

# ESSAY

## LEGAL AND MANAGERIAL “CULTURES” IN CORPORATE REPRESENTATION

*Geoffrey C. Hazard, Jr.\**

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\* Thomas E. Miller Distinguished Professor of Law, University of California Hastings College of Law; Trustee Professor of Law, University of Pennsylvania Law School; Sterling Professor of Law Emeritus, Yale Law School. The Author was the keynote speaker at the Thirteenth Annual Houston Law Review Frankel Lecture on November 7, 2008, where an initial version of this Essay was presented.

## I. INTRODUCTION

Perhaps the most difficult professional task for a lawyer is giving firm advice to a client concerning a legally risky project (transaction or litigation) in which the client has a substantial investment—psychological, financial, or otherwise. A client's project can be affirmative in that the client contemplates positive action, such as launching a new venture, or negative in that the client refuses or omits to take action, such as holding on to a losing investment or refusing to settle a dispute on terms recommended by the lawyer. This Essay focuses on representation of business clients, particularly corporations, although similar problems arise in all branches of practice.

In the corporate setting, the client is the corporate juridical entity, not the people who govern and operate it. For convenience, in this Essay reference will often be made to “the client.” This reference should be understood to mean the relevant corporate officials.

If the client has doubts about the desirability or feasibility of the project, the client and the lawyer will usually make parallel and complementary assessments. Sometimes lawyers can envision bolder strategies than their clients. However, much legal advice is addressed to legal risks and other negative aspects of a transaction, while clients typically think in terms of opportunity. Hence, in commonly encountered transactions the client is more or less committed to a project. In a corporate representation, a project often will not even surface for legal consideration unless someone in the company has become invested in it. On the other hand, the lawyer may believe the project should be reshaped or abandoned.

If the client is a fairly sensible person, as most clients are, the project will have a reasonable basis; that is, be objectively rational in business terms. If the lawyer is a fairly sensible person, as most lawyers are, and has doubts or reservations, it is because the project entails substantial risk of serious adverse legal consequences. The lawyer therefore considers the project to be imprudent when considered objectively.

Unfortunately, some lawyers fail to fulfill their professional responsibility to give objective legal advice, as required by professional tradition and the rules of ethics.<sup>1</sup> This deficiency is often “systemic” or “cultural,” be it within an office in

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1. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 2.1 (2005) (mandating that lawyers “exercise independent professional judgment and render candid advice” when representing their clients).

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independent law practice, in a corporate law department, or in the interactions with a client. This problem is important and well documented.<sup>2</sup> Nevertheless, for the purposes of this Essay it will be assumed that lawyers and their corporate management counterparts are competent and professionally responsible.

Lawyers recognize that the client is the principal and the lawyer a mere agent. As principal, the client has final authority on how to proceed.<sup>3</sup> The lawyer must proceed as the client directs, short of the extreme case where the lawyer may withdraw because the venture appears utterly imprudent.<sup>4</sup> In the corporate setting, there is technically no individual principal because both the lawyer and the managers “personify” the client as agents of the corporate entity.<sup>5</sup> The extreme case where the lawyer feels impelled to resign is unusual in the corporate setting. The practicable problem in the client–lawyer relationship, therefore, is getting to an assessment of the project from a viewpoint shared by the client’s management in business terms and by its corporate counsel in legal terms. Many clients grumble that the trouble with lawyers is that they only advise what not to do.

The conflict involved in these different perspectives is common and commonly complained about in several forms: legal literature; “lawyer stories” in popular literature; and business management literature. From one viewpoint, no inconsistency may be involved. The client’s approach may well have very positive elements in terms of the client’s perceptions and values, but also be burdened with serious adverse consequences when viewed in legal terms. The different appraisals of a project by management and legal counsel will both be well grounded, but based on somewhat different interpretations of the project.<sup>6</sup>

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2. For example, Arthur J. Lachman discussed the issue in a recently published bibliography. Arthur J. Lachman, *Are They Just Bad Apples? Ethical Behavior in Organizational Settings: An Introduction (and Bibliography)*, 2007 PROF. LAW. (SYMPOSIUM ISSUE) 33.

3. MODEL RULES OF PROF’L CONDUCT R. 1.2 (2005) (stating that except in narrow circumstances “a lawyer shall abide by a client’s decisions concerning the objectives of representation and . . . consult with the client as to the means by which they are to be pursued”).

4. MODEL RULES OF PROF’L CONDUCT R. 1.16(b)(4) (2005) (allowing a lawyer to withdraw from representation if “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement”).

5. See MODEL RULES OF PROF’L CONDUCT R. 1.13(a) (2005) (“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”).

6. Geoffrey C. Hazard, Jr., *Foreword: The Complex Role of Corporate Counsel*, in THE BUREAU OF NAT’L AFFAIRS, LEGAL ETHICS FOR IN-HOUSE CORPORATE COUNSEL, at xi, xi (2007).

Compliance with regulations usually involves costs that business efficiency would avoid. However, compliance with the regulations is a central concern of a corporation's legal staff.

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... In determining the kind and level of regulatory compliance, there is therefore usually an element of practical judgment involved—and hence risk. Making that determination requires corporate management and corporate counsel to confront a practical situation from two viewpoints: that of business management, focused on present cost and eventual effect on profit... and that of corporate counsel, who must also take account of subsequent cost and perhaps eventual loss entailed in noncompliance.<sup>7</sup>

One aspect of such differences in interpretation can properly be described as “cultural”: the difference between the typical culture of responsible business management and the typical culture of responsible lawyers. That difference is the subject of this Essay.

## II. INDIVIDUAL CLIENTS

The problem of “cultural” disparity between client and lawyer arises in all fields and forms of law practice. This problem in the corporate context can be put in sharper focus by a preliminary reference to the corresponding cultural disparity in the representation of individual clients.

That problem has been given greatest attention concerning representation in two types of practice: domestic relations practice, particularly divorce matters,<sup>8</sup> and representation of people who have limited means and limited acquaintance with the law and administration of justice.<sup>9</sup> The latter category of clients has no clear definition and includes many clients who pay legal fees but who have very limited resources for doing so; for example, clients ensnared in matters involving immigration, landlord–tenancy, workers’ compensation, and criminal

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7. *Id.*

8. See, e.g., Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663, 1671–72 (1989) (noting that divorce lawyers often talk to their clients without explicitly mentioning the rules that govern the client's situation and speak to the client as if talking to another lawyer, rather than to someone unschooled in the law).

9. See, e.g., Ascanio Piomelli, *Cross-Cultural Lawyering by the Book: The Latest Clinical Texts and a Sketch of a Future Agenda*, 4 HASTINGS RACE & POVERTY L.J. 131, 131–32 (2006).

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wrongdoing, such as DUI (driving under the influence). This second category includes virtually all clients of legal aid and of the legal clinics now established in most law schools. These clients often have enormously burdensome legal problems. Even those who can pay cannot afford very much. They can be referred to simply as “low-pay” clients, recognizing that they are often “no-pay” clients.

Concerning clients in domestic relations practice, a seminal study done some years ago revealed what all divorce lawyers know: That handling the usually intense personal feelings of the parties in a divorce case is at least as important as handling the legal aspects of the representation.<sup>10</sup>

In practical terms, the clients in a divorce have become immersed in a different culture from other people in their community. Divorcing parties are dealing with a serious disaster in their lives and are accordingly angry and frustrated. Typically they have ceased to observe the norms of civility—cooperation and forbearance—that prevail in family and neighborly relationships, and the norms that prevail in most workplace settings. Divorcing parties ordinarily interpret their past interpersonal relationships in very different ways.

Concerning low-pay clients, most law schools today have clinical education programs that concentrate on legal services for clients who are more or less indigent. A component of the clinical training in these programs is education of neophyte lawyers in understanding the client’s perspective. This element of clinical legal education is now addressed in substantial professional literature, among whose central authors are Professor David Binder and his colleagues.<sup>11</sup> Additionally, I will draw upon further analysis of that field of practice written by a colleague, Professor Ascanio Piomelli of Hastings College of the Law.<sup>12</sup>

In representation of low-pay clients, the basic message is plain although its subject is complicated. The message is simply that the cultural background of most low-pay clients is very different from the background of most lawyers. Low-pay clients usually have had little or no experience in sophisticated business matters, or even transactions of merely ordinary complexity such

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10. See Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer’s Office*, 20 *LAW & SOC’Y REV.* 93, 116–17 (1986) (describing how divorce lawyers must help their clients separate the emotional aspects of their divorce from the legal aspects).

11. See, e.g., DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004); see also Piomelli, *supra* note 9.

12. Piomelli, *supra* note 9.

as loans, tenancy obligations, or credit card obligations. They often have limited literacy and verbal skills. They have lived in marginal housing, gone to marginal schools, and had marginal jobs. Many have often been involved with drugs. Typically their experience with the “justice system” has been encounters with the police or the welfare department. Many are minorities or immigrants.

Professor Piomelli adds this important corollary: In dealing with clients, lawyers must be aware not only of the client’s cultural background but also of their own peculiar professional culture.<sup>13</sup>

### III. TYPICAL CORPORATE MANAGERS AND PROPRIETORS

I suggest that functionally similar “cross-cultural” problems arise in legal representation of business and corporate clients. The counterpart problems in corporate representation look so different from those in representation of low-pay clients that the problems may seem invisible. However, the basic message is still plain: The cultural background of typical business clients is different from that of the typical corporate lawyer.

The difference in culture between corporate managers and lawyers is of course much narrower. Business owners and managers are sophisticated in business matters. Most of them, certainly most employed by large corporations, have a formal education comparable to lawyers, at least up through college. Many of them have advanced formal training, as MBAs, accountants, engineers, high-tech people, and scientists. They have had extensive experience in practical matters apart from business, and most move in sophisticated social circles. They are smart, perceptive, and assertive, just as are most lawyers. Within those similarities, what are the differences in the vocational cultures of business managers and lawyers?

The differences are not universal. For example, a business person may be worried about legal risk in a situation where a lawyer sees great business opportunity. Some lawyers with experience in business matters indeed decide to leave law practice and go into business.

Moreover, there are two other dimensions that can make a difference in the perspectives of corporate management and counsel, as suggested in two important empirical analyses of corporate and business law practice. One is a study by Marc Galanter and William Henderson, *The Elastic Tournament: A*

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13. *Id.* at 160.

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*Second Transformation of the Big Law Firm*, dealing with changes in the structure and character of large independent law firms.<sup>14</sup> Professors Galanter and Henderson recount the strong pull of external economic forces on law practice and law firms, with effects on both lawyers in that practice setting and on lawyers in corporate law departments.<sup>15</sup> “Culture” is influential, and economic forces, which are a part of culture, are also influential.<sup>16</sup>

The other study, published a little less than a decade ago, is by Robert Nelson and Laura Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, and concerns differences between lawyers representing corporations in independent law firm practice and lawyers employed in corporate law departments.<sup>17</sup> Professors Nelson and Nielsen conclude that there is some difference in professional orientation between lawyers representing corporate clients in independent practice and those employed in corporate law departments. As they conclude, the latter are more inclined to define themselves as “team players, rather than cops.”<sup>18</sup> I suggest that “cop” is hyperbole for the role of a lawyer in relation to any client, corporate or otherwise. “Strong voice of caution” would come closer to the tone in which “independent professional judgment” is typically expressed.

The situations to be addressed here, however, are framed in terms of more typical differences in outlook between business people and lawyers, allowing for their relative similarity in the larger social spectrum. In sum, these different perspectives are caused by the fact that business people interpret a situation as a business transaction, while lawyers interpret the same situation as a legal problem.<sup>19</sup>

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14. Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1867 (2008).

15. See *id.* at 1880–81 (discussing how the spread of information about lawyers and law firms has created an imbalanced legal market “in which the highest stakes transactional and litigation work flows to the most capable practitioners”).

16. See *id.* at 1882 (discussing the shift in the legal profession’s culture from valuing professional accomplishments to valuing regard and prestige, which are largely measured by income).

17. Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC’Y REV. 457, 457–58 (2000).

18. *Id.* at 487.

19. I am indebted to Thomas Boardman, Hastings College of the Law Class of 2009, for his assistance in developing this subject.

## IV. "CULTURE" IN CORPORATE CONTEXT

This Essay attempts to get beneath the surface of this issue, to interpret it in terms of the frames of reference in which clients and lawyers see and respond to business legal problems. Viewing these situations in this way could perhaps enable business lawyers, and possibly also clients, to have a somewhat better understanding of the lawyers' professional responsibility.

The concept of "culture" in professional practice has been used by thoughtful lawyers, and hence is not merely an academic approach. A prime example is Susan Hackett, Senior Vice President and General Counsel of the Association of Corporate Counsel. That association is a professional organization that describes itself as "the in-house bar association."<sup>20</sup> In her 2007 monograph, *What's Keeping the GC [General Counsel] Awake at Night?*, Ms. Hackett repeatedly uses the term "culture," and incidents of culture, to analyze problems encountered by corporate CLOs in their professional relationships with management.

To quote from Ms. Hackett's presentation:

- "establishing compliance systems across culture is very challenging;"
- "tensions between universal policies and local customs: the impact of cultures on behaviors;"
- "variances in behaviors/expectations of prosecutors and enforcement agents;"
- "employee education is complex and unending."<sup>21</sup>

A more formal analysis of the same relationship can be found in the new book by Ben W. Heineman, Jr., *High Performance with High Integrity*.<sup>22</sup> Mr. Heineman recently retired from his position as General Counsel of General Electric, one of the world's largest corporate conglomerates.<sup>23</sup> As the title of his book indicates, his key term is "integrity," which refers to the sincerity and continuity of a competent corporate management's ethical leadership. As he says, the aim of high integrity management is to "move beyond 'tone at the top' platitudes and drive a robust performance-with-integrity culture deep into the

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20. ASS'N OF CORPORATE COUNSEL, ACC FAST FACTS, <http://www.acc.com/aboutacc/membership/everybodywins/upload/facts.pdf> (last visited Feb. 23, 2009).

21. Susan Hackett, Senior Vice President & Gen. Counsel, Ass'n of Corporate Counsel (Boston Chapter), Presentation: What's Keeping the GC Awake at Night? (Oct. 9, 2007) (on file with Author).

22. BEN W. HEINEMAN, JR., *HIGH PERFORMANCE WITH HIGH INTEGRITY* (2008).

23. *Id.* at 197.

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company.”<sup>24</sup> In his analysis, corporate “integrity” is what corporate management must demonstrate in developing high performance corporate culture.<sup>25</sup>

The “culture” of an organization or a profession is the style and character in which its members typically behave in terms of effort, focus, efficiency, awareness, dedication, and ethical tone. It receives systematic attention in modern business management, particularly in large organizations in which far-flung operations are conducted in different venues, and in those venues different “local customs” have an “impact on behaviors,” to use Ms. Hackett’s terms.<sup>26</sup>

International business indeed was the original focus of management attention on the problem of cultural difference. Pioneering studies sponsored by IBM are the analytic foundation of the cross-cultural approach elaborated on by Professor Piomelli. For example, on the key scholarly work done by a Dutch sociologist, Geert Hofstede, back in the 1970s, Professor Piomelli states, “Given its empirical roots in the study of IBM employees, Hofstede’s work has . . . been quite influential in the literature aimed at preparing international business people for cross-cultural communication.”<sup>27</sup>

The terminology referring to culture sometimes used in academic analysis is “professional ideology” or, to borrow a French phrase, “*mentalité*.”<sup>28</sup>

#### V. “CULTURE” IN REPRESENTATION OF CORPORATE CLIENTS

The significance of cultural differences in the client–lawyer relationship between business and legal counsel can arise in the context of almost any legal problem. Most are serious matters

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24. *Id.* at 4–5.

25. *Id.* at 2–5 (explaining that high integrity is not just a nicety, but valuable to a corporation’s bottom line, and must come from the top down).

26. Hackett, *supra* note 21; see also Kevin T. Jackson, *Breaking Down the Barriers: Bringing Initiatives and Reality into Business Ethics Education*, 30 J. MGMT. EDUC. 65, 69–70 (2006) (discussing how a business’s culture, or ethics, influences its reputational capital, which in turn generates both financial and nonfinancial returns for the company and its shareholders); Adrian Michaels, *Understanding Corporate Governance Part 3: Rewriting the Rule Book*, FIN. TIMES, Jan. 16, 2004, at 2 (describing WorldCom’s efforts to remake its corporate culture throughout the international company in the wake of its much-publicized accounting scandal).

27. Piomelli, *supra* note 9, at 144.

28. The French term “*mentalité*” literally translates as “mentality.” THE OXFORD-HACHETTE FRENCH DICTIONARY 528 (3d ed. 2001). However, the term has also been used in academic analysis in reference to the “cognitive element” of tradition. See Ugo Mattei & Anna di Robilant, *The Art and Science of Critical Scholarship: Postmodernism and International Style in the Legal Architecture of Europe*, 75 TUL. L. REV. 1053, 1071 (2001).

that can have criminal implications—antitrust, Securities Act issues, interaction with the Internal Revenue Service, Foreign Corrupt Practices Act problems, and so on. Many types of civil matters can have comparable significance. For example, there can be major civil consequences in such fields as intellectual property law, employment law, environmental law, and plain old Delaware corporation law. Regulatory matters, such as encounters with the Securities and Exchange Commission or the Equal Employment Opportunity Commission and state regulatory counterparts, stand halfway between criminal and civil in consequences. Similar difficulties, often more complex, can arise in international business, as many companies have discovered in China, Russia, and the European Union.

There are aspects of all business legal problems in which the typical business person's perspective is necessarily different from that of the typical lawyer. A catalogue of these differences can be stated as the following:

- Benefit versus burden
- Certainty versus ambiguity
- Subjectivity versus objectivity
- Multiple versus single
- Time horizons
- Task techniques.

#### A. *Benefit Versus Burden*

The ultimate objective of a business corporation is to make money for its owners—the shareholders. This was most forcefully stated a generation ago by Milton Friedman: “[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.”<sup>29</sup>

This statement is entirely acceptable if its reference to the “rules of the game” is understood as including the complex legal regulations characteristic of modern societies.<sup>30</sup> Most business

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29. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine), at 126 (quoting MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962)).

30. “[A] corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.” 1 AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(a) (1994). However, “[e]ven if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business . . . [i]s obligated, to the same extent as a natural person, to act within the boundaries set by law . . .” *Id.* § 2.01(b).

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executives would acknowledge that corollary, although some of them talk as though they had stopped at the phrase “activities designed to increase . . . profits.”

Business people generally, and understandably, regard law and legal regulation as a burden.<sup>31</sup> Most of them see and react to all regulations as a nuisance, impediment, or menace. This sentiment is sometimes expressed as desire for “a level playing field.”<sup>32</sup> The business idea of “level playing field” is often a field of wide-open space where business managers can roam free.

The direct costs of complying with regulatory standards are almost always more expensive than the alternative. Certainly, this is generally so in the short run; otherwise, the standard would already have been recognized as efficient business. However, Mr. Heineman, the former GE general counsel, argues that, generally speaking, compliance with regulations is more efficient in the long run.<sup>33</sup> There is always risk that noncompliance will be met with law enforcement efforts, including private-party legal maneuvering and litigation. Everyone knows that encounters with law enforcement are expensive, not only in direct costs but also in indirect costs, including reputational damage.

Complying with regulations requires a business manager to attend to legal dimensions they may not understand. Additionally, complying with the law often requires them to interact with government officials or with outside antagonists in the private sector. These are good reasons for a business person to regard the law with fear and loathing.

On the other hand, lawyers interpret the law; this, taken as a whole, is a benefit to society, including the business community. Lawyers may acknowledge that regulation is often incoherent, ill-conceived, or merely symbolic, and that compliance is often an expensive ritual. However, lawyers are also cognizant of the lawless places in the world—where business can roam, but must encounter bandits and pirates, many of them wearing government uniforms. We can readily point to China and Russia, or to Venezuela and Zimbabwe, as relatively lawless environments.

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31. See Nelson & Nielsen, *supra* note 17, at 474 (discussing how inside corporate counsel feel their business counterparts perceive them as a “necessary evil”).

32. See, e.g., Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 388–89 (1997) (“Even where competition law appears a burdensome, but inevitable, form of regulation, many businesses prefer a level playing field wherein all competition is subject to the same restraints.”).

33. See HEINEMAN, *supra* note 22, at 15–20 (discussing the negative, and potentially ruinous, results that could arise over time from noncompliance).

The legal viewpoint is that in the long run, and on average, all things considered, law and government are positive social institutions. When this approach is presented to business people, it is often regarded as alien or even hostile. One knowledgeable business analyst, reflecting on a presentation at a management conference, recounted that he “suggested that there could be times when the interests of society might supersede shareholder interests. Upon reading a transcript of this talk, one of [his] finance colleagues sent an email to [him] . . . characterizing the talk as . . . representing an ‘anti-business stance.’”<sup>34</sup>

### *B. Certainty Versus Ambiguity*

The business manager wants certainty about legal obligations. His legal question is simply: “All right, what are we supposed to do?” The need for certainty is not childish or irrational, but reflects management’s basic responsibility to maintain a balance between risk and opportunity. As much certainty as possible is sought in all elements of a business equation—supply, personnel, marketing, accounting, and so on. Legal risk is simply one among many uncertainties that constrain business maneuvering. The business manager’s need concerning legal risk is classically expressed as a wish for a one-handed lawyer. When asked why, the business person’s answer is: “I am tired of advice in the form of ‘on one hand, on the other hand.’”

In contrast, lawyers are habituated to dealing with the ambiguities of the law. These include textual ambiguity in common and statutory law, and irregularities in the administration of the law, particularly irregularities in the law enforcement process. Lawyers regularly use not only the phrase “on the one hand, on the other hand,” but also such conditional phrases as “all things considered” and “although there is doubt about the matter, it is our opinion that . . .” We know that because law found in the books is written in general language it is inherently ambiguous. We also know that law in practice is enforced through initiatives of government officials and hostile private interests. And we know that authoritative legal interpretation through the courts may be unavailable or adverse, or, at a minimum, slow and expensive.

Lawyers know better even than law-jaded clients how uncertain the law can be, and that the degree of legal uncertainty

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34. Dennis A. Gioia, *Teaching Teachers to Teach Corporate Governance Differently*, 7 J. MGMT. & GOVERNANCE 255, 257 (2003).

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is itself often uncertain. One of a lawyer's most important capabilities is making reasonably accurate estimates of legal risk.

*C. Subjectivity Versus Objectivity*

Clients, corporate and otherwise, do not face isolated legal issues, such as those addressed in legal memoranda, but instead clusters of legal issues. All legal problems in a business client's life intersect with the client's financial problems, management problems, labor relations, and can even spill over into the client's family life. These intersections are unique for each client, which in turn means that the client views them "subjectively."

If the client has a regular lawyer, whether inside or outside counsel, that lawyer "has" those same problems in much the same way. But a lawyer also "has" the client's legal problems in a different way. Indeed, another principal legal skill is the ability to experience a client's legal problems more objectively than the client. A legal problem can be agony for the client, but to be handled properly it must be treated as a professional job by the lawyer.

*D. Multiple Versus Single*

Related to the matter of a client's subjectivity in encounters with legal problems is the fact that a business client almost always has more than one legal problem. Problems come in sets—labor and employment issues, federal income or state sales tax issues, trouble with regulatory filings, and so on. Accordingly, every effort to deal with one legal risk requires effort that could be addressed to some other legal risk. "Solutions" are in competition with each other within the business. In contrast, a lawyer must, at least analytically, disengage one legal problem from another.

*E. Time*

The time horizon of most business managers is also different from the time horizon of most lawyers. Business management's vocational time horizon takes the present as given and is oriented to achieving a better and more profitable future. The personal time horizon of a business person is more or less correlated with his or her age, seniority, and present position. Many business managers will be in some other position of responsibility within a few years, either with the present

employer or in some other company. The average tenure of a CEO today is about five years.<sup>35</sup>

The lawyer's vocational time horizon looks backward in history and forward to eventualities that may be years away. Looking backward, all lawyers have been schooled in the Constitution, a document now more than two hundred years old, and give heed to precedents that are decades old. Looking forward, transaction lawyers draft contract clauses that may not become operative until decades later. Litigation lawyers give heed to statutes of limitation and the knowledge that complicated legal disputes can take years to reach conclusion.

Traditionally, most lawyers visualize themselves as being with "the firm" indefinitely. Although the reality of legal employment stability is changing,<sup>36</sup> the perceived personal scenario of individual lawyers probably remains traditional.

#### *F. Vocational Techniques: Deeds and Words*

Perhaps the most fundamental difference between business managers and lawyers involves their very vocational techniques—their professional tools of trade. A business manager's basic task technique is decision and action. Everything else is preparatory: facts are gathered, opinions received, departments consulted (this includes not only the legal department but other departments, such as finance, marketing, and human resources). Sometimes action can be considered deliberately, sometimes not. But whatever the opportunity to think, the manager's basic work product is decision and action.

A lawyer's basic task technique is words, both written and spoken—written words in law books, legal memoranda, opinion letters, and briefs; spoken words in consultations with the client, negotiations with opposite parties, and oral arguments before courts and agencies. The words may be ingredients of action, but they are not action itself. Action is taken by someone else—a court in rendering a decision, an opposite party accepting or rejecting a proposal, or the client exercising the client's authority as principal.

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35. Tom Neff & Dayton Ogden, *Anatomy of a CEO*, CHIEF EXECUTIVE, Feb. 1, 2001, at 30, 31 (noting that the "median tenure of CEOs in office in 2000 was five years" and predicting that median tenure would not "climb[ ] again").

36. See Deborah L. Rhode, *Foreword: Personal Satisfaction in Professional Practice*, 58 SYRACUSE L. REV. 217, 226 (2008) ("Fewer lawyers gain full equity status and partnership no longer promises lifetime security or saner schedules.").

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Moreover, the lawyer's task technique is idealized in the concept of "independent professional judgment."<sup>37</sup> Every lawyer, even a junior associate, is expected to think autonomously and to express opinions accordingly. In contrast, as demonstrated in Mr. Heineman's book, the aim of business management is to establish a collective culture in the enterprise.<sup>38</sup>

VI. CONCLUSION:  
A COMPARATIVE SOCIOLOGICAL APPROACH

These differences in culture between managers of client organizations and lawyers can be "mapped on to" Professor Piomelli's analysis of differences between low-pay clients and lawyers.<sup>39</sup> Professor Piomelli analyzed six differences, as follows:

- "Tolerance for unpredictability;"
- "Power distance;"
- "Individualism/collectivism," meaning "the degree to which individuals are supposed to look after themselves or remain integrated into groups;"
- "Masculinity/Femininity," with masculinity preferring "task-oriented, competitive, and aggressive" behavior and femininity valuing "compromise, . . . teamwork[,] and relationships;"
- "Long Term/Short Term Orientation;" and
- "'High Content/High Context Communication'—with high-content cultures attending primarily to the precise words actually spoken or written and high-context cultures drawing meaning from the larger context . . . and unspoken cues."<sup>40</sup>

These six dimensions approximately correspond to those I have formulated above. "Tolerance of unpredictability" essentially corresponds to the tension between certainty and ambiguity as between business client and business lawyer.<sup>41</sup> Similarly, "power distance" basically relates to the relationship between the business client and the business lawyer. However,

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37. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2005) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.").

38. HEINEMAN, *supra* note 22, at 160–61 (arguing that CEOs must work to create a culture of integrity "across and down into [their] company").

39. *See supra* notes 11–13 and accompanying text.

40. Piomelli, *supra* note 9, at 145–46. Piomelli's analysis is based on the works of BINDER ET AL., *supra* note 11, and GEERT HOFSTEDE, *CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES* (1980). Piomelli, *supra* note 9, at 143–44.

41. *See supra* Part V.B.

with low-pay clients the lawyer is usually dominant, whereas in the corporate context it is the client and not the lawyer that ordinarily is in the dominant power position.<sup>42</sup> Additionally, “individualism/collectivism” substantially corresponds to a difference between the lawyer’s ideal of independent professional judgment with the managerial ideal of a collaborative culture extending throughout the corporate organization.<sup>43</sup> Further, “long term/short term orientation” parallels differences in time horizons.<sup>44</sup> Finally, “high content/high context communication” substantially mirrors the difference between a lawyer’s sensitivity to “the precise word” and a business manager’s sensitivity to the situation as a whole, to which the business manager must respond with action.<sup>45</sup>

As far as “masculinity/femininity,” in my observation most business managers and most corporate lawyers in that dimension are almost alike. We are all competitive and aggressive, and we all have to work hard to achieve “teamwork and relationships.”

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42. *See supra* Parts II–III.

43. *See supra* Part V.F.

44. *See supra* Part V.E.

45. *See supra* Part V.F.