Foreword

On one sunny spring day in Santa Monica in 1999, I stepped into the office of my major client to meet with the company's officers. But instead of meeting them in my capacity as the principal outside corporate lawyer, a role that I had happily occupied for four years, I met them as a fellow employee—the new inside general counsel. On that first day as a corporate employee, I had only an inkling of what my new role would entail. I knew then that I would continue to assist the company in navigating the laws and regulations that constrained their business activities. What I did not anticipate, however, were the tremendous social, political, and ethical challenges inherent to the in-house role.

Only years later, after launching an academic career focused on inside counsel and business corporations, did I stumble on Professor Robert Eli Rosen's path-breaking Ph.D. dissertation, completed in 1984. Although *Lawyers in Corporate Decision-Making* was unpublished at the time, it was widely regarded by experts in the field as a pioneering work in the sociology of the legal profession and a foundational piece in the slowly emerging canon of empirical research on inside counsel.[1] Indeed, I have since used his work in my own writing on corporate legal ethics in context.[2] Professor Rosen's study provides a rich, detailed account of the roles of inside and outside lawyers in corporate ethical decision-making. It is jam-packed with anecdotes and direct quotations from an astonishing number (70) of in-depth interviews with inside and outside lawyers and business persons.

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[1] *See, e.g.*, Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 Yale L.J. 1445, 1503 n.205 (1996) ("Rosen's important manuscript is widely cited in recent literature on legal professionalism."); David Luban, *Asking the Right Questions*, 72 Temp. L. Rev. 839, 855 (1999) ("Some years ago, Robert Eli Rosen completed an important study of in-house counsel...."); Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 Md. L. Rev. 255, 281 (1990) ("Robert Rosen on the sociology of in-house counsel's work is particularly suggestive"); Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 Emory L.J. 1057, 1070 (1997) ("According to Rosen, successful legal risk analysis enables its practitioners to become influential within the corporation. Articles in the popular legal press strongly support Rosen's thesis."); Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 Geo. J. Legal Ethics 465, 471 (2008); Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 Law & Society Rev. 457, 458-59, 470-72, 482-83, 486-87 (2000); Lawrence M. Friedman, et al., *The Growth of Large Law Firms and its Effect on the Legal Profession and Legal Education: Law, Lawyers, and Legal Practice in Silicon Valley: A Preliminary Report*, 64 Ind. L.J. 555, 559 (1989); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U.L. Rev. 1, 27, 30 (1988).

[2] Sung Hui Kim, *The Ethics of In-House Practice*, in Lynn Mather & Leslie Levin, eds., Lawyers in Practice: Ethical Decision Making in Context, ch. 10 (Univ. of Chicago Pr., fthcg. 2011).

As one example of the many gems embedded in this text's pages, consider Rosen's masterful case study about how four professionals handled an employment discrimination issue [pp. 151-153]. A divisional personnel officer was disturbed to learn that a corporate manager who had recently transferred to a new business unit wanted to terminate a female Black employee because she was "difficult" [p. 151]. The personnel officer strongly suspected racial motivations because the employee had worked in the unit for five years without incident and had good relationships with past superiors. As a result, the personnel officer brought in an inside lawyer and asked him to "explain to [the manager] the law on firing members of protected classes" [p. 151]. The inside lawyer, who was relatively new to the company and unfamiliar with employment law, brought in an outside law firm specializing in employment matters. The law firm immediately focused on "how" and not "whether"; in other words, it advised the manager on how to create the necessary paper trail before firing. Frustrated by this course of advice, the personnel officer brought in a second inside lawyer, and together they reminded the manager of the company's commitment to rewarding loyal employees. They pointed out to the manager that this employee had been a trusted colleague for five years. Due to this intervention, the manager reversed his decision to terminate the employee.

According to Professor Rosen, the first inside counsel and outside counsel "assumed a decision had been made and they were simply conduits for it" [p. 152]. Since neither was certain that the manager harbored an illicit motive, neither felt it was part of his job to second-guess the manager. "To avoid a power struggle between themselves and the manager, both these lawyers relied on the law's potential sanctions to discipline the manager" [p. 153]. In other words, these lawyers did not see it as their role to dissuade the manager; if anything , that was anti-discrimination law's job.

By contrast, the personnel officer and second inside lawyer had a much more political understanding of their roles. They understood that the corporation had created their professional positions in part to constrain managerial discretion without supplanting it. Accordingly, their job was not to simply obey hierarchical commands issued by the "corporate bureaucracy" but, rather, to use their discretion to participate in the conflicts, compromises, and bargaining from which corporate goals and decisions emerge. Through this and many other in-depth accounts, Rosen unpacks the complex role of inside counsel—its transformative potential, its educative function, its limitations, its conundrums, and the hard moral choices that it presents.

But *Lawyers in Corporate Decision-Making*'s contributions are not limited to rich, thick description. The study also normatively challenges the legal profession's ideology of moral "independence"—the claim that lawyers are morally firewalled from and thus not morally responsible for their clients' objectives or actions. To avoid misunderstanding, this claim of independence is not that the lawyer should exercise independent moral judgment; to the contrary, it means that the immorality of the client's ends cannot be linked back to the lawyer, which in turn licenses the lawyer to be dependent and servile to the client's wishes without fear of moral taint or social reprimand. This claim of moral independence has long been used to justify providing legal advice in the service of ethically problematic ends and the profession's collective retreat away from the role of "influential counselor," as exemplified by lawyer-statesmen, such as Elihu Root or Louis Brandeis. It has been used to disclaim lawyers' responsibilities to broader social concerns. As one outside lawyer in Rosen's study snidely put it, "Let's find out what makes us guardians of the public interest and write it out of our retainer agreement" [p. 83].

Most significantly, Rosen argues, the professional norm of moral independence disserves the corporate client by permitting lawyers to ignore "organizational pathologies," such as managers who insist on their pet projects without regard to whether they are truly in the firm's best interest. Rosen argues that loyalty to the corporate client does not mean blind obedience to the corporate manager: "Loyalty to the client may require the lawyer to transcend the problem as set by the client [representative]" [p. 81]. Because the true client is the corporate entity, lawyers must "transcend the customer's definition of corporate interests and problems" and exercise some control over how corporate objectives are selected in the service of the collective enterprise. Rosen acknowledges that doing so isn't easy. However, he highlights that inside counsel, who have few explicit limits on their engagement [pp. 168-170] and are often tasked with overseeing compliance, are well positioned to influence corporate decision-making processes. Of course, many counsel would rather not rock the boat and prefer to take the path of least resistance. Rosen reminds us, however, that such a path may be morally deficient.

In 1984, Rosen wrote, "Although the profession prefers to avoid discussion of the influential lawyer, the growth of inside counsel has put it on the profession's agenda" [p. 169]. Twenty-six years later, it is still on the profession's agenda. But, thankfully, with the long-awaited publication of this manuscript, corporate lawyers will have something to guide them.

— Sung Hui Kim

School of Law

University of California at Los Angeles

Los Angeles, California
November, 2010