments serve as legal resources and educate non-legal managers on the law through training programs.¹⁵⁰ Legal training programs are an effective tool for a corporate law department to explain the law in a way corporate managers can understand and implement in their day-to-day jobs.

Finally, Barton's accommodation approach and guiding principles also benefit corporate governance. The corporation benefits when internal corporate lawyers embrace their obligations to advise corporate agents of the impact of the broader implications of their decisions on ethics, moral duties, and on society. Internal corporate lawyers can positively influence good corporate governance by reminding its agents of their broader obligations to society. This type of counseling is what the SEC and other professional organizations expect from corporate lawyers.¹⁵¹

IV. CONCLUSION

The challenges for internal corporate lawyers to protect the interests of the corporate entity, respect the goals of its corporate agents, and weigh the interests of the corporation against its obligations to external constituents create many professional tensions for the internal corporate lawyer.¹⁵² Preventive Law not only describes internal corporate law practice, it also provides a framework for a legitimate role of corporate law departments in dispensing ethical advice.

Many call for a new way of thinking about the role of internal corporate lawyers and their role as counsel to corporations. Preventive Law jurisprudence is a strategy that goes beyond professional rules to offer a more personal perspective in defining the role of internal corporate lawyers.

Moreover, Preventive Law jurisprudence offers the opportunity to embrace Barton's scholarship on the accommodation style of problem solving and to explore a systemic model for internal corporate lawyers to advise corporate agents of their fiduciary, ethical, and moral obligations to

148. Johnson & Ricca, *supra* note 86, at 683-84.

149. *Id.* at 687; Langevoort, *supra* note 18, at 1624.

150. Gruner, *supra* note 77, at 1143.

151. See generally The Report of the A.B.A. Task Force on Corporate Responsibility (Mar. 2003), available at http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf (last accessed Jul. 17, 2008).

152. Langevoort, *supra* note 18, at 1621-22; Stolle & Wexler, *supra* note 15, at 28; Veasey & Di Guglielmo, *supra* note 55, at 35; Regan, *supra* note 74, at 207.

prevent future corporate misconduct.¹⁵³ Preventive Law jurisprudence offers a strategy for internal corporate lawyers to manage corporate governance in a way that reclaims the role of the law and lawyers as moral guides and to avoid the role of complacent enablers of corporate malfeasance.¹⁵⁴

153. Johnson & Ricca, *supra* note 86, at 690-91.

154. *Therapeutic Jurisprudence*, *supra* note 128, at 935-36; Langevoort, *supra* note 18, at 1622; Gordon, *supra* note 57, at 791-92.

