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Ethical Considerations for the Corporate Legal Counsel

By

Thomas B. Metzloff
Duke University School of Law
Durham, North Carolina
The American Bar Foundation's most recent Statistical Profile of the United States Legal Profession demonstrates the significance of in-house corporate counsel within the legal profession. At present, a full 10% of the attorneys are employed in private industry, totalling over 55,000 attorneys. About half of these attorneys (or approximately 25,000) were employed by either Fortune 500 firms or firms in the top 50 in various industry categories. 32% of the attorneys in private industry worked in companies with a legal staff of over 50.

Yet, these numbers do not capture the true nature of the evolution. In addition to just numbers, the quality of the work being performed has undergone a significant change. Before, the paradigm was one of routine---in-house counsel did the work that the law firm lawyers didn't want to do. Certainly that picture is no longer correct. More and more substantive work---including litigation---is being performed by the corporation's own attorneys.

What then should be said about the ethical dimension to this evolving sector of the practice? To begin our understanding of this topic, a few observations about the nature of the work is in order. All are expressed in terms of what corporate counsel are not---thus emphasizing the difference with the law firm attorney.

1---The Lawyer as Non-Independent Contractor. The attorney is more clearly employed by the client-entity (who is signing his check) than is the lawyer in a firm who at least functionally works for the firm who in turn is working for the client-entity. Whether this makes any different is a difficult question, but the difference in form is at least potentially significant.

2---The Non-Transaction Nature of the Representation. The in-house attorney's work is not usually compensated on a per hour basis or even on a per task basis. This is perhaps the clearest manifestation of a fundamentally different model of representation. A corporate law department is not a profit center as is a private law firm. Indeed, one rather cynical business manager referred to his company's legal staff as "the Department of Profit Prevention." Law firms have a market-driven check on their performance---how much money are clients paying us each year over and above any malpractice liability that we have? Given the lack of paying work, it becomes more difficult to assess in a tangible manner "how things are going."

3---The Importance of Non-Legal Advice. The work to be performed tends to be more prospective as planning is often involved. Perhaps the best short-hand description is that an in-house
attorney's job is to facilitate the business side's work. As such, the line between the attorney's legal role and non-legal "business" issues is less distinct than in law firm practice. Thus as Eve Spangler has recently remarked in her book on "Lawyers for Hire," the lawyer's involvement in clearing a business deal "shades by imperceptible degrees into availability as a sounding board for the business person's ideas..."

4---The Non-firm structure. The organization of the corporate law department is not nearly as uniform as the partner/associate structure of the law firm. Centralization and "lines of command" vary according to the industry and dictates of the individual general counsel. Opportunities for "promotion" organized differently as there is less of a sense of up or out. Prospects for getting what my law firm's partners called "the big bucks" are probably less. Other differences in the hiring/firing/paying system exist such as non-lawyer review and lateral entry into the business side of the same corporation.

Given the above factors, how then do we begin to fit this segment of the legal profession into the legal ethics frameworks developed over the years? Regrettably, one does not find much help in the formal legal codes. Putting the ethical issue in historical focus in terms of formal "ethical codes" does not take much time at all--there simply is not much to talk about. All the professional codes through to the early 1970s basically assumed a model of an attorney in a private law firm who primarily handled litigation. This ethical system had two major attributes. First, the ethical rules presupposed that there was a process by which an attorney was retained by a client to perform a given service. Many corollaries flowed from this seemingly straightforward proposition: (1) there was a need for clients to obtain information about the universe of attorneys and select one; (2) the question of fees needed to be resolved; (3) the attorney had leeway whether to accept or reject the representation; (4) attorneys would have many clients; (5) issues relating to termination must be addressed; (6) the codes must also deal with representing conflicting interests.

Second, the ethical codes established loyalty to the client as the primary attribute of the profession. At the same time, the codes could pay lip service to public interest by defining the public interest as being a "zealous advocate" for your client since from the battle of advocates "truth" would emerge. The advocacy model seems to presuppose litigation as the only role to be played by lawyers. Within this model, at least the facade of independence was maintained. A lawyer could go full out on your clients behalf without buying into their values. After all, you had many clients, and by speaking for one, you were not speaking for the others or yourself.

There is just one problem--this model has next to nothing to do with most corporate counsel's legal professionalism. The one-on-one advocacy model simply does not work for a large number of lawyers. As stated by Geoffrey Hazard, "For the lawyer retained by
an organization such as a corporation . . . , identifying the client is much more complicated. Client identity is ambiguous, continuously problematic, and requires resolution by conscious choice." Hazard, Ethics in the Practice of Law (1978) The old Codes then gave worse than no guidance. Rather, they assumed that most of the "representational" problems were resolved at the beginning of the representation. Who was paying the bill was generally the client—that person is embraced in a close relationship, while everyone else is put at an arms' length or further. Yet, as Hazard remarked, "in the real world, the identity of the client may not be established until after some critical decisions have to be made, and may never be unambiguously established at all." Id.

And what then of those "client-like" non-clients? It happens all the time—the estate lawyer dealing with a family yet writing the will for one spouse. Yet, our rules talk about clients as if they are to be held and cherished like your mother in old age, and "non-clients" who should be viewed with skepticism and at least occasionally loathing. "When the prospective primary client is uncertain how to define his own relationship to the other person in the transaction, the lawyer's position is inevitably tentative and ambiguous." Id. See generally Jonas, Who is the Client?: The Corporate Lawyer's Dilemma, 39 Hastings L. J. 617 (1988); McCall, The Corporation as Client: Problems, Perspectives, and Partial Solutions, 39 Hastings L. J. 623 (1988).

The key problem of corporate legal ethics revolves rather tightly around the question "who is the client" for the corporate counsel. What's fair to say is this—we began this decade with a very poor conception of the corporate counsel's ethical role. We are now experimenting with a new effort at definition as defined by Rule 1.13 of the Model Rules of Professional Conduct. This provision of the Model Rules went through several drafts during an intensely political debate over its provisions. See Riger, The Model Rules and Corporate Practice: New Ethics for a Competitive Era, 17 Conn. L. Rev. 729 (1985). As the corporate counsel profession comes of age, we can expect further change and evolution. Serious criticism of the new approach detailed in Model Rule 1.13 have been raised. See Mitchell, Professional Responsibility and the Close Corporation: Toward a Realistic Ethic, 74 Cornell L. Rev. 466 (1989).

Saying someone is your client is really a shorthand expression that you are operating on the behalf of someone or something else as opposed to your own interests. In a sense, this characteristic is captured by the notion of loyalty, which in many respects is fundamental. As a second attribute, there is a strong notion that this loyalty characteristic is meant to operate to the exclusion of a similar loyalty interest to a sometimes poorly defined group of other interests. This notion is captured by the concept of "conflict of interest."

The basic problems of determining representation in the
corporate context are explored in Problem One which is attached. In reading through the problems, consider whether the corporate counsel acted properly in dealing with the company's President who was being forced out of the company by other shareholders. The facts are based upon the recent decision of the Massachusetts Supreme Judicial Court in *Robertson v. Gaston Snow & Ely Bartlett*, 536 N.E.2d 344 (1989) (reversing $500,000 judgment against attorney who played role similar to that of the corporate attorneys in the problem.

When everything is working right in a company, the business managers view the law department as "part of the team, not intruders to be viewed with suspicion." This view causes many commentators great concern. These lawyers cannot be "trusted" to protect the private interest---they are too loyal. There is no sense of independence, or separation. That presents two important questions: Is "independence" an important professional virtue for lawyers, and, if so, is there something about the nature of the in-house attorney's work that makes it largely unattainable? See generally Gordon, *The Independence of Lawyers*, 68 Boston U. L. Rev. 1 (1988). Consider the following quote from one law firm partner:

It is not uncommon for us to tell the president that he's a turkey. You know: "You're a damn fool, and you've got an environmental problem right now and you've got to spend a million dollars to fix it even though it will lose you money this year, or you're going to go to jail. That's the magnitude of your problem. I'd like to hear an in-house lawyer say that to a president who just had a stockholders' meeting where he's promised the world. I'd like to see an in-house lawyer tell his board of directors that his president is violating the Foreign Corporate Practices Act. The fact is, there's just no room for wilful blindness at that level. If you have both loyalties and accountability to the superior, you can't be independent."

What this quote exhibits is a serious criticism about the "overloyalty" of in-house corporate attorneys, and somewhat clear suggestions that the law firm attorney---with the added separation that the firm structure gives him---is somehow "more ethical." Nor is the point made only by law firm attorneys: The literature in this field has a number of quotes from general counsels to the following effect: "I always feel I have one hat, and this is: I am a corporate office who happens to be a lawyer." The argument can be recast in a slightly altered form as follows: In the business world, the lawyer's ethic of risk prevention will inalterably be in conflict with the entrepreneurial ethic of risk taking.

At first blush, the concern being expressed here is troubling. All professionals are supposed to be "independent" aren't they? Yet, the legal profession has never really been very serious about independence as a professional norm, especially when measured alongside loyalty. Unlike the accounting profession, lawyers have done little to insure a meaningful sense of independence. Indeed,
the attorney-client relationship is in some respects the antithesis of the CPA role. The lawyers' job is not typically conceptualized as that of a "public watchdog", but rather as a facilitator of the client's objectives. Constraints on advocacy or the limitations on assisting the client often come from non-ethical considerations.

How then do we measure this corporate lawyer's contribution in ethical terms? The ethical justification for the increase in in-house counseling must be found, if it is to be found anywhere, is the Model Rule's reorientation towards competence. See Model Rule 1.1. The true measure of the in-house then becomes the in-house attorney's relative competence on the key issues versus the firm lawyer's competence. Is the nature of the in-house practice likely to result in greater competence? This is the type of question which the legal profession is not very good about asking, much less answering. Maybe each has some advantages—greater breadth of experience in the outside firm which may be useful in some situations. But the key issue is competence, and in this context, my guess is that it relates to two additional critical concerns not often discussed in an ethics course: specialization and cost.

Loyalty has never been penalized for being too much in abundance. Yet, it does create some problems in the corporate context. The strength of the loyalty runs to many potentially different clients. Yet, this is not unique to in-house attorneys. The real question is what happens when the interests are in conflict. The difficulty of answering the question "who is the client" is in a sense a shorthand for a very different, and ultimately more important question: "How are we going to handle conflicts of interest in this context?"

The primary conflict of interest rule (Model Rule 1.7) works better when you're an attorney considering whether to take on a client in the relative quiet of your office. The Rules want you to investigate the new client and see if his/her or its interests are adverse to somebody you are already representing. If it's a group of people who are hiring counsel, the Rules want you to analyze whether you can do the job for everybody. This is well and good, but does it help in-house corporate attorneys? Consider the usual scenario -- We already know we've got the one "big" client—the company. We are not considering whether to "add" that client to an existing portfolio. All of a sudden some issue comes along, and someone with a legitimate claim to the loyalty of the company (to whom we owe loyalty both individually and professionally through the derivative relationship with the corporate client). That person asks us, the company's lawyers, for help. What do you do?

If your omniscient, you can look into the crystal ball and see where the matter will eventually lead. Is this really any different than the private lawyer? The private practice lawyer in uncertain cases has a rather useful tool to help him or her decide—ask the existing client. No conflict rule can ever be precise enough to tell you what to do. By definition, the inquiry is subjective and speculative. The rules try to put order onto chaos,
and malpractice rules, disciplinary rules, and the like are making this pressure even greater. The corporate representation situation is perhaps the most amorphous of all. These are people seeking help who have a legitimate moral claim to assistance or at least explanation. They are acting on behalf of the company. Is there a way to conduct an analysis? This is clearly an emerging area of law that is far from settled. The potential for major ethical mistakes exist and will become even more serious as corporate counsel go further into litigation activities. See Reycraft, Conflicts of Interest and Effective Representation: The Dilemma of Corporate Counsel, 39 Hastings L. J. 605 (1988).

There is a clear need for educating those around you about the nature of the corporate representation. Lawyers often do not understand that it is primarily their responsibility to clarify the relationship. Developing a good understanding requires a sensitivity to conceptualizing the problem as one of multiple representation as opposed to a pure conflict. For example, consider a sex discrimination suit against a company supervisor with both the company and the supervisor named as defendants. When the claim is initially made (assume its before a lawsuit is even filed), it looks like the claim is lacking in merit, although maybe not frivolous. You hate to go out and hire a separate attorney for both the company and the supervisor. So you use the legal staff to "represent" both. Can you even do this? Almost clearly yes if you satisfy the basic Model Rule 1.7 construction, i.e. (1) the lawyer does not believe that it is directly adverse; and (2) consent of both clients after consultation. The possibility exists for a potential disaster. The supervisor is found individually liable for something under some state law theory. The supervisor may well seek to assert a malpractice based upon a conflict of interest.

How can this be avoided? Always having separate counsel is expensive. Can the company even pay for separate counsel? The answer here is yes. See Comment, Rule 1.7: "So, also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyers' professional independence." It is thus essential that an attorney (1) recognize the potential concern; (2) make a formal analysis under Rule 1.7 that your judgment is that one lawyer can represent both; and (3) make disclosures so that individual's client's judgment is exercised based upon good information. Some attorneys go further and obtain independent counsel to analyze the Rule 1.7 question.

Basic problems with the role of corporation counsel are evident from a number of judicial decisions drawn from a variety of contexts. For example, in the area of wrongful discharge, courts have taken a basic view that in-house attorneys are essentially similar to outside counsel so that the "client"—the corporation—has the ability to fire counsel with or without cause. Thus, most courts have held that in-house counsel have no claim for wrongful

This line of decisions suggests that courts have some lingering uncertainty and confusion about the nature of the in-house counsel's role within the company. Court remain uncertain about such issues as the ability of in-house counsel to obtain other jobs in the marketplace, their ability to "blow the whistle" without suffering serious adverse consequences. For an interesting analysis of the wrongful discharge cases as well as other cases from other contexts in which courts have analyzed the roles played by corporate counsel, see Schneyer, Professionalism and Public Policy: The Case of House Counsel, 2 Georgetown J. Legal Ethics, 449 (1988).

A final, and critical issue, relates to corporate counsel's duties of confidentiality. In order to focus the discussion, a hypothetical problem is attached. This problem presents a number of ethical issues faced by an attorney representing a corporation. The earlier Codes (i.e. the Canons of Professional Ethics and the Model Code of Professional Responsibility) did not deal very clearly with attorneys representing entities as opposed to individuals. The new Model Rules of Professional Conduct (Model Rules), on the other hand, make a significant attempt to focus the attorney's ethical responsibilities when representing an entity. See Model Rule 1.13. This relatively new attempt to define the attorney's responsibilities is of great significance, and indeed, may be the most important substantive addition brought about by the Model Rules.

As you read through the problem, consider the following questions:

(1) **Who do you represent?**

The Model Rules provide in Model Rule 1.13 that an attorney representing an organization like a corporation represents not the individuals involved in that organization but the organization itself. Thus, throughout the discussion with Mr. Treasurer, Connor was acting as the attorney for FirstData, not the attorney for Mr. Treasurer or Mr. McEnroe as individuals.

(2) **Can Connor can assist Treasurer R. McEnroe?**

We must reference Model Rule 1.13 as a starting point, and then proceed from there. A prudent attorney faced with this information, should at a minimum first advise Mr. Treasurer that he is the attorney for the corporation. Rule 1.13, however, does not proscribe an attorney for a corporation representing an officer individually. Rather, Rule 1.13(e) references Rule 1.7 concerning...
representing conflicting interests. While a contrary argument is possible, Rule 1.7 would seem to preclude joint representation in this case. It is doubtful that an attorney could conclude representing Mr. Treasurer would not "adversely affect" the primary representation.

(3) What actions do you take?

Rule 1.13 creates a rich array of factors for the corporate attorney to consider including:

(a). The seriousness and consequences of the violation involved. Are the violations here criminal acts? What is the likely effect on the company of disclosure? How much is involved? Does it really put the corporation's position in that untenable position. Has the practice stopped? What is the likely litigation scenarios and outcomes?

(b). The scope of the attorney's representation. Is it your position to comment? Sometimes, the matter involved is not the lawyers' business. This provides outside counsel. The extent to which the attorney has the ability, influence, and resources to "get to the bottom of the problem" or "to take it to the top" is relevant to the ethical analysis. An outside counsel who has handled a traffic case last year simply isn't going to be in a position to command much respect when he takes the issue to the Board of Directors. Corporate Counsel almost inevitably are is such a position.

(c). The responsibility in the organization and the apparent motivation of the "guilty" parties. This factors is supposed to be getting at some notion of personal gain versus "good" motives for bad actions.

(d). The policies of the organization regarding such problems. What does the company say it should do in this case?

A few basic observations are warranted. At a minimum, the attorney should not get involved in the fraud. More fundamentally, the attorney should insist that any fraudulent practices stop immediately. The ethical codes have always drawn a clear line between past acts and future acts.

Without defining an answer as to how Rule 1.13 should be applied in this case, it is clear that the Rule 1.13 analysis is far more likely to result in the inside lawyer having an obligation to do something than it is for the outside attorney. Consider the following points.

--- The in-house counsel will seldom have a "know nothing, see nothing, do nothing" argument as is provided to outside lawyers under the "scope and nature of the representation" argument. The in-house counsel is dead solid on the bulls-eye when it comes to involvement with the company.
The in-house counsel is likely to have superior information (both in terms of the company's "rules" for handling problems both formal and informal, and respecting the likely consequences of disclosure) than the outside counsel. The in-house counsel will be less likely to fool himself into thinking this is a minor problem. Thus, the same problem will in my view be perceived as a more serious problem with more negative effects by an in-house attorney than by regular outside counsel.

This superior knowledge will effect all the factors set forth above, and tend towards the need to do more.

Rule 1.13 sets forth a precise, and relatively clear approach that the attorney is required to take. The limited disclosure requirements under Rule 1.13(b) are triggered when a lawyer knows that an officer of the corporation is engaged in action that (1) violates the law and (2) which "is likely to result in substantial harm" to the company. Both conditions would appear to be met in this case. Once the attorney concludes that there is a serious violation likely to result in substantial harm to the corporation, Model Rule 1.13 requires that the attorney "shall proceed as is reasonably necessary in the best interest of the organization." While there are certainly some potential ambiguities in this formulation, it is crystal clear that the relevant focus is on the company and not that of the individuals. Often this requires referring the matter to the corporation's Board of Directors for action. If no sufficient response is achieved, the attorney's ultimate choice is resignation. See Hemmer, Resignation of Corporate Counsel: Fulfillment or Abdication of Duty, 39 Hastings L. J. 641 (1988).

(4). Can you keep that conversation confidential?

As you think about how to respond, consider who it is that can waive the privilege relating to the conversation. Pre-Upjohn, the question would have sparked a debate. After Upjohn, there is no question that the attorney is working only for the corporation. There is also no question that Connor's conversation with Treasurer is protected by the attorney-client privilege based upon the client-attorney relationship between Connors and FirstData. The issue then arises as to who can waive that privilege? This question is obviously of critical importance to Treasurer who has exhibited his interest in maintaining complete confidentiality. The important point to recognize here is that despite his clear interest in confidentiality, the applicable attorney-client privilege is not subject to his control. FirstData, or indeed others, may decide to waive the privilege which will result in making Connors obligated to respond, if subpoenaed, to discuss the conversation. In a sense, this observation merely underscores the central theme of the entire problem that Connors is the attorney for the corporation, and not for individual.

The potential complications relating to waiver are well demonstrated in Commodity Futures Trading Commission v. Weintraub,
became the target of a federal government investigation. After a federal agency filed a complaint against the company, it filed for bankruptcy. The bankruptcy court eventually appointed a Trustee. Despite the bankruptcy, the federal government continued its investigation, and eventually subpoenaed the company's attorney seeking information on events that occurred prior to the bankruptcy. The attorney refused to answer any substantive questions claiming the attorney-client privilege.

The government then asked the Trustee to waive the company's attorney-client privilege, which the Trustee did. Before the attorney could testify, however, a former officer and director of the company told that attorney to maintain the privilege. This issue eventually worked itself to the Supreme Court which ruled that the privilege was only that of the company's and therefore the Trustee, who succeeded to the company's rights, had the power to waive the privilege. The Supreme Court held that the Trustee had the power to waive the attorney-client privilege even over the objection of the former officers.

Thus, in this case, it seems clear that Treasurer (even if he should someday want Connors to testify in some proceeding such as to prove his lack of malicious intent), cannot waive the privilege, but that FirstData itself or its successor-in-interest could waive the privilege even over Mr. Officer's objections.
Christie Curtain Co. was founded in 1925 by Charles Christie. The old corporation, whose primary business was manufacturing curtains, had as its principal customer Sears, Roebuck & Co. While originally a family business, Christie Curtain had grown so that there were both family members and non-family members active in all levels of management.

Thomas Shelton, was hired as Christie Curtain's general counsel in 1983. Prior to that time, Shelton had been at the law firm of Pickens & Dooley, where he had worked on a number of matters for Christie Curtain. The work performed had been wide ranging, and included individual representation of some of the members of the Christie family in a variety of areas such as estate planning. Relevant to this problem, Shelton had drafted a will for Joel Christie, the youngest son in the family.

In mid-1989, Charles Christie asked Shelton to investigate the possibility of a major corporate reorganization of Christie Curtain, in part motivated by his own estate planning needs. The basic plan called for the sale of all the old corporation's assets to a new corporation, Christie Industries, which would be owned not only by Christie family members but by senior, non-family members of the current management team.

When this plan was discussed with Sears, Christie's major client, Sears sought assurances that Joel Christie, then President of Christie Curtains, would not control the new corporation and would be placed in a different position in the company owing to long-standing problems between Sears and Joel. Instead, Sears wanted a non-family member, Will Washburn, to become president. This demand was acceptable to Charles Christie and other family members who had more than enough votes to effect this change. At the next meeting of the Board, Washburn was elected President and Chief Executive Officer.

At this point, Joel went to see Shelton to discuss his concerns with the proposed reorganization plan, which was actively being pursued by Shelton and outside counsel retained to draft the necessary documents. Joel asked Shelton whether he was going to receive an employment contract with the new company. Shelton indicated that the question was a reasonable one, but that he was not aware of management's plans. Shelton agreed that he would put the question of employment contracts for various individuals on the agenda for the next planning meeting. Shelton also gave Joel a copy of a form employment contract from another company that he had in his files. They also had a general conversation about the types of items that are typically included in long-term employment contracts. Several days later, Joel circulated a memo to the officers of the corporation with a copy to Shelton raising a number of concerns with the proposed reorganization.
Prior to the closing with respect to the reorganization, Washburn informed Shelton that none of the employees would have long-term contracts with the new corporation. Shelton did not disclose this information to Joel.

The closing took place on December 30, 1989. Following the closing, Joel owned 22.5% of the new corporation. Joel's brother also owned 22.5% with the rest of the ownership dispersed among non-family members. The question of long-term employment contracts was not raised at the closing. In January, 1990, four non-family members and Joel's brother (who together controlled more than 50% of the shares in the new corporation) asked Shelton to draft a voting agreement that would require the signatories to vote for any candidate for the Board of Directors supported by any three of the signatories. Shelton prepared a draft, but asked the firms' outside law firm to consummate the agreement. Shelton did not inform Joel or Charles Christie about the voting agreement. In February, 1990, the directors of the new corporation voted to terminate Joel's employment with the company and to replace him on the Board of Directors.

Joel has filed a legal malpractice action and an ethics complaint against Shelton based upon his actions in the reorganization as described above.

Was there an attorney-client relationship between Joel and Shelton? Has Shelton breached any ethical or legal duties owed to Joel? What actions would you have taken differently if you had been Shelton?

DISCUSSION PROBLEM TWO

George Connors is general counsel to FirstData, a modest-sized company involved in selling word processing and data processing systems. Connors came to FirstData about two years ago after having been in private practice for several years with a large downtown law firm. He had worked on several corporate deals for FirstData when he was with the firm. He enjoyed the people and thought the opportunities there were more to his liking, so he accepted an offer to become their general counsel when it presented itself.

This morning, John Treasurer, FirstData's comptroller, has called Connors asking if they could meet immediately. Connors agreed, but detected a note of concern in John's voice. John is one of Connors' closest friends at FirstData, and they work together frequently.

When Treasurer arrived, he was visibly upset. He shut the door, and began by telling George that FirstData was experiencing financial difficulties which, if not corrected, would lead "to more
serious problems." The problem began several years ago when FirstData's President and largest stockholder, Mark McEnroe, began a series of highly questionable financing arrangements. Like any growth company in a high tech field, FirstData had tremendous capital needs. Frequently, they would lease a computer system to a client on a long-term lease and at the same time enter into a financing arrangement with a bank that would loan the money to purchase the hardware. The lease payments from the client would then be used to service the loan and provide FirstData with a profit.

Mr. Treasurer now disclosed that McEnroe had intentionally overstated the value of the computer systems in order to obtain larger loans. The excess proceeds from the loans were then used for general expansion. At first, the overstatements were modest, but have increased over time. Several of the initial leasing agreements were now expiring. After expiring, many customers would return their computer systems, at which time the systems would be valued. It seemed quite likely to Mr. Treasurer that once this valuation was made, the fraud would be uncovered. He thought that perhaps the situation could be handled secretly for a while since the company had adequate cash to keep paying off the loans for the time being at least.

As the details were unveiled, it became clear to Mr. Connors that his old firm had closed many of the loan transactions and may well have been negligent in investigating the value of the computer equipment.

Mr. Treasurer could not specify the total amount of the overstated value, but thought perhaps it was as high as $4.5 million, but could be lower. He was coming to Mr. Connors at this time because he was concerned with the effect of the disclosure on the company's relationship with its Bank. While McEnroe was the primary instigator of the plan, Treasurer, and others, had known about it and had helped to keep it going.

Treasurer then asked Connors to advise him on how to proceed to protect himself, McEnroe, and FirstData. Treasurer also insists that the information be kept confidential since disclosure would certainly harm the company.

What can or must Connors do? Is he ethically obligated to keep the information he has learned confidential, and if so, from whom? Is his conversation with Treasurer protected by the attorney-client privilege? If so, who can waive the privilege? What are Connors's ethical obligations given that his prior firm was involved in the past financial transactions at issue?