

THE ORGANIZATION LAWYER

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Thank you Dean and thank all of you for being here. I am tempted to ask whether somebody misinformed you that you would get credit for being here. I don't think you do, so if anybody wants to leave now, I'll just close my eyes.

I have held a variety of jobs in my career, and I used to joke that my business card was really just a piece of slate with a piece of chalk because I had to keep changing it so often as companies I worked for were sold or merged. Each change provided me with a different opportunity or a different crisis. Each job that I had exposed me to thousands of different legal, business, political, or other issues, and helped to build a foundation of experience that became essential in my ability to meet the next challenge. And that variety of experiences also gives me a bit of perspective about being a lawyer today: what each of you will face as you go out and launch your legal careers.

It really was not too long ago that aspiring lawyers “read” the law, apprenticed to a practitioner, and were “called to the bar.” Being a lawyer meant working with other human beings—people we called “clients”—who needed help navigating through the complexities of the law, whether in buying a house, writing a will, or being represented in civil or criminal litigation. The lawyer sat across the table from the client and was able to counsel that client directly and in a way that was supposed to focus solely on the interests of the client. The client could look you in the eye, speak right to you, and tell you what it was they needed help on.

But, more and more, this model has changed. Law-school graduates from around the country will do what many of the VLS students in this room will do when they graduate. A large number of you will go to work in an organization—if not right away, then probably at some point in your career. Over the past several years, about 30% of VLS graduates have gone to work either for a government organization, or in business or industry—a slightly larger percentage than all graduates of all law schools in the United States. While I do not have data about what happens later in your careers, I suspect that sometime within your careers, most of you will work as a lawyer in an organization. And even those of you who do not initially find

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† Thanks to Dean Shields, for inviting me to speak and encouraging the law-school community to listen to a perspective that may have been new to the students but, I think, is (and will continue to be) very important today and going forward. Thanks also to the staff of the *Vermont Law Review*.

yourself working within an organization will probably at some point in your career be in a position to represent and provide advice and counsel to an organization and the lawyers who work within that organization.

There are many types of organizations you could find yourself a part of: a government regulatory agency or office at the federal, state, county, or municipal level; a corporation, small or large, public or private; an NGO; or some other similar type of practice where the lawyer is also an employee with one or more bosses.

Every organization has a “culture”—it may be the way people dress, talk, eat, socialize, think, or act. But it is unique to each organization. One of the great myths I have seen in the corporate world is the assertion that when two companies merge, it is a “merger of equals” because both companies have such similar cultures. People who have lived through such an experience know such talk is a fairy tale designed to try and make people feel better and more hopeful at the beginning of the merged entity’s existence. The reality is that one company wins and one company loses, because the cultures of even companies that look very much alike with the same types of products and customers are very different. For instance, Vermont Law School has a particular culture that is different from, say, Pepperdine Law School, even though both schools are dedicated to training men and women to be outstanding lawyers.

The culture of every organization provides clues to employees within that organization as to what they need to do in order to do well, to advance and to succeed in that organization. The new employee can watch those who succeed and those who fail, and draw conclusions from those observations as to what it takes to make it in the organization, as well as what will doom a career to failure. Understanding that culture—its values, language, and unstated expectations—is essential to being able to be effective as a lawyer in or counseling that organization.

Working as a lawyer within an organization, you will not be simply a lawyer without a human being as a client as in the prior model. Rather, you will be an employee—with managers, supervisors, bosses, career paths, health plans, and all the other things that every other employee of an organization has to deal with. Working within an organization can be a tremendously satisfying and fulfilling personal and professional experience. Within an organization, freed of the pressures of time sheets and billing, lawyers are free to spend as much time on an issue as it takes to get the job done. Many of the lawyers in private practice that I have known in my career found that working in private practice was not what they had hoped. They envied those of us who “went inside” and who were able to focus our time and attention on the counseling of business, rather than the business of

counseling. As a result, working as a lawyer within an organization, whether with the government or in a company, has become a very attractive career choice for many lawyers.

So, my focus today is the *organization lawyer*. This dynamic is different from the situation lawyers faced in the “old days”—when a lawyer had an individual human being as a client. The organization client is an incorporeal legal fiction. It is hard to sit across the table, develop a personal or professional relationship, and have a chat with that sort of client. And, because you cannot speak directly with your client, you need to develop different counseling skills to be able to do your job professionally and well on behalf of the client.

When I was a federal prosecutor, I had the great honor of being able to stand up in front of a federal judge and jury and say that I spoke on behalf of the people of the United States of America. But I did not have a clue what the people of the United States of America wanted me to do—I had not spoken with “the people,” nor had I taken an opinion poll. Rather, often with the advice of colleagues and subject to broad policy and procedural guidelines, I had determined on my own what the position of the United States should be. I had the responsibility and the authority to take positions on behalf of the people of the United States of America, such as whether and how to make an evidentiary objection, or what charges to bring, what charges not to bring, who to charge, and what kind of sentence to recommend to the judge. It was an extraordinary power to have when I was very young and very inexperienced.

Within any organization, some of your fellow employees will have the responsibility and authority to speak on behalf of the client. Some of these fellow employees may be your boss or higher and have the power to decide your salary and your professional future. It is possible that you may come across a fellow employee who has the power to speak on behalf of the client but who may propose an action that you do not believe would be in the best interest of the client. The problem is that reasonable minds—or powerful people—may honestly differ as to what is in the best interests of the client.

If the issue is possible illegality, that’s usually pretty easy to spot and it is absolutely clear that you must take the issue higher within the organization—what is referred to as “going up the ladder.” But, it is more difficult when it is a question of how much legal risk to accept, and thus it is a matter of judgment as well as experience and training, while weighing competing and legitimate interests. How and when do you decide that your judgment and opinion are superior to that of your boss or other people who may have more experience and who can control your income and your future?

This structural dynamic requires that the organization lawyer have a well-developed set of antennae to be aware of the challenges, risks, and opportunities that the lawyer in a more traditional private practice might not have to deal with.

Let me first discuss some of the personal qualities that you will need to help guide you as you start your professional journey, wherever that may take you. Before you find yourself in a position within an organization where you will be called upon to offer advice, you should first pause and take a personal inventory: consider who you are, what your strengths and weaknesses are, what are the real challenges that you will face, and whether you have what it takes to work—and succeed—as a lawyer in an organizational environment.

You need to think about, and have a mature understanding of, how and why good people—just like you—made mistakes that caused companies, jobs, reputations—and in some cases their personal freedom—to disappear. Don't doom yourself to repeat the lessons of history because you have not learned those lessons. The stories of Watergate, Enron, WorldCom, Arthur Andersen and others make for more than just interesting reading. The German expression “Schadenfreude” means the unanticipated delight in the suffering of another. If that is all we got from these recent histories, then we have learned nothing worthwhile at all. There are indeed lessons to be learned.

Some of these lessons I learned as a result of my joining Tyco after the scandal had exploded on the front pages of the papers, and the CEO, CFO, and General Counsel had all left the company under a cloud. All of a sudden, I was the new General Counsel in what was then a \$38 billion company with 2300 subsidiaries around the world and 260,000 employees. We were suing the CEO, CFO, and GC who had preceded us, and each of them was under indictment. We literally had no one to give us any advice or information—such as where the bathroom was or where the documents we needed to do our jobs were kept. Of course, just about every document at Tyco's headquarters was in one box or another going to some government office pursuant to a subpoena. Adding to the challenge was that the former General Counsel was a friend. He and I had worked together when I was at the White House—he was on the Senate staff; I was in the White House. Yet, he was under indictment and on behalf of Tyco I was suing him, and so it was a very personal situation. I have given a lot of thought to how this man I knew as an honorable, competent, and decent lawyer had ended up in that situation, and how other good lawyers in other organizations had found themselves in such dire circumstances.

One thing that I have concluded is that in addition to studying the law, the regulations, and the ethical rules that guide all of our behavior as lawyers, you need to think also of the twin roles in the organization that you will simultaneously play as both a leader and as a follower.

Every member of the VLS community is a leader, and you will be a leader within any organization with which you associate. This will, in part, be because in every social group, people at every level are leaders in some way. And, that has nothing to do with title, pay grade, or seniority. This is especially true for lawyers. There is an enhanced recognition of lawyers as leaders. And, as lawyers and leaders, you will have a special spotlight on you, as people will assume you are “learned in the law,” perhaps even wise, with a keen sense of not just what is legal, but what is right.

So, what is leadership? How did we define this concept of leadership in the organizational context in the past—and how should we think of it in the future? If we go back into recent history—and perhaps even to today’s headlines—being a leader in government, business, or other organizations has meant power, influence, fame, celebrity, and often great personal wealth.

How have others thought of leadership in different contexts over the years? A traditional theme of leadership is that the leader owes a number of duties to those who follow him or her. Among those duties are—and should be:

- 1) *Service*: that is the most frequent trait of leadership I have seen in both my own experience as well as in what I have read on the subject.
 - You can go back to the Gospels where St. Matthew wrote, “And whosoever will be chief among you, let him be your servant.” Matthew 20:27
 - And, Martin Luther King, Jr. said, “Everyone can be great because everyone can serve.”
 - Service is traditionally the cornerstone of what leadership is all about. You don’t aspire to be a leader for the power; you aspire to be a leader because you can serve others.

- 2) *Inspiration*: leaders inspire people.
 - “A leader who does not inspire is like a river without water,” Lance Secretan, a friend of mine, wrote. That inspiration can be for either good or not. We’ve seen both. We can inspire people with our words—but more importantly, by our actions. St. Francis of Assisi famously said, “Preach constantly. When necessary, use words.” What he was saying was that people are going to look at what you do and make judgments and conclusions about who you really are by your actions.

Other criteria of leadership are:

- 3) *Vision*: having a vision and being able to articulate it in a credible and compelling manner.
- 4) *Honesty*: being believable, and being a person whose word is indeed his bond.
- 5) *Integrity*: articulating standards of behavior, and then acting and living consistently with those standards.
- 6) Finally, *Encouraging Personal Growth*: allowing, encouraging and being a catalyst for others to grow and become leaders in their own right.

These indicia of leadership are not the exclusive domain of the CEO, the elected official, or the person in the media spotlight. They are qualities that each one of us aspires to in our role as leaders, whatever our position within any group or organization.

With regard to many of the past corporate and government leaders who have found themselves and their companies in the news, the courtrooms, and sometimes in prison cells, they failed as leaders. The leaders forgot that leadership is about serving others, not about serving oneself. The leaders forgot how much they needed to set an example by what they said and what they did. I think of Mr. Kozlowski, the former CEO of Tyco. I never met him, but I spent a lot of time repairing the damage that he was responsible for and I saw the legacy that he left behind. I submit that he is a real example of someone for whom it was all about him, not about those whom he should have been serving. He and other leaders forgot how much they needed to set an example by what they said and what they did. They forgot that they were teachers who should have been focused on preparing the next generation of leaders to take over and become servants of their followers. The leaders forgot that they needed to provide an atmosphere—a culture—in which followers were not only encouraged to speak up and offer a contrary position, but where a lack of candor from followers was unacceptable.

Let me talk about the second duty. Everyone in this room is today, and will always be, not only a leader, but a follower as well. Now, saying someone is a “follower” has kind of a pejorative connotation to it these days. But, I am talking about followership as a quality and attribute to which each of us should aspire.

While we focus a lot in our society on leaders, equally important is the role we all play as followers. There is no leader that does not, at the same time, follow, answer to, and owe a duty to someone, whether it is a boss, a dean, a board, the Congress, “the people,” or even “the Community and the World.”¹

Fundamentally, followers owe a duty to their leaders and to the organizations in which they serve. Simply stated, that duty is to help the leaders make the right decisions, and to remember what is really important. A loyal and faithful follower is someone who recognizes and acts upon that duty.

I submit that, in addition to a failure of leadership, there was a failure of followership that allowed some of the corporate and government disasters that we are all familiar with to occur. Where were the followers who warned the leaders that they had forgotten the true lessons and meaning of leadership? Where were the followers who had the courage and the candor to point out that the path taken and the decisions made were wrong? Where were the followers who reminded the leaders that they should focus more on being servants than on being served? Again, think of Mr. Kozlowski. Did anyone ever say to him, “Dennis, this is really wrong. What are you, nuts?” I don’t think anybody ever said that to him. And that is a failure of all the people who worked with him, including the board. Perhaps if someone had reminded him of his duty as a leader, things would have turned out differently for the company and for him personally.

With this discussion of leadership and followership as a foundation, let me put these concepts in the unique context of being a lawyer working in, first, a government organization. Most of you remember something called Watergate. Some of us lived through it. Others of us have read about it or heard our grandparents speak of it. I was a young lawyer working for a U.S. Senator back in the early ’70s, and one thing that always stuck in my mind was the role and fate of a lawyer by the name of John Dean. We were both graduates of Georgetown University. John Dean was a young lawyer, barely thirty years old, who was put into a position of dealing with the most powerful people in the country. The Chief of Staff to the President of the United States and the Attorney General of the United States invited him to take the job of Counsel to the President and be part of the Nixon Administration’s “senior team.” John Dean wanted to be in the inner circle of power—he knew it would be good for his resume and his career. He wanted to get phone calls from, and have meetings in, the Oval Office with

1. This last item in the list is a reference to Vermont Law School’s motto, *Lex pro Urbe et Orbe*, which translates to “Law for the Community and the World.”

the President. But, he forgot his role as a lawyer and his duty as both a leader and a follower.

His desire to please his bosses in the White House and advance his career and his ambitions became the catalyst for him to stop acting as a lawyer who had higher professional—if not legal—obligations, and to become part of the crime and cover-up that eventually brought down a President. John Dean was not a loyal follower who counseled his leaders what the legal thing and what the right thing to do was—until it was too late. And, because of his position as Counsel to the President, others who regarded him as a leader were no doubt comforted or seduced into believing that it was okay to do things that in their hearts they had to have doubts about. After all, the lawyer was involved and approving things. He was giving his implicit—if not explicit—imprimatur to those actions.

As John Dean began to realize how much trouble he was in, he reflected on his career and his talents, and in a searing but probably accurate self-appraisal in a book he wrote afterwards, aptly called *Blind Ambition*, he concluded that he had “an organized mind, an ability to read the desires of my superiors, a capacity to anticipate.” But he also said that “[d]eep down, I knew I was a meek, favor-carrying staff man, not hardboiled enough to play the game.” Frankly, not the description you want of a person advising anyone in a powerful position. I recommend John Dean’s book to you, not only as a fascinating piece of history that hopefully none of you will ever have to repeat, but as a way to question yourself as to how you might have behaved—or might in the future react—under similar circumstances or pressures.

I recall that when I first read John Dean’s book some thirty years ago, I thought to myself that, had I been in his position, I certainly would not have done what he did. But, the more I thought about it, I was less confident that if it had been me—someone that young, thrust into such a position of power and possibility, I would not have been tempted to take the first small steps towards that slippery slope where he eventually was coordinating paying hush money as part of a conspiracy to obstruct justice. I hoped I would not have made the decisions that John Dean did, but it is not that difficult to imagine yourself as a young, ambitious lawyer in the West Wing of the White House, overwhelmed by the place, the personalities, and the power.

With a new administration taking office in Washington next January, whether a Republican or a Democrat, I worry about all the young lawyers who will join the administration, convinced of the wisdom and righteousness of their cause, dazzled by the blinding light of power, seeing a possible eight years in power as an eternity, but lacking in the maturity,

experience, and self-reflectiveness that they will need to clearly keep their eyes, their minds, and their hearts focused on their legal and ethical obligations as lawyers.

In 1987, I was brought in to the White House as a young lawyer to be Ronald Reagan's lawyer in the Iran Contra investigation and to handle the hearings on the Hill and the Independent Counsel investigation. I had agreed to do the job full time for six months (though I continued as a part-time consultant through the end of the Reagan Administration and also served as Special Counsel to President George H. W. Bush, "41," for part of his term). During those six months, I would often mentally pause as I ran up the back stairs of the White House or walked around the West Wing, and think how fortunate I was to be there. I did in fact think about how John Dean had walked these same halls and used these same stairs, and I tried to remember the lessons from his time there and how he had failed. I also kept in mind that I had only signed up for six months to work on a specific task. The fact that I was a "short timer" gave me some perspective and an advantage because I knew I was leaving. I wasn't there as an ideologue or a political appointee; I was there as a lawyer to do a job.

But we were also fortunate because President Reagan had the perspective and the wisdom to realize, as I heard him say many times, that he was just the latest tenant of the office and he needed to leave it in at least as good shape for his successors as he had found it. At his age, eight years probably didn't seem that long a time to him, and so I think he also thought of himself as a "short timer."

The President's approach and perspective had an effect on all of us who worked with him. The Counsel to the President for whom I worked,² when we faced and discussed an issue, would ask the following questions in the following order: What does the Constitution say? What does the law require? What precedent might we be setting for whoever might be President ten to fifteen years from now? What are the political implications? The decision was always made before we got to that last question, but we asked it anyway because we needed to be able to anticipate the reaction we would get. Sometimes as I walked on Pennsylvania Avenue and saw people waiting in line to take a White House tour, I thought to myself that those folks would be proud if they knew that this was the template we were using to make important decisions.

In my estimation, both the President and the Counsel to the President, during the time I worked at the White House, set the right example as

2. Arthur B. Culvahouse Jr. was Counsel to the President of the United States in the Reagan Administration from March 1987 to January 1989. Mr. Culvahouse is now the Chair of O'Melveny & Myers LLP in Washington, D.C.

leaders, and the Counsel very definitely was a loyal and faithful follower, in the best sense of that word. They both inspired me then, and in the years since, to try to live up to their examples.

In the corporate context, while not as exciting as working in the White House, the challenges are nonetheless daunting. A lawyer—working within a corporation as a lawyer, as opposed to as a banker or an electrician—has different responsibilities and risks than other nonlawyer employees have. Over the past decade or so when a variety of corporate scandals filled first the news media, and later the courtrooms, the question was often asked by commentators, regulators, and judges, “Where were the lawyers?” The underlying assumption was that lawyers owed a professional duty to have prevented the things that went wrong. And, if things did go wrong and lawyers were in the organization, the harsh light of scrutiny turned towards them.

As an example, and you can see this in the press almost every week, the *Wall Street Journal* on October 6, 2008 published a column that noted that “the role of not-very-careful lawyers will be Exhibit A in inevitable lawsuits against banks.” That’s true. Lawyers these days always find themselves under close scrutiny after something goes wrong. The trick is when you are at the table and the decision is being made—and a thousand decisions are being made—to be able to figure out which of those decisions is the one that may go south on you and cause trouble three to five years from now.

As an organization lawyer, let’s think about how you may be called upon to give legal advice—or how you may need to give legal advice even if no one asks your opinion. The easiest counseling is at the beginning of a proposed deal or action. Someone comes to you and asks you to draft a document, or structure a deal, or simply asks your advice, with the understanding, explicitly or most often implicitly, that it be done in compliance with the law. And, it will be the very rare case indeed where you will be asked to or expected to violate the law. It is the cases of alleged criminal activity that get the most attention in the press and in the courtrooms, but they are very much the extraordinary exception to the day-to-day challenges that an organization lawyer faces. In the careers of most lawyers, wherever they serve—unless you are consigliere to the Corleone Family—it is rarely the case where you will come upon a client who intentionally and knowingly decides to violate the law.

More common are two situations. First, the client does not know what the law requires, but because of that ignorance, may propose an action that could violate the law or a regulation, or otherwise put the company at some legal risk. This is especially true in the area of complex regulation, such as

environmental regulation, the tax code, and the area of government contracting. The actual statutes involved in each of these areas are complex enough, but the regulations implementing them have grown to gargantuan proportions. Federal Acquisition Regulations, or FARs, are nonintuitive to the uninitiated in this area. I used to joke in the aerospace industry that whoever signed a certification to the government that a hundred-page proposal met all of the requirements of the thousands of provisions in the FARs was the “Designated Defendant.” The joke made some of my contract administrators a bit nervous.

When I went to law school, the tax code and regulations were regarded as the most complex set of rules yet devised by the minds of lawyers, but that was before the environmental regulations grew to surpass them in both length and complexity—about 17,000 pages in the CFR—compared to a little more than 12,000 pages for IRS regs. As someone trained in the area of environmental law, you may often find that it is ignorance of the law that you are dealing with—not folks intent on poisoning the air or water and knowingly and intentionally risking jail in the process. And, as a side note, it is very often the plant manager of some manufacturing facility in some small community that may have the most day-to-day responsibility of knowing what the law is and the most need of help to stay within its bounds. You will find it is often this ignorance of the law rather than somebody intentionally trying to do something wrong where you will be providing important legal counsel.

A second common situation is one in which the client wants to do something perfectly legal, but perfectly stupid. Usually, the short-term ease of the proposed solution ignores the long-term risk of the decision to the organization. And, what today may be a dumb but legal decision may be viewed many years from now as not just dumb but illegal as well. As perceptions and attitudes change, public and media pressures shift focus or intensify, a predictable result is that prosecutors, regulators, and courts discover new theories by which administrative, civil, or criminal responsibility may be alleged and prosecuted. For example, the *Wall Street Journal* on September 24th, in the midst of the failures of some large banks and institutions, said: “Pressure is building for the FBI and regulators to hold top executives accountable” Translation: prosecute executives and send them to jail. This is not surprising as a political matter. But when the public pressures federal law enforcement to find criminal responsibility, it points to the future; when things really go badly, we want to put someone in jail. The laws are complex and broad enough, and prosecutors and regulators are ambitious enough to be sensitive to political pressure, that it is not that difficult to come up with a new theory of criminal prosecution.

It is in these two types of situations that most lawyers will find themselves needing to provide counsel, guidance, and alternative solutions to their clients that may—within an organizational structure—be both personally and professionally challenging. Many of these situations will occur in the context of pressure to meet internal corporate budgets or profit goals, and publicly announced earnings targets for the stock. It is not uncommon for managers in a company to be told to “make your numbers.” That can be a typical and perfectly appropriate and lawful directive that assumes that everyone will act in a way that will not place the company at legal risk.

Of course, context is everything. If someone asks you to go to the bank and get some money, are you being asked to use your ATM card—or a gun—to get the cash? When Bernard Ebbers was being prosecuted in January of 2005 for crimes connected to his role as CEO of WorldCom, the federal prosecutor in his opening statement said, “When he said ‘hit the numbers,’ it was a command to commit fraud.” That became the theme of the prosecution. But because of the reality that in almost every corporation, managers are saying “meet your numbers,” the context of when that is said, as well as the culture of the organization that is given that directive, will be extraordinarily important for you as an organizational lawyer to intimately understand.

As the organization lawyer, you have to understand that context, anticipate what is really behind the corporate directive, comprehend the motivations, understandings, and plans of those who are trying to achieve them, and be sensitive that whatever you do may be viewed years later in a different context if things do not go well. This is where understanding the twin responsibilities as a leader and a follower are important.

Your success as an organization lawyer will be measured by how well you can function—as a lawyer with special responsibilities—within the culture of the organization, how you navigate the politics that exist in any group larger than one person, and how well you are able to act as both a good leader and a loyal and faithful follower. Your judgment, your integrity, and sometimes your courage, will be your tools as you determine when and how—not whether—to fulfill your unique responsibilities as a lawyer.

With all of this in mind, let me offer a couple of hypothetical situations that would not be unusual for an organization lawyer.

First, your boss asks you advice about a proposed action. The action is not illegal. But, you think it exposes the client to too much risk. You advise against it. Your client decides to go forward notwithstanding your advice. What do you do? Do you write a memo to the file about how your boss did

not follow your advice? Such a memo might be a very good thing for you to have in your file in case some day five years from now the investigators come knocking on your door. You'll be able to say, "Hey, I told them not to do it—here is my contemporaneous memo." But if you do that, you may be saving yourself at considerable risk to your client by putting such a document in your file. Do you volunteer the information to a member of the Board? Do you seek the opinion of outside counsel and ask her opinion as to what to do? What if outside counsel agrees with you? What if outside counsel agrees with your boss? What if you go to the board meeting and the CEO presents the proposal and doesn't mention the fact that you didn't think it was a good idea? Do you say, "ehem, excuse me . . . ?" What if one of the board members says, "Well, what do you think about this idea?" What if in a side meeting the chairman of the audit committee comes up to you and asks, "Do you really think this is a good idea?" Does it make a difference if your concern and advice were based upon your legal analysis, the business consequences, or the Corporate Social Responsibility issues?

The second, I preface with a story. When I was working for Lockheed Martin, we built and sent spacecraft to Mars. One of those spacecraft was launched and after a while, we never heard from it again. We had to try to figure out what happened to it. I found myself as the company lawyer trying to counsel a room full of rocket scientists as they drafted a public report on what might have happened out in space. The essence of the report was aeronautical engineering, a subject that I didn't know anything about. The only way I could be effective and helpful was to constantly question statements or conclusions in the report and see if in fact there were facts to support them, or whether the engineers were simply making educated guesses. It was amazing how the draft report changed as a result of a lawyer simply asking questions about the language in it.

What if you are sitting in a senior-management meeting and something is being discussed that you don't know much of anything about, such as financial issues, accounting issues, or engineering issues—and you don't have a clue about what's being discussed? Do you get up and leave the room and say, "Obviously, this is above my pay grade. Just call me when you get to something legal"? (That's probably not a good idea for your career.) Do you say, "Excuse me, I don't have a clue what you all are talking about. Could someone explain it to me?" And they say, "Okay, we're going to have Accounting 101 or Engineering 101," at which point everyone looks around the room and says, "What a dummy this guy is." What do you do? Do you make a memo to the file? What if you stay in the room and don't say anything, and then years later the decision that was made in that room—while you were thinking, I don't know what the heck

they are talking about—gets the company into trouble? When the investigators come knocking on your door, do you say, “You know, I was in that meeting, but I didn’t know what they were talking about”? That might not be a very credible defense from a legal point of view, and imagine how it would look on the front page of the *New York Times*.

These are difficult questions and there may be no clear answers. But, they are the types of challenges you may face working as an organization lawyer that you would probably not face if your client were a real human being sitting across the table from you.

While you have the time and the opportunity, and before you work for an organization, I encourage you to take time to reflect upon how others have succeeded or have failed in recent history, and why. Most of the people who have become infamous for their misdeeds in the corporate world or in government, or indeed in law firms or nonprofits, were not evil people. Indeed, most of the lawyers who have found themselves in trouble in these situations were not evil people. But I think that they got themselves into trouble by not understanding at the very beginning that working as a lawyer in an organization carries some unique risks and challenges.

To be a good and valued lawyer in an organization, you will have to be able to discern, analyze, and offer advice on a myriad of issues. But, how do you recognize a problem when it either shows up in a conversation or lands on your desk? Rarely do they come with red flags attached. Somewhere in that 80-page PowerPoint presentation, or somewhere among your 300 daily e-mails, or even somewhere among the pile of junk in your inbox on your desk, may lurk a hint of an issue that could become a “bet your company” lawsuit or investigation. And, if it does, rest assured that there will be an evidentiary trail to prove that it was brought to your attention.

The best way to spot these issues is to have seen it before in your prior experience. One thing that gave me constant comfort when I joined Tyco was that almost all of the problems I saw were, in one way or another, similar to issues that I had seen in my various types of practice over the prior thirty years. Yet, one of the things that gave me constant discomfort when I joined Tyco was the gnawing fear that there was some problem lurking that I had never seen before and that I might not even recognize. I worried that because of my inexperience and ignorance on a particular issue, I would miss it and put my company into jeopardy.

In an effort to help avoid that fear becoming a reality, I have always tried to have around me experienced colleagues who are much smarter than me. And, I make sure that the lawyers with that experience and intelligence get a chance to see as much as possible. I would often refuse to approve or pass along some document until and unless someone who I

knew had the requisite experience had looked at it and given me their thoughts on it.

It is the rare lawyer who knows the answer to every possible legal problem. In fact, if someone told me that he was such a person, I would check to make sure I still had my wallet. The truly great lawyers do not know all of the answers, but they do know all of the questions. I have always thought that if I knew the questions, I could find out the answer. I had to learn to have the confidence to say to the Board or the CEO, "I don't know the answer, but I will find it and get back to you."

In-house counsel need to keep learning, reading, and gaining from the experience of others so that they will be able to know the questions to ask. When I was a trial lawyer, I knew everything there was to know about the particular subject that was at issue, whether it was how to read an EKG so I could cross examine an expert cardiologist, or how internal banking documents could be manipulated in an internal fraud. But, once the trial was over, I forgot most of what I had learned and I went on to the next trial topic.

As in-house counsel, you need to be an expert on everything. You need to read a number of newspapers every day, including the *Wall Street Journal* and other business focused publications, so you can be aware of what is happening in the world of business. Your CEO and your Board will surely be reading them and they will expect you to be as up to date as they are. You need to read the professional publications that highlight the legal issues that other organizations are grappling with, or that may have snared the unwary. You need to know what political issues around the world may impact your organization's business going forward. Exchange rates, labor issues, government corruption, parliamentary elections—all of these may well become relevant at some point. So, be a voracious reader, attend seminars, and stay up to speed on emerging trends in the law, regulatory and legislative issues, and enforcement and prosecution theories.

You also need to know what it is that the people who are likely to be on the other side of litigation are working on. If you are a big company, class-action plaintiffs' lawyers are probably having seminars and writing articles about new theories of liability they can use to sue your company. For example, there is a company, now part of LexisNexis, called Mealey's, which sells subscriptions to periodicals, which anyone can buy, dedicated to the latest theories of liability that plaintiffs' lawyers are talking about. They hold conferences on these topics where lawyers discuss their theories, tactics, and strategies. Likewise, lawyers who tend to represent defendants in civil actions hold similar conferences and publish articles on these same issues from the defense point of view. These can be gold mines of information that will help fill the experience voids in your career. Don't be

afraid to show up at “the other side’s” conferences if you really want to learn what may be coming your way in the future.

Once an issue is spotted, where can you go for guidance? If there is clearly an ethical or serious legal issue, then you may want to consult the local rules in your jurisdiction as to your ethical obligations and restrictions. But, keep in mind that the rules vary from state to state. Since most organizations are now multistate, and indeed multinational, the rules that you need to follow may be found in several places, but may be inconsistent. Assume you are admitted to practice in three states, each of which has somewhat different rules. Assume further that you are in one of your home jurisdictions when you learn of a problem at your company’s manufacturing facility in a second jurisdiction in which you are admitted, but that the impact of a proposed action will take place in many different states, including the third jurisdiction to which you are admitted. You will need to know whether you are prohibited from exposing the danger of the proposed action, required to do so, or if it is up to you to decide whether or not to do so. And that will depend to some degree on the nature and type of the potential harm—is it financial, or might it impact the health or safety of humans? If the requirements of these three jurisdictions are contradictory—well, welcome to the real world. You will need to seek expert advice—and probably document it—not only to do the right thing but to protect your professional license and reputation.

Likewise, there could be an instance where a lawyer in an organization becomes aware of a situation that falls within the requirement of Sarbanes-Oxley’s duty to “report up the ladder.”³ In that case, you will probably at least want to review the language of the law which, as is often the case with hastily drafted legislation that was the result of various political compromises, may not provide as clear an answer to your question as you would hope. But, there are usually experts around whom you can consult to understand the requirement of the law.

More typically, the types of issues that you may spot and that may puzzle you cannot be resolved by going to the law library. They may be the type of issues that you really can’t discuss with anyone other than someone who is in your position in a different organization. That is where networking among organization lawyers becomes crucial. In the real world, the most typical way these tough issues are analyzed is by one in-house

3. See 15 U.S.C. § 7245 (2006) (authorizing and directing the Securities and Exchange Commission to promulgate rules of conduct for attorneys “practicing before the commission”); 17 C.F.R. §§ 205.3(a)–(b) (2008) (requiring “up the ladder” reporting of ethical violations by issuers of securities). See generally Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 U.S.C.); 17 C.F.R. §§ 205.1–7 (2008) (regulations implementing Sarbanes-Oxley).

counsel calling another and asking, “Have you any experience in this situation . . . ?” And then giving enough facts to help explain the problem, but not too many to risk divulging privileged information.

A hallmark of in-house counsel is their willingness to help colleagues navigate through difficult and thorny issues, even though they may work for competitors. In the corporate world, there are a number of organizations that can provide this type of networking and help. The Association of Corporate Counsel (ACC) is the largest organization of in-house counsel in the United States. They have chapters in most major cities or geographic areas, as well as in a number of countries around the world. They also have subject-matter national and international committees. At the Chief Legal Officer level, there is the Association of General Counsel, composed of the GCs from the top companies in the United States. They meet twice a year and have formed a tight network of colleagues who struggle with many of the same issues that anyone involved with a large multinational business may encounter. They share confidences, problems, and advice freely in an effort to help everyone come up with the best answers possible. There are numerous other organizations of lawyers that focus on particular industries or legal issues that one can join. Developing your own network of lawyers whose judgment, experience, and discretion you can rely upon will greatly enhance your ability to spot issues, and work through problems where there does not appear any clear “right” answer.

Whatever you do, find your network. Don’t think you can do this alone, that you can become an organization lawyer for the first time and not need help, guidance, support, and good advice. No one is that self-sufficient or that wise.

Some of you may be like me. I seem to think better when I am talking. I find the discussion of a problem with a colleague—where pros and cons are considered, potential varying factual situations are discussed, and where we can challenge each other in a collegial fashion—helps me to pick my way through legal or practical minefields and determine the course of action I will take and the advice and counsel I will give my client. Find someone with whom you feel comfortable to have these types of conversations.

These external sources of help, combined with the results of your own personal inventory, will be invaluable to help you be a successful lawyer as well as a successful employee of your organization.

Being an ambitious employee who aspires to promotion and greater responsibility and visibility within an organization or a chosen field of endeavor is not necessarily wrong or misdirected at all. But, it can blind you—or at least blur your moral compass—as you try and navigate between your own career’s advancement and the acceptance and esteem of your

colleagues. You are not like every other employee. As a lawyer, you have responsibilities greater than everyone else. And sometimes, those unique responsibilities may require you to have to choose between advancing your career in an organization, or doing what you think is right.

Being a “lawyer leader” in an organization is a huge challenge, especially when you are not *the* leader. Certainly, people will look up to you because you may be at a higher organizational level. But, no matter what your level within the organization, people will look up to you because of your status as a lawyer. You will be amazed that years later, people will come to you and recall how you reacted or what you said at some crucial point in their lives, but that you have no recollection of. That is when you will see the impact of your leadership. Service, doing the right thing—legally as well as ethically, and setting the right example—these are the duties of leadership.

Being a “lawyer follower” in an organization requires courage, integrity, judgment, tact, and resolve. As a lawyer, it is your job to steer your client, and your bosses and coworkers, away from legal risk and towards positions that do not expose the organization or themselves—or yourself—to legal risk or public vilification. It can sometimes be very difficult to summon the courage to do that. Frankly, it is difficult to raise your hand in a public meeting, in a board meeting, in a senior-management meeting, or even in a one-on-one with the CEO, and offer a contrary view. If, when you considered John Dean’s self-evaluation of his character, you thought, “Gee, that sounds like me,” then maybe a legal job within an organization is not for you.

Sometimes, you do indeed have to “Just Say No” to your boss or someone else within your organization. But, as useful as “Just Say No” may be as a first step, a wise lawyer will never let it be the only piece of advice offered. You have to help people see which path is the best to take, not just which path they need to avoid.

There is an old story of a fellow in a hot-air balloon who was lost over the countryside. Spotting a person on the ground below, the balloonist yelled out, “Where am I?” The fellow on the ground replied, “You are in a balloon, hovering several hundred feet off the ground.” The balloonist said, “Say, I bet you are a lawyer.” The other fellow replied, “Why, yes I am. How did you know?” And the balloonist answered, “Because what you told me was perfectly accurate, but perfectly useless.”

“No” may be a perfectly accurate and appropriate answer to a legal issue, but unless you offer something else, it may be pretty useless. The better answer to your client is, “No, but . . . ,” followed by a suggested path that will help achieve the organization’s goals but avoid or mitigate the

legal risk associated with it. And, sometimes, you must provide this advice and counsel when you are not asked to, or even when it is not welcome. These are the duties of followership.

Eventually, every lawyer builds up enough experience that the times he feels he needs to consult books or even other people diminishes. But never be so cocky and self-assured that you believe you cannot benefit by asking for an opinion, by kicking around a problem with someone you trust, and by falling back on all of those things you have learned outside of the law-school environment. Constantly trying to understand and to do the right thing, and providing the example or advice to help your clients do the right thing—legally, ethically, or business wise—is not a project. It is a never-ending journey. As with any long journey, we need to plan ahead and carefully assemble all of the tools we will need to be able to successfully navigate what may be a difficult and obscure path.

Lou Holtz, the football coach, has said that whenever anyone meets someone new, they instinctively ask themselves three questions about the new person: Can I trust you? Do you care about me? Are you committed to excellence? Or, in other words: Do we share the same values?

At the end of the day, you will want to be part of an organization and a team of people who all can answer “yes” to Coach Holtz’s three questions. You trust each other. You care about each other. And, you share the same values. If you cannot answer “yes” enthusiastically and emphatically to each of these questions, then you will know that it is not the right organization for you.

Ralph Waldo Emerson said it well when he defined success:

To laugh often and love much; to win the respect of intelligent persons and the affection of children; to earn the approbation of honest citizens and endure the betrayal of false friends; to appreciate beauty; to find the best in others; to give of one’s self; to leave the world a bit better, whether by a healthy child, a garden patch or a redeemed social condition; to have played and laughed with enthusiasm and sung with exultation; to know even one life has breathed easier because you have lived—this is to have succeeded.

In the end, whether you are evaluating a new job, or looking back over a career, you will appreciate that the two most satisfying criteria for success, both professionally and personally are, first, to make a difference—whether in the life of one person, a family, a town, a business, or a country or the world; and second, to have fun doing it—enjoying what you do and the people with whom you do it, and finding the time to laugh.