

Professor Bill Sennett's Comments on Professor Heminway's Presentation

I am Bill Sennett, a Visiting Professor in the Clayton Center at the University of Tennessee. Before I start, I would like to thank the *Transactions* Journal staff. I know how hard it is to put on these events—especially on top of everything else you do for school—so thank you very much. I would also like to thank Professor Heminway. Not only is she obviously a big driver behind this event, but she's also actually been a great mentor for me in my short time here, and I thank her for that. I'd also be remiss if I didn't thank Professor Kuney, who runs the Clayton Center, whose assistance on this project and pretty much everything else I've done since I've been here is also greatly appreciated. I'm grateful for the opportunity to provide these comments to this impressive group of professors, professionals, and students. I admit I have been nervous about this event, as following Professor Heminway is quite a task. So the temperature was pretty high in my office this week, and this morning when I heard someone refer to her as a subject matter expert on corporate law, well the temperature got a little bit higher. I decided to provide comments from a purely anecdotal point of view, which allowed me to revert to my younger days, and what it was like for me when I first started out as a business lawyer. I was indoctrinated into the art of business lawyering in the early 1990s, which should tell you something about how long I have been a lawyer. This was the period of time which Ben Heineman, Jr., former General Counsel of General Electric, refers to as the "Inside Counsel Revolution."¹

During this time period there was a significant increase in both the number and sophistication of lawyers being hired by in-house legal departments. This new wave of hires had a significant impact on how legal services were being delivered to corporate clients by their Legal Department, much to the chagrin of many in the legal industry at the time. I was just a simple foot soldier in the revolution, but I was a firsthand witness to the difficulty of being a successful business lawyer in an in-house capacity during this era. Back then, the negative attitudes that both law firm lawyers and businesspeople had toward in-house lawyers were fairly strong. On my first day at a new in-house position someone referred to me as the new "Dr. No"

¹ BEN HEINEMAN, JR., *THE INSIDE COUNSEL REVOLUTION, RESOLVING THE PARTNER-GUARDIAN TENSION* (2016).

from the Legal Department. This type of attitude turned out to be a significant impediment to becoming involved in the corporate decision-making process. It became apparent to me that overcoming these objections was going to require a different set of skills than those I had learned in law school or the law firm where I had previously worked. It was going to require adding a different set of tools to my toolbox. I decided the best way to have an impact on business matters or any type of organizational behavior was to include in that toolbox both legal skills, which were obviously a necessity, and the relationship building skills analyzed in Professor Heminways's article. This realization was born out of an understanding that to be effective counseling on the day-to-day legal issues I was going to confront as an in-house lawyer was going to require skills that would help influence and persuade—as opposed to being directive or lawyerly—before people would find value in the legal services being provided. This type of counseling required a significant increase in the level of trust and confidence people would have in my advice on matters related to their business. This trust and confidence would need to be based not only on my legal acumen or expertise, but on traits like empathy, humility, dependability, and collaboration. It highlighted for me what my wife had always told me about being a lawyer: “...remember, people aren't going to care what you know about anything until you show them that you care about something...” This notion of caring actually foreshadowed my in-house career very well. I also had a significant advantage when it came to using these different skills over other lawyers because the philosophy of my boss was what he referred to as “boots on the ground.” This meant I was actually embedded into the businesses where I served as legal counsel. Why was this critical to the mission? Because to him my best ability was “availability”. I do not remember thinking much of that idea at the time, but it turned out to be a very valuable lesson. It was much easier to develop personal and business relationships because I was so close to the people who were actually doing the work. It allowed me to obtain a more thorough understanding of the business, and as Joan mentioned, a better understanding of the regulatory environment in which it operated.

Having this knowledge turned out to be crucial in creating a level of trust and credibility with my fellow employees. We had something to bond over; something to collectively complain about when edicts came from

management (which I was actually a part of!). It was a gateway that allowed me to understand each employee's part in the success or failure of business initiatives, which led to a better understanding of how all of us could contribute to the success of the business. Once this foundation was laid, I started to build on top of it by establishing the required credibility with the other employees through the use of empathy and respect for how difficult it was for them to make many of these decisions. I walked in their shoes to understand what their concerns were—not just legal concerns—but also the concern that the Legal Department was just there to tell them what they could not do. After a while my fellow employees began to understand that I had learned about their business operations, understood the risks associated with its activities, and the risk tolerance of the organization. I finally got to see what went on “behind the curtain” in regard to the process they used to make decisions. I could start assisting them in the way clients really wanted to be helped: identifying the problems needing to be solved and providing practical, actionable, legal advice on how to solve them. They did not want theory, they wanted me to tell them what they could do and then help them do it.

Eventually I was not seen so much as a corporate “spy” (the whole “we’re here from corporate and we’re here to help” mantra). I was actually fairly successful in breaking down the silos that are usually present in a hierarchical organization like a corporation. Once I broke through the silos, I could call on the thoughts and ideas from some of other disciplines (like the finance group or human resources) to produce consensus solutions. Now everybody had some “skin in the game” because they were part of the decision-making process—it wasn’t just the lawyers telling them what they could do or couldn’t do. More importantly, it helped create a credibility reserve, an important tool for any lawyer when circumstances required a tough or unpopular decision. At some point the business lawyer has to be able to call a “time out” to identify some significant risk in a decision being made or a plan that is being implemented. This pause would allow for an analysis of whether something was too risky, or if there was something that could be done to mitigate the risk to help obtain the ultimate business goal. This kind of access to and input into the decision-making process is what we use to call the “the holy grail” because it was one of the most difficult things

to do as an in-house lawyer—stopping something in its tracks to advise of other possible solutions. Maintaining this role as a trusted advisor required people to believe this was a collaborative relationship, and the solutions were both legally right, but also the right thing to do. The only caveat I have to this concept of the business lawyer, is its potential conflict with what Mr. Heineman described as the conflict in-house lawyers had in their role as business partners and as the “guardians” of the company’s corporate citizenship and long-term interest and values. This requires in house counsel to be an active, not a passive, participant in their analysis and not simply doing whatever the client wanted to them to do:

I do not believe that the choice for general counsel and inside lawyers is to go native as a yay-sayer for the business side and be legally or ethically compromised, or to be an inveterate nay-sayer, excluded from key discussions and decisions, and from other core corporate activity.²

A balance needed to be struck between the competing interests of being the business partner and the guardian, because the legal graveyard was filled with lawyers like those at Enron, who in their eagerness to partner with business leaders failed utterly in their responsibility as guardians.

To Mr. Heinemann, and the general counsel I have worked for, there was no dilemma in these situations. If you understood the significance of your responsibility to speak truth to power, then you also understood the ramifications, which meant you should show up for work every day expecting to be fired (a belief that caught my wife quite off guard at the time). You simply have to ask yourself as a business lawyer or someone aspiring to be one, is there a higher obligation you have than to ensure your client complies with the applicable laws, rules, and regulations? If you do not like the rules, then you should work to change the rules. Compromising your ethics or the reputation of your company with something that you either know, or have a pretty good idea, is not legal is simply not an option. Throughout his book, Mr. Heineman cites the business crises occurring during the 2000s as examples of the dangers associated with the lack of leadership by in-house

² *Id.* at 57.

counsel (while not as emphasized as much as the lack of leadership from the financial world has been) as still a big factor in allowing such things to occur. Hopefully if you are a student thinking about being a business lawyer you will take this obligation seriously. I cannot think of a higher calling, than to make sure your client complies with the law.

Thank you.

