1973

The Code of Professional Responsibility in the Corporate World: An Abdication of Professional Self-Regulation

Carl A. Pierce
University of Tennessee College of Law

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Legal Ethics and Professional Responsibility Commons, and the Legal Profession Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjlr/vol6/iss2/4

This Article is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
THE CODE OF PROFESSIONAL RESPONSIBILITY IN THE CORPORATE WORLD: AN ABDICATION OF PROFESSIONAL SELF-REGULATION

Carl A. Pierce*

The American Bar Association’s Code of Professional Responsibility1 (Code or CPR) provides the foundation for the regulation of the legal profession by the members of the profession themselves. Although the drafters of the CPR have described it as a body of fundamental ethical principles applicable to all lawyers regardless of the nature of their professional activities,2 this article examines the vitality of the CPR and professional self-regulation in one particular area of lawyers’ activities: corporate practice.3 The article suggests that the legal profession has abdicated its self-regulatory role, discusses the consequences of this abdication, and advances some alternatives to remedy the failings of professional self-regulation in the area of corporate practice.

I. THE FAILURE OF THE MECHANISMS OF SELF-REGULATION IN CORPORATE PRACTICE

Evaluating self-regulation in corporate practice entails the ex-

---

*Assistant Professor of Law, University of Tennessee College of Law, B.A., 1969, J.D., 1972, Yale University. The author wishes to acknowledge with appreciation the suggestions of Professor Geoffrey C. Hazard of Yale Law School.

1 ABA CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as CPR].

2 CPR, PRELIMINARY STATEMENT. This approach, the drafters state, is necessitated by the impossibility of foreseeing every problem that might arise in the many varieties of legal practice. In actuality, however, the CPR does contain rules applicable to very specific segments of legal practice, such as group legal services (DISCIPLINARY RULE 2-103(D)), litigation (DISCIPLINARY RULE 7-106 et. seq.), and public service activities (DISCIPLINARY RULES 8-101, 9-101). The Code may be analyzed better as a compendium of rules some of which are applicable to all lawyers and some of which are designed to deal with specific problems foreseen in conjunction with specific varieties of practice. Within this framework, the draftsmen of the CPR chose not to articulate specific rules for the corporate counselor.

3 For the purposes of this article, the phrase corporate practice refers to the representation by attorneys of enterprises doing business in the corporate form. In this context corporate attorneys are those attorneys who serve business corporations in a professional capacity, whether as house counsel or as a member of a large law firm whose clients are primarily corporations. These firms have been discussed in E. SMIGEL, THE WALL STREET LAWYER (1964).
amination of a system of social control premised on the assumption that if rules are “properly defined, effectively internalized, and actively enforced they would be faithfully observed.” This system of self-regulation relies on several elements. The CPR represents a codification of professional obligations designed to define norms of conduct for the legal profession. The ABA Committee on Professional Ethics, in conjunction with state and local ethics committees, implements the goals of the Code by providing the continuing education that is deemed necessary for the internalization by attorneys of their responsibilities. The final component of the regulatory scheme is the ABA Committee on Professional Grievances, which in conjunction with state and local grievance committees provides for the active enforcement of the CPR and discipline of those lawyers who deviate from its strictures. The success or failure of the system of self-regulation in corporate practice, as well as in other varieties of practice, thus depends in part on the clarity of the rules set forth in the CPR, the ability of the ethics committees to impress upon the corporate bar the meaning of their professional obligations, and the ability of the grievance committees to discipline those attorneys who deviate therefrom.

A. The Failings of the Disciplinary Mechanism

For the scheme of social control envisaged by the profession to be successful, the bar must be able to discipline effectively those corporate attorneys whose conduct deviates from the standards set forth in the CPR. The profession’s disciplinary machinery, however, has proved inadequate for this task.

At the heart of the disciplinary mechanism is the concept of self-policing. Although complaints to a grievance committee may on occasion emanate from aggrieved clients, the CPR also re-

\[5\] The CPR replaced the American Bar Association's Canons of Professional Ethics. The drafters of the Code felt that the Canons were out of date, did not reflect the changed and changing conditions in the legal system and society at large, did not cover many lawyers' activities, and were so broad and generalized that they provided neither guidance for the lawyer nor standards by which he could be judged.
\[6\] See ABA Comm. on Professional Ethics, Opinions on Professional Ethics 1-7 (1967). Although this article will focus on the performance of the ABA Committee on Professional Ethics, it should be remembered that most state bar associations and many city bar associations have their own ethics committees.
\[7\] Cf. ABA Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (final draft, 1970) [hereinafter cited as Disciplinary Enforcement]. It again should be noted that most state and local bar associations have their own grievance committees. Most of the disciplinary proceedings that occur are at the state and local level. Id. at 5.
\[8\] See generally id. at 1-9.
quires that a lawyer possessing unprivileged knowledge of a violation of a disciplinary rule report the violation to the appropriate grievance committee. Failure to report a known violation is in itself a violation. In theory these requirements are commendable, but as Professor Carlin has pointed out, "lawyers are notoriously unwilling to lodge complaints against colleagues."

Several factors militate against effective self-policing. Corporate attorneys might be hesitant to file complaints because the application of the CPR to their own practices may generate uncertain results. As will be seen, it is difficult enough for an attorney to determine his own professional obligations, much less those of his brethren. Additionally, one might suspect that an attorney will not report a violation of a professional norm if he himself believes the norm to be trivial, and Professor Carlin's findings suggest that many of the peculiarly professional rules are so regarded by most lawyers, including those in corporate practice.

The practical pressures of corporate practice further militate against the effective policing of the corporate bar. Even if lawyers desired to act as policemen, most simply do not have the time to do so; the pressures of keeping their corporate clients within the law precludes their acting in an overzealous fashion in keeping their brethren true to the strictures of the CPR. Because many law firms and corporate law departments are large in size, many violations are invisible to all outside the specific organization and probably to some of those inside as well. Even where a violation is visible to a member of the organization, it is unlikely that he will report it to the appropriate grievance committee as required by Disciplinary Rule 1-103(A). Professor Smigel, in his study of corporate lawyers, isolated "good judgment" as an essential ele-

---

9 DISCIPLINARY RULE 1-103(A) of the CPR provides: "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."

10 CPR, DISCIPLINARY RULE 1-102(A) provides "A lawyer shall not violate a Disciplinary Rule." A failure to report unprivileged knowledge of a violation of a disciplinary rule would thus violate Disciplinary Rule 1-102(A).

11 J. CARLIN, supra note 4, at 153. Professor Carlin has suggested fear of retaliation, lack of concern, and the greater effectiveness of economic sanctions as possible reasons for the lawyer's hesitancy to bring his colleagues before a grievance committee.

The ABA Special Committee on Evaluation of Disciplinary Enforcement has also concluded that "[w]ith few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility." DISCIPLINARY ENFORCEMENT, supra note 7, at 1.

12 See part I C infra.

13 J. CARLIN, supra note 4, at 49-52, 155. Professor Carlin terms such rules "paper norms" and demonstrates that the corporate bar does not regard as salient some of the profession's rules against solicitation and the representation of conflicting interests.

14 If one needs convincing, see, e.g., Swaine, Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar, 35 A.B.A.J. 89, 91 (1949), for a discussion of the pace and pressure of corporate practice.
ment in the organizational success of Wall Street law firms. It is doubtful that "good judgment" would include reporting a suspected violation by a partner or an associate of one's own firm to the grievance committee.

In addition to these practical factors, the disciplinary mechanism may be undermined by an informal "professional value" akin to that discerned by Professor Smigel in his study of Wall Street lawyers. Most of the lawyers in Professor Smigel's sample considered it improper to criticize the work of other lawyers or to gossip about them. In fact Smigel encountered difficulty in persuading the corporate bar to discuss their activities at all, much less their ethical problems. This rule of professional etiquette is reinforced by very practical considerations: the risks of the bitterness and retaliation that reporting a violation would provoke. In view of these realities, it is likely that unless an attorney or his client has been seriously injured by the misdeed of another, the violation will go unreported. Thus, it is conceivable that many violations of the CPR by corporate practitioners will never come to the attention of the bar association at all.

These considerations support the conclusion that there is little, if any, actual self-policing within the corporate bar. The absence of self-policing indicates that, as elsewhere in the profession, nonenforcement of the CPR constitutes the norm. Thus the deterrent effect of disciplinary proceedings is dissipated. When the sanction of reporting a violation of the CPR to the bar association is so rarely used against unethical lawyers, one cannot help feeling that the disciplinary machinery exists more for win-

15 E. SMIGEL, supra note 3, at 260–62.
16 Id. at 17–21, 266.
17 Professor Kaplan, in discussing the penalties for representing conflicting interests in corporate practice, concludes: "I don't really see severe discipline as a very likely thing." PRACTICING LAW INSTITUTE THIRD ANNUAL INSTITUTE ON SECURITIES REGULATIONS, CONFLICT OF INTEREST IN CORPORATE LAW PRACTICE 247 (1971) (remarks of Professor Kaplan) [hereinafter cited as Kaplan]. See also J. CARLIN, supra note 4, at 150–67; E. SMIGEL, supra note 3, at 271.
18 J. CARLIN, supra note 4, at 161. But see, E. SMIGEL, supra note 3, at 272; Kaplan, supra note 17, at 247. Professor Smigel "presumes" that the threat of punishment, albeit slight, serves as a deterrent to antisocial behavior. Professor Kaplan thinks that any possible embarrassment due to bar discipline will incline corporate lawyers to consider their responsibilities carefully. Because adverse publicity lies at the foundation of the deterrent effect envisaged by Professors Smigel and Kaplan, Professor Carlin's finding that little publicity is accorded to most disciplinary proceedings weakens their argument. J. CARLIN, supra note 4, at 161. This author finds more persuasive Carlin's conclusion that the deterrent effect is minimal.
19 J. CARLIN, supra note 4, at 161–62, 163 n.9. Most lawyers, Professor Carlin reports, would actually use economic sanctions, such as terminating referrals, against the unethical. These sanctions, however effective they may be as a deterrent, are not part of the formal self-regulatory scheme of the CPR.
dressing than for the effective scrutiny of the professionalism of the bar.\textsuperscript{20}

\textbf{B. The Failings of the Educational Mechanism}

In addition to discipline, the self-regulatory system of the profession relies on the continuing education of attorneys concerning their responsibilities. The educational mechanism relied upon by the drafters of the CPR, however, proves to be as inadequate as the disciplinary mechanisms.

The opinions of the Ethics Committee at best provide a meager source of ethical elucidation. There are very few opinions applying the Canons expressly to corporate practice.\textsuperscript{21} No doubt this paucity of opinions stems from the fact that requests from corporate practitioners for opinions are few. The lack of requests for opinions may arise because some ethical problems of the practitioner may simply be ignored; many may not be recognized as ethical problems at all; others may be resolved to the satisfaction of the individual lawyer involved, so that he would not see any need for the assistance of the Ethics Committee. The corporate attorney is just as unlikely to seek ethical advice from the Ethics Committee as he is to turn to the Practicing Law Institute for technical advice or to the economics committee of the state bar association for advice about running his firm. It is often the case that the needs of a client for immediate advice or action may preclude formal inquiry of the Ethics Committee before the advice is rendered or the action taken. When corporate counsel is under such pressure to provide the correct legal answer, it is not surprising that he does not find time to search out the correct ethical solution. Nor is it surprising that after having acted, the attorney might be hesitant to solicit an opinion to the effect that he had acted improperly.

Much of the difficulty with the educational mechanism may be attributed to the Ethics Committee. It regards its function as only advisory in nature,\textsuperscript{22} and, as a result, many of the opinions from

\textsuperscript{20} \textit{Id.} at 161.

\textsuperscript{21} Of the 330 Formal Opinions rendered by the ABA Committee of Professional Ethics, only six appear to be related to corporate practice. \textit{See ABA Comm. on Professional Ethics, Opinions on Professional Ethics} (1967) [hereinafter cited as \textit{ABA Formal Opinions}]. Of the approximately one thousand informal opinions only twenty, or 2 percent, appear to have arisen from corporate practice. \textit{See ABA Comm. on Professional Ethics, Informal Opinions} (1968) [hereinafter cited as \textit{ABA Informal Opinions}].

\textsuperscript{22} The function of the Ethics Committee is "primarily to formulate opinions of general application, or to render advisory opinions where a lawyer is in doubt as to whether or not
WINTER 1973] CPR in the Corporate World 355

the Committee are equivocal—painting broad parameters and leaving the final resolution of the problem to the individual practitioner.23 It has also been loath to upset the existing order.24 Rather than suggest the ethical impropriety of a prevalent practice, the Committee will base its decision on corporate theory that may not reflect accurately the reality confronting the corporate lawyer.25 Furthermore many of the opinions involve relatively unimportant questions of professional etiquette.26 Ultimately, however, the failure of the Ethics Committee results from its unwillingness to take the initiative and to issue opinions considering difficult, frequently recurring problems of corporate practice about which it has not been asked.27 The small number of opinions dealing with corporate practice indicates that complete re-

---

23 See, e.g., ABA Comm. on Professional Ethics, Informal Opinions, No. 1056 (1968), discussed in notes 25 and 40 infra.

24 When the Committee addressed the question of the professional propriety of an attorney's sitting on the board of directors of a client corporation, for example, it approved the practice in part because it was commonplace at the time. ABA Comm. on Professional Ethics, Informal Opinions, No. 930 (1966). The same approach was adopted when the propriety of an attorney's owning stock in a client corporation was questioned. ABA Comm. on Professional Ethics, Informal Opinions, No. 1056 (1968). Ideally, one might hope that the Committee would at least lead rather than follow in the delineation of standards of professional conduct.

25 The Ethics Committee also justified the practice of an attorney's serving as a director of a client corporation on the theory that there is no inherent conflict of interest between the directors of a corporation and the corporation itself. ABA Comm. on Professional Ethics, Informal Opinions, No. 930 (1966). This theory, of course, overlooks the inevitable conflict of interest over legal fees and the reality that "anytime a lawyer advises a corporation to do something that might embarrass or cast aspersions on the board, he is going to think twice about it if he is a member of that board." Gardner, A Question for Mr. Casey, Wall St. J., March 3, 1971, at 16, col. 3. When the real conflicts do arise, the Ethics Committee typically offers little assistance.

Similarly the Committee permits an attorney to purchase—or accept as a fee—stock of a client corporation on the theory that "what is in the best interests of the corporation furthers his interests as a stockholder." ABA Comm. on Professional Ethics, Informal Opinions, No. 1056 (1968). Again, reality belies the simplicity of this conception and reveals conflicts between shareholder interests and the corporate interest. See, e.g., Mundheim, Representing the Acquired Company in Merger Negotiations: Some Problems of Professional Responsibility, 10 Corp. Practice Commentator 217, 221-22 (1968).

26 See, e.g., ABA Comm. on Professional Ethics, Formal Opinions, No. 285 (1951), for a discussion of the propriety of a law firm's being listed as general counsel on a corporation's letterhead and in reports to stockholders.

27 The Ethics Committee has authority not only to express its opinion when consulted by an attorney, but also to "[formulate and recommend standards of ethics and conduct in the practice of law as a profession." ABA Formal Opinions, supra note 21, at 3. If the extent of this authority is not clear, it should be made so.
liance upon formal inquiries will not provide sufficient opportunities for the Ethics Committee to fulfill its function of continuing education of the corporate bar about its professional responsibilities. Absent a change in the activities of the Ethics Committee the educational input that is necessary for the success of the profession's self-regulatory system will not be forthcoming.

II. THE FAILURE OF THE CODE OF PROFESSIONAL RESPONSIBILITY

If one discounts the value of both the disciplinary and educational mechanisms relied upon by the drafters of the CPR, he might conclude that the effect of the CPR upon the corporate bar, if any, will not be realized through external indoctrination and enforcement. Rather, for the Code to be effective, each attorney must achieve both a self-initiated awareness of his obligations under the Code and a recognition of a duty of compliance. Yet to have even this limited, although by no means insignificant, effect, the CPR must be functionalized in the corporate setting: it must address the nuances of corporate practice. An analysis of the CPR, however, indicates that the drafters did not succeed in clarifying the professional obligations of the corporate lawyer. Rather they left him with extensive individual discretion in the conduct of his professional activities.

In their quest for rules applicable to all lawyers regardless of the nature of their practice, the drafters of the CPR followed the general approach of the Canons, which defined the attorney's obligations in terms of a simplistic notion of the attorney-client relationship as a one-to-one interaction between a solo practitioner and an individual client.28 In order to fit the corporate client into this mold, the drafters then provided in Ethical Consideration 5-18 that

[a] lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stock-

---

28 The major sections of the CPR that involve the attorney-client relationship are Canons 4, 5, 6 and 7.

Canon 4 provides: "A lawyer should preserve the confidences and secrets of a client." Canon 5 provides: "A lawyer should exercise independent professional judgment on behalf of a client." Canon 6 provides: "A lawyer should represent a client competently." Canon 7 provides: "A lawyer should represent a client zealously within the bounds of the law."

The Canons are "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers." CPR, PRELIMINARY STATEMENT. Each Canon is followed by Ethical Considerations, which "are aspirational in character and represent the objectives toward which every member of the profession should strive" and Disciplinary Rules, which "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Id.
holder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization.

This statement contains a preliminary recognition of the artificial nature of the corporation. It was, of course, designed to provide a framework for the application of those disciplinary rules which do not take account of the special problems presented when the client is a corporation rather than an individual.\textsuperscript{29} Not all of the disciplinary rules of the CPR are particularly relevant to the attorney-client relationship in the corporate setting. In contrast, some of the disciplinary rules are specifically designed for corporate practice.\textsuperscript{30} However, many disciplinary rules, especially those dealing with client confidences\textsuperscript{31} and conflicting interests,\textsuperscript{32} are particularly troublesome. The vitality of

\textsuperscript{29} The Preliminary Statement to the CPR indicates that an enforcing agency "may find interpretive guidance in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations." CPR, PRELIMINARY STATEMENT.

\textsuperscript{30} For example, a lawyer may be designated as an attorney in routine reports and announcements of a corporation for which he is a director. CPR, DISCIPLINARY RULE 2-101(A)(3). Similarly, the general counsel of a corporation may be specified as such on stationery of the corporation if he devotes a substantial amount of professional time to the representation of that client. CPR, DISCIPLINARY RULE 2-102(A)(4).

\textsuperscript{31} CPR, DISCIPLINARY RULE 4-101 provides:
   (1) Reveal a confidence or secret of his client.
   (2) Use a confidence or secret of his client to the disadvantage of the client.
   (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

CPR, DISCIPLINARY RULE 4-101(C) provides in part:
   A lawyer may reveal:
   (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

\textsuperscript{32} CPR, DISCIPLINARY RULE 5-101(A) provides:
   Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or is reasonably likely to be affected by his own financial, business, property, or personal interests.

CPR, DISCIPLINARY RULE 5-105 provides in part:
   (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).
   (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).
   (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
these rules as norms of professional conduct depends on the concepts set forth in Ethical Consideration 5-18, and, unfortunately, Ethical Consideration 5-18 does not serve the purpose envisaged by its drafters.

A. Representation of Conflicting Interests: A Lack of Guidance for the Corporate Counselor

When tested in corporate practice, those rules of the CPR dealing with the maintenance of independent professional judgment offer an example of the inadequacy of Ethical Consideration 5-18 as a source of guidance for the attorney seeking to ascertain his professional responsibilities. If an attorney's professional judgment on behalf of a client's interests "will or reasonably may be affected" by his own financial, business, or personal interests, or those of another client, he must not accept or must withdraw from representation unless there has been full disclosure of the circumstances and consent by the client.\footnote{CPR, \textit{Disciplinary Rule} 5-105.} If an attorney must withdraw, his partners also may not accept the employment.\footnote{CPR, \textit{Disciplinary Rule} 5-105(D). One should note that the proscription of Disciplinary Rule 5-105(D) applies only to those situations where an attorney's independent judgment is impaired by the interests of another client. It does not appear to apply where an attorney's independent judgment is impaired by his own financial, business, property or personal interests. For a discussion of intrafirm conflicts of interest under the Canons, see \textit{Note, Unchanging Rules in Changing Times: The Canons of Ethics and Intra-Firm Conflicts of Interest}, 73 \textit{Yale L.J.} 1058 (1963).} Under Ethical Consideration 5-18, the client is the corporate entity itself, and the corporate lawyer must determine the propriety of his representation by reference to the interests of the entity, not those of any groups connected with the entity, such as directors, officers, or stockholders.

The apparent simplicity of these principles is misleading because the corporate interest—\textit{i.e.}, the interest of the client—can be determined only by the balancing of the many, often divergent interests of those persons who have legal interests in the corporation.\footnote{These could include the interests of directors, officers, bondholders, preferred stockholders, common stockholders, potential investors, employees, suppliers, consumers, and even the federal government.} As different persons or groups within the corporation have differing concepts of the corporate interest, so also the power to speak and act for the corporation may be located in different persons or groups within the corporation. Furthermore this locus of power is always subject to change. Ethical Consideration 5-18 may be an adequate guideline for the attorney when
all interested parties agree about the corporate interest, or when there is only one group or individual having any legal interest in the corporation. Unfortunately those situations are quite rare.

1. **Representation of Conflicting Interests**—Two common situations reflect the inadequacy of Ethical Consideration 5-18 in situations involving potential conflicts among those legally interested in the corporation. Consider, for instance, the propriety of an attorney's representing both a parent corporation and its subsidiary in a transaction between the two. Both the parent corporation and the subsidiary corporations are separate legal entities within the meaning of Ethical Consideration 5-18. If there is a “substantial identity of underlying ownership” of both the parent and the subsidiary, the profession will pierce the corporate veil and treat the corporations as one client for purposes of applying the CPR.\(^{36}\) If the parent does not own all the stock of the subsidiary, however, conflicts of interest may arise between the parent corporation and the minority ownership interests of the subsidiary.\(^{37}\) Because there is typically an overlap of management in parent-subsidiary relationships, it is not surprising that, in order to reduce legal expenses, management of both corporations might seek the assistance of one attorney in structuring a transaction between the two corporations rather than retaining two attorneys, one for each corporation. The Ethics Committee has permitted an attorney to represent both corporations, provided that (1) the dual representation will not affect the exercise of the attorney’s independent judgment, (2) it is obvious to the attorney that he can adequately represent the interest of each corporation, and (3) each corporation consents to the representation after full disclosure.\(^{38}\)

One must question the vitality of the profession’s standard for determining the permissibility of such dual representation. The Ethics Committee could have simply barred dual representation where a minority interest existed in the subsidiary corporation.

---

\(^{36}\)ABA **Comm. of Professional Ethics, Informal Opinions, No. 973** (1967). Substantial identity of underlying ownership is deemed to exist where the subsidiary is wholly owned by the parent or where the stock of both the parent and the subsidiary is owned “by substantially the same shareholders in substantially the same proportions.” The pregnant phrase “substantially the same” is left undefined and seems to leave open the possibility of dual representation of a parent and subsidiary where minority interests are present.

\(^{37}\)See Kohn v. American Metal Climax, Inc., 322 F. Supp. 1331 (E.D. Pa. 1970), rev’d in part, 458 F.2d 255 (3rd Cir. 1972), involving a merger between a parent and a partially owned subsidiary. An action brought by minority shareholders under SEC Rule 10b-5 alleged a failure to disclose that the same law firm advised both the parent and the subsidiary. For a discussion of Kohn from the standpoint of professional responsibility, see Kaplan, supra note 17, at 240–47.

\(^{38}\)CPR, **Disciplinary Rule 5-105(A)**; ABA **Comm. on Professional Ethics, Informal Opinions, No. 973** (1967).
Rather it chose to permit each attorney to decide the question for himself. Unfortunately, the Committee has provided no meaningful standards to assist the attorney in deciding the issue. The attorney must resolve two questions: whether his independent judgment will be affected and whether he can adequately represent the interest of each corporation. Independence of judgment is, of course, a nebulous concept at best and accords the attorney great leeway. As concerns the second question, it should be clear that the corporate interest in any given situation is invariably the subject of dispute. Because the Ethics Committee did not expound upon the meaning of independent judgment or undertake a definition of the corporate interest, the attorney is left entirely to his own judgment. Even the requirement of client consent is illusory in this setting, for the very individuals who requested dual representation in the first place are those empowered to consent for both corporations. 39

2. The Practitioner, the Corporation, and the Corporate Interest—The difficulties in applying the principles of Ethical Consideration 5-18 are equally pronounced when only one corporation is involved. In a recent request for an opinion a corporate counselor inquired whether it would be proper for him to advise the president of his corporate client as to a method of conducting the election of directors whereby the incumbent promanagement slate could outpoll a minority slate and thus prevent the minority stockholders from gaining a seat on the board of directors. The Ethics Committee responded that the attorney might do so as long as he sincerely believed his advice was legally sound and “not contrary to the interests of the corporation itself.” 40 Because the corporation may act only through its officers and directors, the Committee reasoned, the attorney should give these agents legal advice in all matters relating to the corporation (presumably

40 ABA Comm. on Professional Ethics, Informal Opinions, No. 1056 (1968). Compare Informal Opinion No. 1056 with ABA Comm. on Professional Ethics, Formal Opinions, No. 86 (1932). In Formal Opinion No. 86, the Ethics Committee considered the propriety of a corporation’s general counsel’s soliciting, by means of personal interviews and letters, proxies from stockholders. The Committee ruled that such solicitation was improper and stated most broadly that “in acting as the corporation’s legal advisor [the general counsel] must refrain from taking part in any controversies or factional differences which may exist among stockholders as to its control.” Although Formal Opinion No. 86 can be construed to prohibit a corporate attorney from any participation in a battle for control of his client corporation, Informal Opinion No 1056 construed the earlier opinion very narrowly and emphasized the impermissible manner of participation in the proxy fight (the personal solicitation of proxies) rather than the mere fact of participation. See also ABA Comm. on Professional Ethics, Informal Opinions, No. 516 (1962).
including matters such as tenure, in which management has a personal interest as well), "except in situations where to his knowledge the interests of the officers are adverse to the interests of the corporation and the giving of advice would be contrary to the interest of the corporation." Note, however, that the Ethics Committee did not determine whether the electoral manipulation involved was contrary to the corporate interest. Instead it left that determination to the individual attorney, without the slightest hint as to the proper resolution of the question. Inasmuch as these questions only arise when the corporate interest is in dispute, the attorney is given unbridled discretion and no meaningful guidance in what the Ethics Committee called a "very difficult and delicate position."

In one sense, the drafters of the CPR have neglected to define the "client" of the corporate practitioner. Ethical Consideration 5-18 tells the practitioner that his client is an abstract legal entity, whereas in reality he must provide services for different persons and groups, all of whom arguably embody his "client" but who may have conflicting interests among themselves in that regard. Whenever conflicts arise, the attorney is forced to ask anew, "who is the corporation?" After all, he is dealing with real people, as well as legal concepts. As the corporate attorney defines his client, he simultaneously defines his professional obligations. He necessarily does so completely on his own because the CPR speaks of professional obligations only with reference to an ascertainable client, which begs the question if the attorney has complete discretion in determining, who, among many possible candidates, shall be deemed to embody the corporation.

Viewed slightly differently, the requirement of Ethical Consideration 5-18 that the attorney act with reference to some undefined concept of the "corporate interest" places the corporate lawyer in a position similar to that of the "public interest" lawyer. Although there are many lawyers who criticize the latter for predetermining the public interest, the profession requires, as an attribute of ethicality, that the corporate attorney predetermine the corporate interest, a concept at least as vague and as subject to dispute as the public interest. Because "corporate interest," like "public interest," is not embodied in an objective standard, but must be defined with reference to the desires of the in-

---

individuals and groups who are constantly seeking to further their personal versions of the "corporate interest." Ethical Consideration 5-18 essentially requires the corporate lawyer to resolve the merits of a conflict while the matter is pending and to represent only those persons, if any, who agree with his concept of the corporate interest. Instructing the attorney to represent the corporate interest only raises the essential question, "What is the corporate interest?" Both the CPR and the Ethics Committee have left that question unanswered.

By leaving the determination of the corporate interest to each individual attorney, the CPR and the Ethics Committee in essence require the corporate lawyer to be "counsel for the situation," a role that stands in sharp contrast to the traditionally accepted role of the lawyer as an advocate for or counsel to only one interest at a time. For the corporate practitioner to determine which interest to advocate he must in reality act as a mediator of potentially conflicting interests of directors, officers, shareholders, and even potential investors. He must consider the interests of all parties affected by the corporate action rather than the interest of just one party. The attorney must, therefore, determine his professional responsibilities as counsel for the situation. Only after determining the corporate interest in this manner can the corporate attorney commence the traditional role of advocate. Inasmuch as the CPR does not acknowledge the possibility of an attorney's serving as counsel for the situation, it provides no standards for the corporate attorney who is required by Ethical Consideration 5-18 to serve in that role.

B. The Silence of the CPR

Not only does the CPR fail to provide objective standards of conduct, but its emphasis on the corporate entity, as opposed to the individuals who make it a functioning organization, leaves unaddressed many of the foreseeable ethical problems of the corporate bar. It fails to provide guidance as to what are the

---

42 The phrase "counsel for the situation" was coined by Justice Brandeis when, during the Senate fight over his confirmation as a Justice of the Supreme Court, he was charged with having represented conflicting interests. Frank, The Legal Ethics of Louis D. Brandeis, 17 Stan. L. Rev. 683, 702 (1965). "Counsel for the situation" handles a transaction and considers the interests of all parties to the transaction rather than the interest of only one party. He acts as a neutral resource person and aids all parties to reach an acceptable consummation of the transaction or resolution of the issues in dispute. He acts not as an advocate, but rather as a mediator. Kaplan, supra note 17, at 236.
corporate lawyer's obligations to potential investors,\textsuperscript{43} to the shareholders who indirectly pay his salary or retainer,\textsuperscript{44} and to the board of directors vis-à-vis his obligations to the executive officers.\textsuperscript{45} The lawyer must, of course, preserve the corporation's confidences, but the CPR does not delineate any duty to preserve the confidences of the executives he works with—confidences within the corporation.

The CPR requires consent of the corporation before an attorney may accept or continue employment in situations in which his interests or those of other clients may affect his professional judgment. A serious problem is raised because attorneys are not informed as to whose consent will suffice.\textsuperscript{46} Ethical Consideration


Although the gravamen of part of the complaint is the failure of the law firms involved to disclose an impending fraud to the SEC, the SEC may be regarded as the protector of the investing public. Potential investors have an interest in the corporation under the securities laws, and consequently attorneys must balance their interests with those of existing shareholders, officers, and directors. In this instance, the SEC has sought to weigh the balance in favor of the potential investor's interest in the corporation.

Alternatively, of course, one can parallel the attorney's duty to report frauds to the SEC to his duty to report frauds to the courts. See, CPR, \textit{Disciplinary Rule} 7-102(b)(1). See Karmel, \textit{supra}, at 1160–62; Hazard, \textit{supra} note 41, at A-1, A-2; Kaplan, \textit{supra} note 17, at 256 (remarks of SEC Commissioner Loomis). An attorney for a corporation subject to SEC regulation might be regarded as an officer of the SEC as well as an officer of the court.

The corporate bar has expressed great concern about the \textit{National Student Marketing} case. Unfortunately, one must suspect that the concern is not so much about the ethical posture of the corporate attorney, but rather about his potential civil liabilities under the securities laws. ABA \textit{Informal Opinion} No. 1056, \textit{supra} note 25, simply did not command the same audience as did the complaint in \textit{National Student Marketing}, which has been described as "the best read document since 'Gone With the Wind.'" Green, \textit{supra}, at 1, col. 1. The SEC apparently has the means available to encourage corporate attorneys to consider their professional responsibilities and perhaps should be encouraged in its efforts.


\textit{Informal Opinion} No. 1056, \textit{supra} note 25, provides an excellent example of how the emphasis of the CPR on the corporate entity enables the Ethics Committee to avoid discussing the attorney's obligations to the shareholders.

\textsuperscript{45} See H. Koontz, \textit{The Board of Directors and Effective Management} 74 (1967), for the view that the directors should be aware of a division of the attorney's loyalties between them and the operating executives. This could be especially serious when there are "outside directors" sitting on the board, and the executive officers and the directors disagree over a particular course of action to be followed. Conflicts may also develop among the directors or among the officers, but the CPR is equally silent about the attorney's obligation in the face of such internecine disputes.

\textsuperscript{46} CPR, \textit{Disciplinary Rules} 5-101(A), 5-105. ABA Comm. on Professional Ethics, \textit{Formal Opinions}, No. 181 (1938) suggested that consent of the shareholders is
7-5 permits an attorney to continue to assist a client who has not followed his advice, but it is not clear whether he may continue to do so if a top-level executive desires to suppress an ugly situation, or if a middle-echelon executive insists on pursuing a course of conduct that will bring the corporation into conflict with the law. With the advent and growth of the corporate law department, differences have arisen among lawyers about the proper relationship between house counsel, retained counsel, and the corporate executives. Yet even in this area of professional etiquette (to which the bar has always assiduously directed its attention) the CPR is silent.

C The Ignored Realities of Modern Corporate Practice

Ultimately, the inadequacy of the CPR in corporate practice is a result of the failure of its drafters to address the changed conditions of modern legal practice. While the hypothetical attorney addressed by the CPR is a solo practitioner, the modern corporate attorney is a member of what Professor Smigel terms a professional bureaucracy—a loose hierarchy of professional colleagues ranging from the most senior partner to the youngest associate. Many lawyers in a corporate firm are salaried employees of the firm, having obligations to the partners as well as to clients. Responsibility—that essential aspect of the professional self-image—is unequally shared, and therefore the attorneys of the large law firms are not the professional equals envisaged by the CPR. Indeed the firm takes on an existence separate from that of the individual attorneys who are members at any given time. As a result both partners and associates must think of the firm as well as of themselves.

This bureaucratic nature of the modern “attorney” is paralleled by that of his “client”—a large, often decentralized, often

---

47 See, e.g., Seamans, Relations Between Corporate Legal Departments and Outside Counsel, 15 Bus. Law. 633 (1960).

48 E. SMIGEL, supra note 3, at 277–86.

49 Because it regards all attorneys as professional equals, the CPR does not address the obligations of the associate in a large law firm who disagrees with a partner over the ethicality of a proposed course of conduct. May he ethically defer to the partner’s judgment or must he do otherwise? If the latter, what course of action must he follow? In this situation, not unlike that of a soldier who must decide whether to obey orders of questionable legality, the associate is left without guidance.
multi-national organization. The simplest organizational chart betrays the complexity of the corporate attorney's client.\textsuperscript{50} Ownership is significantly separated from the management of the corporation.\textsuperscript{51} The board of directors, which is responsible for the supervision of corporate affairs, is composed of a conglomerate of persons representing different legal interests in the corporation: executives, major shareholders, commercial bankers, investment bankers, major suppliers, major purchasers, the corporation's law firm, and perhaps in the future labor, public consumers, and the government. The corporation's operations are decentralized both functionally—\textit{i.e.}, sales, purchasing, engineering, development, public relations, etc.—and geographically, both nationally and internationally, the latter phenomenon being well demonstrated by the growth of the conglomerates in the 1960s. Authority and responsibility are typically diffused throughout the organization, both for the initiation and approval of actions that bring the corporation in contact with the law.\textsuperscript{52} Its business affairs are so entwined with legal considerations that it is often difficult to separate the two, and the latter are so ever-present that the corporate client, unlike the client of the CPR, often has its own law department, a professional bureaucracy within the corporate bureaucracy.\textsuperscript{53}

Once the attorney-client relationship is created, unchartable patterns of power, authority, prestige, and responsibility arise from and influence the law firm, the law department, and the corporation itself. These professional and corporate bureaucracies come into contact at all different levels: various members of a law firm may deal with directors of the corporation, executives at all levels, general counsel, and various members of the law department.\textsuperscript{54} Attorneys in the law department of the corporation face

\textsuperscript{50} \textit{Cf.} R. Gordon, \textit{Business Leadership in the Large Corporation} 49 (1945).


\textsuperscript{52} The decentralization of the modern corporation is well demonstrated in R. Gordon, \textit{Business Leadership in the Large Corporation} (1945). The author points out the various functions of the board, the chief executives, and the middle-level executives who speak for the corporation, but admits that no schematization may adequately describe the great variety of authority patterns that exist in the modern corporation.

\textsuperscript{53} The law department often is a strict hierarchy of attorneys ranging from the general counsel (who is often a vice president and perhaps a director) down to staff attorneys. It is usually organized horizontally into subdisciplines of law and sometimes decentralized regionally in a fashion similar to the corporation itself. Although the hierarchy of the law department is more pyramidal than the large law firm, the two are not dissimilar. As is the case with the attorney in a firm, the attorney employed by the corporation is not the hypothetical attorney of the CPR. \textit{See} Q. Johnstone & D. Hopson, \textit{Lawyers and Their Work} 199–242 (1967); Creighton, \textit{Corporate Law Departments Adjust to Corporate Decentralization}, 16 Bus. L. 1004 (1961).

\textsuperscript{54} The extent of "client" contact increases with the seniority of the attorney. Beginning
the same variety of professional contacts. Indeed the law firm and law department have as many clients as there are directors, officers, department heads, employees, or any groups thereof who seek legal advice.\textsuperscript{55}

These patterns become even more complex when one considers that the variety of legal interests within the corporation often conflict and that directors do not always agree among themselves, with executives, or with shareholders. The attorney is often in the center of this conflict, serving in his professional capacity. His involvement may be further complicated if he is a director or a stockholder of the corporation as well as its lawyer. As indicated above, the profession permits the attorney to occupy these dual roles on the theory that no conflicts of interest are involved.\textsuperscript{56}

Regardless of this theoretical lack of conflict, the attorney practicing in such a milieu is constantly subjected to pressures and influences, many of which may be in conflict. The conduct of a modern corporation necessarily involves a constant reconciliation of the many differing legal interests of those people who comprise the corporation: potential investors, common shareholders, preferred shareholders, bondholders, customers, executives, employees, and directors. Professor Smigel indicates generally the social pressures of a professional bureaucracy and notes the "special role of the client" in influencing the conduct of the corporate bar.\textsuperscript{57} Professors Johnstone and Hopson suggest that middle- and lower-echelon executives sometimes attempt to influence their attorney's professional judgment,\textsuperscript{58} and Professor Gordon delineates the many influence groups, including the attorneys, that affect the decision-making process in a large corporation.\textsuperscript{59} As Glen McDaniel, a one-time Wall Street lawyer, has indicated, the reconciliation of conflicting interests in a corporate "client" presents numerous opportunities and pressures to violate professional norms.\textsuperscript{60} These opportunities, temptations, and pressures associates, Professor Smigel reports, do not often meet alone with principal clients, but they do deal with subordinates of the client and quite often join partners at client conferences. E. SMIGEL, supra note 3, at 144. Senior associates report substantial client contact such as conferring with and advising corporate officials. Id. at 155–56. Partnership brings with it extensive client contact and responsibility. Id. at 156–60.


\textsuperscript{56} ABA COMMITTEE ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 930 (1966); ABA COMMITTEE ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1056 (1968).

\textsuperscript{57} E. SMIGEL, supra note 3, at 262.

\textsuperscript{58} Q. JOHNSTONE & D. HOPSON, supra note 53, at 205.

\textsuperscript{59} R. GORDON, \textit{BUSINESS LEADERSHIP IN THE LARGE CORPORATION} (1945).

\textsuperscript{60} McDaniel, supra note 44. While indicating situations that present difficulties for the corporate lawyers, Mr. McDaniel concludes that corporate representation presents fewer temptations, opportunities, and pressures to violate professional norms than other varieties of practice. See also J. CARLIN, supra note 4, at 66–83. Edward Bloustein disagrees. From
sures for the violation of professional standards have not been adequately analyzed and at present their precise definition is impossible. The bar, however, needs to recognize that the social setting of corporate practice confronts the lawyer with many challenges, varying in subtlety and social visibility, to his professional standing. A better understanding of the social setting may aid the profession in remedying the weaknesses of the CPR or at least further its awareness of the problems confronting professional self-regulation in corporate practice.

his experience in corporate practice, he feels that the temptations, opportunities, and pressures are significant. "the only difference being in the degree of subtlety and social visibility of the 'pressures' involved." Bloustein, "Lawyers' Ethics"—A Review, 22 RECORD OF N.Y.C.B.A. 479, 482 (1967).

Sociologists have suggested the use of status and role set theory to penetrate the complexity of such interpersonal relationships and to isolate some of the conflicts, pressures, and influences which may affect a person's decisions and actions. They attempt to delineate the positions occupied by a given person at a given time (statuses), the persons with whom he comes into contact as an occupant of that position (role partners), and the conflicts which may arise. Cf. R. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE (1957). For an application of this theory to broker-dealer relationships, see Levin & Evan, Professionalism and the Stockbroker, 21 BUS. LAW. 337 (1966).

Analyzing the corporate attorney-corporate client relationship with regard to status and role set theory, one might note that the drafters of the CPR envisage the attorney as occupying just one status—that of attorney. Yet in corporate practice, the attorney often occupies more than one status. In many law firms and legal departments, attorneys may be classified as employees as well as attorneys. Additionally, the nature of the modern corporation makes available several other statuses that an attorney might occupy or with which he might interact: potential investor, stockholder, director, officer, employee.

Status conflict results when the interests and obligations of two statuses differ and is most acute when the same individual occupies conflicting statuses. Id. at 342. Because attorneys often occupy multiple statuses, the profession needs to analyze empirically the interests and obligations of each possible status and the conflicts (no matter how subtle) that might arise.

In any status, a person interacts with role partners; for example, a partner of a law firm may deal with other partners, associates, directors, stockholders, executives of varying rank, and other attorneys. A person's role partners comprise his role set; any status has a unique set of role partners. Id. at 340. Persons in different statuses, however, may interact with the same role partner; for example, a director and an officer (two separate statuses) may both interact with a corporate attorney. Different statuses may also have overlapping role sets.

Role conflict results when a person's obligations to one role partner are incompatible with his obligations to another. Id. at 343. Conflicts may arise due to the rank, prestige, or influence of role partners and the effect different role partners can have on the interests of the status occupant. For example, the role partner (whether it be an executive, a director, or a group thereof) who retained the services of an attorney and has the power to terminate the relationship may have greater influence with the attorney than a role partner who does not have such power. To understand the social setting in which the CPR applies, the profession must seek to delineate an attorney's role partners, the conflicts that arise, and the influences that affect the resolution of the role conflicts.

Status and role set theory provides a framework for an empirical study of the corporate law firm-corporate client relationship. Of course, any such study may be opposed by the profession as violative of the confidentiality of the attorney-client relationship. Without such an empirical foundation, however, it will be difficult for the bar to draw any meaningful conclusions about the social setting of corporate practice and its impact on the vitality of professional self-regulation.
III. THE CODE AND SELF-REGULATION OF THE CORPORATE BAR: SOME CONSEQUENCES

Given the failure of the CPR to address so many aspects of professional conduct in corporate practice and the inadequacy of the standards set forth, the corporate lawyer is left without official guidance. The profession has abdicated its self-assumed and jealously guarded role of self-regulator. This abdication is particularly significant in the corporate arena, where the interaction between the lawyers and the corporation is so complex, and the societal stakes so large. As public concern about corporate conduct increases and is translated into law, the needs of the corporation for legal assistance will increase; and as the patterns of relationships among the attorneys in law firms, the attorneys in law departments, and the executives of the corporation enlarge, the individual attorney may find it increasingly arduous to balance his obligations in a manner consistent with the expectations of the profession. Before the attorney can even attempt to resolve his dilemma, he must face the more difficult task of perceiving distinctly what the conflicts are. Lacking any external guidance, his conscience will be his only guide.

What evidence we have, albeit slight, indicates that Abe Pomerantz, the dean of plaintiff's bar, may be correct when he states that conscience is a weak reed on which to rely.62 Although Professor Carlin concluded that the incidence of deviation from professional standards is lower among corporate lawyers than among lower status practitioners, little comfort can be found in the fact that only 35 percent of the "elite" attorneys surveyed disapproved of representing one of two previously represented business partners against the other without the consent of the other in an action to dissolve the business, a course of conduct involving potential conflicts of interest and breaches of confidence.63 Without intending to characterize the corporate bar as a community of sinners, one also must be concerned when attorneys are named as defendants in suits alleging breach of fiduciary

---
63 J. Carlin, supra note 4, at 50. Similarly only 72 percent of the corporate attorneys in Carlin's sample disapproved of representing an attorney's purchasing stock in a corporation organized to acquire the assets of a corporation for which he was receiver.

Edward Bloustein has challenged Carlin's conclusion about the comparative ethicality of the corporate bar. Bloustein believes that the ethical conflict situations used in the study did not reflect the true ethical problems of large-firm corporate practice. Consequently, he feels that the respondents did not have to resolve their own professional problems, but rather those of the marginal, small-firm practitioner. "We all respond 'more ethically'," Bloustein suggests, "to other people's ethical quandaries, especially when our 'response' is a hypothetical one." Bloustein, supra note 60, at 482.
duty to a corporation or in suits brought by federal regulatory agencies to enforce compliance with the law. Even in cases in which an attorney is not named as a defendant, "we shall have to acknowledge that... departures from the fiduciary principle do not usually occur without the active assistance of some member of our profession." The lack of guidance which results from the failings of the CPR increases the possibility that corporate attorneys will lose the independence of judgment that traditionally has been the hallmark of the profession. The problem cannot be overlooked, because some lawyers believe that corporate attorneys quite often are subservient to their corporate clients. Such was Chief Justice Stone's complaint when he spoke of the "obsequious servants of business." While the Chief Justice may have overstated his proposition, the corporate bar continues to debate whether it is the attorneys in large corporate law firms or those in corporate legal departments who have most lost their independence. Basically, whenever an attorney devotes a great deal of his time and intellect to the many legal matters of any one client, he necessarily develops an affinity to that entity and the persons who operate it, and, in the absence of some external standard of conduct, it is not unreasonable to expect that the professional role of the lawyer might be defined in accord with the expectations of his "client." A professional role defined in this manner, however, may not accord with the bar's preachments about the responsibilities of an attorney.

64 The boards of directors of most corporations include a lawyer. Quite often the lawyer sitting on the board is also the corporation's attorney; for example, 50 percent of Professor Carlin's sample were officers or directors of a client corporation. J. CARLIN, supra note 4, at 8. Given this fact and an awareness that derivative suits often name all the directors as defendants, one may not be surprised to see a fair number of attorney-defendants.

Such suits, particularly if successful, are an indication either that the attorney-director had some difficulty ascertaining when the interests of the management conflicted with the interest of the corporation or that he perceived the conflict and chose to ignore the interest of the corporation. Although derivative suits directly involve questions of corporate law rather than professional ethics, the legal duty of loyalty to the corporation in a general manner parallels the mandate of Ethical Consideration No. 5-18. Violations of the duty of loyalty to the corporation as an entity, therefore, must concern the bar as a question of professional ethics as well as one of corporate law.

65 Such suits are sufficiently numerous that an attorney could state that "the complaint in the National Student Marketing case is not significant or unusual because attorneys are named as defendants." Karmel, supra note 43, at 1156. See also Kaplan, supra note 17, at 254-56.


67 Id. at 7.

68 Corporate attorneys practicing in large law firms suggest that the danger of losing one's professional independence is greatest for the attorney employed by one corporation. Cf. Swaine, supra note 14, at 171. House counsel respond that the problem is just as acute and perhaps more so for the large-firm corporate practitioner. Cf. Q. JOHNSTONE &. D. HOPSON, supra note 53, at 204-05; Grahame, supra note 55, at 161.
The possibility of externally influenced role definition is just one aspect of a more serious problem: the failure of the profession, through the CPR, to define a professional role for the attorney who practices in the corporate arena. The CPR establishes a professional role for the solo practitioner who represents individual clients, but its inapplicability to important parts of corporate practice leaves the corporate lawyer without a meaningful standard by which to appraise his professionalism. Because of this, an ill defined concern about its professional identity seems to overhang the corporate bar. The phrase "unprofessional," never clearly defined, permeates Smigel's study of the Wall Street lawyer. The attorney's involvement in the business affairs of his client and his rendering business advice is considered "unprofessional." An associate's lack of client contact is also "unprofessional." The interweaving of an attorney's duty to his client with his duty to his employer is "unprofessional." Specialization is "unprofessional." In sum, Professor Smigel's findings seem to indicate that the corporate bar suffers from some form of identity crisis, and one might suggest that the CPR contributes to the problem by forcing the corporate attorney to view his professional role in terms of a concept of the lawyer ill-fitted for modern conditions of practice.

The failure of the profession's scheme of self-regulation in the corporate area threatens the concept of self-regulation itself. Not unlike the challenges to the self-regulatory functions of the stock exchanges, challenges to the legal profession's system of self-regulation are developing. Although done under the rubric of the federal securities laws, the SEC is seeking to regulate the conduct of attorneys representing clients subject to its jurisdiction. For example, if an attorney has financial interests in a corporation and is rendering an opinion on the legality of the corporation's public offering of securities, the SEC requires disclosure of his interest. Might they not go further, refuse to accept opinions by financially interested attorneys, and thereby effectively reverse the profession's acceptance of stockownership in client corporations? Escott v. Bar Chris Corporation demonstrates...
strates that the SEC can regulate the conduct of attorney-directors and insinuate itself into Canon 6 of the CPR and the general questions of competent representation. Kohn v. American Metal Climax, Inc.\textsuperscript{77} involved the use of Rule 10b-5 to regulate conflicts of interest in parent-subsidiary transactions. After that case it can be argued that Rule 10b-5 may someday replace Disciplinary Rule 5-105(B). SEC v. National Student Marketing Corporation\textsuperscript{78} now marks the high water mark of the SEC's effort to define the responsibilities of attorneys in corporate practice. Perhaps this threat to self-regulation and an awareness that SEC regulation carries with it civil liabilities will aid the profession in recognizing the shortcomings of the CPR.

IV. BEYOND THE CODE OF PROFESSIONAL RESPONSIBILITY

Unless it is willing to abdicate its self-regulatory function, the profession cannot conclude, as did one corporate practitioner, that "there are . . . [no] . . . black and white rules that we can lay down and say this is where the duty of the lawyer lies and he should or should not do this or that."\textsuperscript{79} The profession must at last confront the reality of the corporate lawyer's world and bring the issue of the professional obligations of these lawyers to the surface for debate, reflection, and hopefully clarification.

The development of a supplemental body of ethical norms for the corporate setting might be considered. Edwin W. Tucker has suggested a rethinking of the professional rules, especially those dealing with specialization and the attorney-client relationship.\textsuperscript{80} Another writer has suggested an amelioration of the profession's rule against intrafirm conflicts of interest.\textsuperscript{81} In this connection perhaps one should consider abandoning the requirement that a

\textsuperscript{78} See note 43 supra.
\textsuperscript{79} Ballard, Mundheim, Weinstock & Wetzel. supra note 44, at 966.
\textsuperscript{80} Tucker, The Large Law Firm: Considerations Concerning the Modernization of the Canons of Professional Ethics, 1965 Wis. L. Rev. 344. See also Mundheim. supra note 25, at 217.
\textsuperscript{81} See Note, supra note 34.
corporate attorney withdraw when conflicts arise and instead re-
quire that he seek an independent opinion to aid him in the
resolution of the legal question at the heart of the conflict. Tax
lawyers have felt the need to delineate the problems peculiar to
their subdiscipline of the law; perhaps the securities bar and the
antitrust bar ought to do so as well.

One might also ask for a delineation of the financial, business,
property, and personal interests that, in the corporate setting, will
be presumed to affect an attorney’s independent judgment. The
profession should perhaps indicate those situations in which the
interests of the executives and directors will be presumed to be
adverse to the corporate interest. It should clarify the attorney’s
duties to corporate shareholders. If the bar is displeased with the
SEC position in the National Student Marketing Corp. case, it
might offer an alternative. Given the difficult position of the asso-
ciate caught between the client and the partners of his firm, and
the unsatisfactory dialogue between house counsel and the out-
side firms, rules should be devised to control these colleague
relationships as well. In general, wherever the CPR is inadequate
or silent as to the professional obligations of corporate practice,
the bar (perhaps the ABA Section on Corporation, Banking and
Business Law) should step in and provide the norms. This is not
a novel request, but one that has been made before and ignored by
the profession.

Because the interaction between corporate lawyers and corpo-
rate clients is so complex, it may be necessary for the profession
to go beyond rule-promulgation and to seek a simplification of the
attorney-client relationship itself. Most often heard is the sugges-

examining the Canons of Professional Ethics, Mr. Paul concluded that there were few
fixed rules of behavior applicable to the tax bar and sought to demonstrate some of the
ethical problems of the tax practitioner.

83 The SEC requires disclosure if an attorney’s interest in a corporation is in excess of
$10,000 or if the aggregate interests of all attorneys involved exceeds $30,000. Securities
Act Release No. 5094 (Oct. 21, 1970). The ABA Committee on Professional Ethics has
ruled that an attorney may not accept employment so as to pit himself against a corpo-
ration in which members of his firm own 50 percent of the stock. ABA COMM. ON
PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 967 (1966). Situations come readily to
mind where 10 percent of the stock is involved or where the 10 percent stock holding
constitutes 50 percent of the attorney’s wealth. The Committee might also address wheth-
er an attorney or his partners may accept employment adverse to the interest of a
corporation for which he serves as a director.

84 Reiterating Professor Mundheim’s admonition, the guidelines adopted
should be grounded in a realistic view of the tasks of corporate counsel and
an honest appraisal of the pressures he faces. They should only impose those
duties which one can reasonably expect real lawyers in a real world to fulfill.
They should eschew the enunciation of lofty “moral” standards which most
lawyers will feel free to ignore.

Mundheim, supra note 25, at 229.
tion that an attorney should neither sit on the board of directors nor own stock of a client corporation. Such a prohibition would eliminate the dual role of the attorney and perhaps would aid the attorney in maintaining a buffer between himself and the conflicts within the corporation.

Alternatively, because even attorneys who are not directors or stockholders can be caught between conflicting directors, officers, and stockholders, the profession might require an attorney to represent only one interest group within the corporation. For example, the corporate bar could define the attorney's client as the executive officers and require the attorney to inform the other groups having an interest in the corporation to seek separate counsel. One can conceive of a corporation with three retained law firms: one to represent the outside directors, one to represent the officers, and one to represent the stockholders. One might even advocate the retention by the corporation of an all-purpose attorney to represent potential investors, consumers, and other public groups interested in the conduct of the corporation. With such a scheme of representation, the number of instances where an attorney must serve as “counsel for the situation” would be greatly reduced.

In addition to reducing the number of conflicts present in corporate practice, the profession might attempt to limit the contacts between the law firms and the corporation in an effort to reduce the number of personal loyalties that might otherwise develop and complicate the attorney-client relationship. Many law firms have one partner who is the contact with the corporate executives. At least one general counsel believes that the corporation's dealings with outside law firms should always be through the law department, and that there should be no direct contact between executives and the retained firm. One might similarly suggest that all

---

85 See Swaine, supra note 14, at 170; Brown, Ethical Problems of Corporation Counsel, 31 Wis. B. Bull., April, 1958, 25, 31; Gardner, supra note 25.

86 Many attorneys do regard their client to be the executives who retained their services and with whom they interact. See Glasser, supra note 73, at 75; Symposium, supra note 44, at 48. The profession might do well to define the corporate attorney's client in accordance with this understanding of the "real" corporate client, i.e., management.

87 Offsetting this benefit, however, would be the increased cost to the corporation of legal representation and the danger of increased confusion in the corporation's decision-making process. Indeed, if carried to an extreme this scheme might increase the conflict within the corporation. On the other hand, if the requirement of independent counsel were limited to a fairly well defined number of situations in which potential conflicts of interest exist (such as mergers, dividend declarations, and executive compensation), it is likely that the benefits would outweigh the costs.

88 For a discussion of the client team system of organization at many large firms, see E. Smigel, supra note 3, at 225–26.

89 Seamans, supra note 47, at 635.
internal legal work for the law department should go through the general counsel and not directly between executives and the staff attorneys. Tampering with organizational structure in pursuit of ethical clarification might, however, entail costs, such as a reduction of the organizational flexibility that has contributed to successful representation of corporate clientele in the past. But such possibilities should not foreclose further inquiry.

Whatever immediate steps may be taken, the profession should rethink those roles which it sets forth as distinguishing the lawyer from the layman and around which all the rules of the profession revolve. It is uncertain whether the lawyer in the corporate setting should be viewed as an advocate when more often than not he must be a mediator. Similarly, the validity of the profession's efforts to distinguish lawyer from businessman can be questioned when the two roles inevitably overlap in corporate practice. The meaning of "professional independence" should be reconsidered when the attorney operates in a continuum of conflicting business, financial, and personal interests that necessarily influence his conduct. The tenet of equality of all professional brethren should also be reconsidered when, in the corporate setting, partners are always more equal than associates.

Basically, the profession must reconsider, in light of contemporary corporate practice, the utility of the values and concepts to which it has been so true. Having defined a professional role for the corporate lawyer in contemporary terms, perhaps then the profession might have better success in devising rules to assure compliance with that role. Even if success is not forthcoming, at least the problems confronting the modern corporate bar will have surfaced and will have been viewed for the first time in twentieth century terms, rather than through the tinted lens of the nineteenth century general solo practitioner.