

June 2015

Attorney as Ethicist

Terry Szmagala

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <http://ideaexchange.uakron.edu/akronlawreview>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Szmagala, Terry (2014) "Attorney as Ethicist," *Akron Law Review*: Vol. 47 : Iss. 1 , Article 2.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol47/iss1/2>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.

ATTORNEY AS ETHICIST*

*Terry Szmagala ***

I'm really excited about the turn our discussion is taking from ethics rules that bind and govern behavior of attorneys and to the perspective of how attorneys can actively engage in the ethical world and help their corporations do the right thing. At Eaton¹ we have the phrase "doing business right," and I would like to echo the comments that were made by other in-house counsel; that it is a wonderful opportunity and a wonderful privilege for me to be able to work at a company that is so ethically driven. Sandy Cutler² sets that tone from the top using a phrase that is pretty important, and you never have to worry about going into the office and convincing someone to not do the wrong thing. It is a wonderful opportunity. I have to apologize at the beginning of my remarks because as you were mentioning the name of my presentation, I realized that I engaged in corporate speak "adding value." I've been out of a law firm now for more years than I care to admit and unfortunately this has been working into my lexicon.

Let's begin by discussing the "old model." What was the old model? Let me ask you: How was the General Counsel of Eaton chosen

* This is a transcript of Terry Szmagala's speech from The University of Akron School of Law's Miller-Becker Center for Professional Responsibility Symposium, *Navigating the Practice of Law in the Wake of Ethics 20/20 – Globalization, New Technologies, and What It Means to Be a Lawyer in These Uncertain Times*, which occurred April 4-5, 2013.

** Taras (Terry) Szmagala is vice president and deputy general counsel. In that role, he is responsible for legal support of the securities, mergers and acquisitions, intellectual property, and environmental functions. Prior to that role, Terry served as chief counsel of the industrial sector, where he was responsible for coordinating the legal support of the aerospace, hydraulics and vehicle businesses. Before joining Eaton in 2007, he served for nine years as group counsel with Avery Dennison Corporation. He started his career with the law firm of Squire Sanders in 1991, where he was resident in the firm's Washington, D.C., Kiev, Ukraine, and Cleveland offices. He received a B.A. in Economics in 1988, and a J.D. in 1991, both from the University of Virginia. He is secretary of the board of directors of University Circle, Inc., and a board member of the Ukrainian Museum-Archives in Cleveland.

1. "Eaton is a power management company providing energy-efficient solutions that help [its] customers effectively manage electrical, hydraulic, and mechanical power." *About Us*, EATON.COM, <http://www.eaton.com/Eaton/OurCompany/AboutUs/index.htm>.

2. Alexander ("Sandy") Cutler is the chairman and chief executive officer of Eaton.

fifty years ago? Any ideas? Usually he was “suggested” by the outside firm Eaton was using at the time. Companies had only one or two significant law firm relationships, and those firms had a significant say in who your General Counsel was.

The model was also “make versus buy.” Why did you have inside counsel? Outside of the basic need in the Ohio statute to have a secretary and certain functions, why did you have a counsel? Because it was cheaper. It was less expensive. It was a pure make versus buy model. And it was a classic control function. You can’t do this. You can’t do that. You must do this. You’re going to go to jail if you do that. It was operated in a very lineal, top-down environment, right? Your authority derived from the position you had. You walked into a room, and you were able to command action because of the title you held. Today, there is a whole new model. When you have a company that has \$21.6 million in sales, as Eaton does today, you cannot have that model anymore. Not only in the legal function, but really in any function. We’re really business partners and counselors now. The way our law department is organized is that we are imbedded into the business. The role that I had before I assumed my new role was Chief Counsel of the Industrial Sector. That role really was to be the General Counsel of that business, and I was expected to understand that business as well as, if not better than anyone on the leadership staff. I was included in the leadership meetings. I was included in the deliberations when the chairman of that sector went to a plant with his staff. I was there along with him. That’s a relatively new phenomenon in diversified industrials. And it’s a model that is really necessitated by the demand of businesses today in the world today. You have to be part of the business. You have to be imbedded in the business to understand where you can best add value. What it also does is that it mitigates the control function aspect of things. If you’re viewed as a control function, what I mean by that is: a lawyer is here to keep you from doing something; there is going to be an inherent tendency, like water finds its way around rocks, to go around you. It may not even be at the front of the mind. But if they feel that you’re a blocker, they’re just going to not use you. They’re not going to use your services. So it’s really important to develop relationships.

And that’s my other point about the current model today. Whereas before we had a linear power structure, where your title enabled you to take action and effect change, today it’s the relationships you have. Frankly, no one cares what my title is within Eaton, and there is very little that I can do outside of a situation in which there is an illegality to

stop a business person from engaging in a course of action. They take advice from me simply because they trust me—because we’ve developed relationships and that takes a lot of work. And that is something that I think is really changed over the last twenty or thirty years. We’ve always had good relationships, but the need to have relationships to effect change in a metrics environment where you’ve got sales in 175 countries and you’ve got 103,000 employees like we do, that’s the only way you can manage. You cannot manage from the top down.

So to dovetail on some of the comments that were made earlier, why would ethics and compliance ever be part of this legal world? I would propose to add to what you said before. Lawyers are at a very interesting position in corporations. Attorneys actually touch everything. We touch everything. We are one of the few functions that cut across operations, supply chain, IT, HR, tax, and finance. We get to see it all. And we’re the function that is responsible and entrusted to connect those dots, to break down those silos. So if you see someone in a function in your corporation engaging in a course of action and you see it’s not compatible, not only with the regulation but with a good idea, you have an obligation to link that function to another function. You have an obligation to bring parties together. And it’s value added that I think lawyers can play in the company and really not many other functions are as positioned. Maybe finance, but outside of that not many other functions are really well-positioned to play it.

At Eaton we talk about creating a learning organization, and lawyers are in a fantastic position to try to facilitate that. There are lessons we learn every day. There was something the chairman of the sector I used to work for used to say to me after I came to his office and gave him a particularly bad piece of news or some sort of compliance issue that we had. For example, we signed a NAFTA certificate and we didn’t really understand what we were signing and suddenly had a potential customs liability. He looked at me, and it was clear that the money that we lost in that specific instance was secondary to him. He said, “What process have we put in place to keep this from happening again?” And I said, “Excuse me?” And he said, “Well if it’s happening here, it’s happening elsewhere.” And I said, “I’m just a lawyer.” He said, “No, no, no. You are to take this and you are to spread the knowledge throughout the organization to ensure that we don’t do this again.” So there you are. The expectation was drilled in to me pretty early on that my responsibility wasn’t only to manage a risk. It was to take the learning and to spread it across the organization to prevent the

risk going forward. I think it's a really fun role to have.

In addition to the point about lawyers being in a good position to drive ethics, it's also a lot more fun. When you're a practicing attorney, you're not in the job to give technical advice on a specific wreck. You're a counselor. So I really like the way that the profession is going in that sense.

In the interest of time, I want to talk about a couple of things that I see that haven't been touched on before. And that is the opportunities and pitfalls of metrics. In large organizations, we are metriced to the hilt. What I mean by that is: Everything is measured. The whole philosophy is if you don't measure something, you're not going to control it. And if you do measure something, you're going to control that behavior so we have these things called "balanced scorecards" where they throw up numbers on sales, on inventory, you name it, there's a number for it. So they look at the functions, including the law function and they say, "Well we want to metric you, too." And we say, "No, no, no. We're artists. We're counselors. What we do cannot be measured. It's a skill, it's an art, it's magic." And they say, "That's nice. Nice try. But we're going to metric you." One of the things I learned pretty quickly is to embrace this trend of being metriced because if you don't pick your metrics, they'll pick the metrics for you. And what metric will they pick? Cost. So you have to get ahead of it. You have to get ahead of this metric phenomenon. It's a dangerous phenomenon within corporations because it actually goes counter to what I said earlier; where we were moving away from this old model into the new model of adding value through being proactive and all these things. Because how do you measure that? The value that you're adding is very, very difficult to track. So there is a balance that we internally, as in-house counsel, are wrestling with now as we're being driven down this metric path. And we have to be very sensitive to make sure that as we set these metrics, our behavior isn't being influenced so we are spending our time on things that aren't as value added as they need to be. It is a point that I think needs to be focused on and it's something that I think maybe the Association of Corporate Counsel ("ACC") could take up as well because frankly again, it evolves to cost, and cost alone is not a particularly effective way to go.

I would like to close my remarks by talking a little bit about organizational structure. Organizational structure is an interesting issue that was touched on with regard to compliance and ethics and whether compliance and ethics should report to the law department. Here's a question: Who should the lawyers report to? I know to the General

Counsel. But who should the business attorneys report to? Should they report to the head of the business? Traditionally, they have been reporting to the General Counsel in order to preserve independence. But GE famously changed that model and more corporations are playing with that a little bit. Regionally, in our corporation, our regional attorneys actually have a solid line to the president of the region. That is an interesting model, with a dotted line to the function. That's an interesting model and there really is no right answer. On one hand you say, the attorneys in Europe have to report in to the President of Europe because the President of Europe is the organization that is driving the business. We want to be efficient, we want to be sure that legal services are provided in the most localized and efficient way possible. So what we don't want to have is some attorney in Cleveland coming in and saying, "You can't use this local firm that we don't know." So it's better to localize.

But then there is this control function aspect of it. We want to know what's going on. We want to make sure that the priorities in the Foreign Corrupt Practices Act in RoHS and all of the other regulations are adequately supervised. How do you adjust those lines? Dotted or solid? My point is that there isn't any one right answer. It's to be conscious of the relationship that you're in because those relationships matter. Those dotted and solid lines matter and they can affect the way you as lawyers make judgments. So there is nothing inherently bad about it. It's more like a disclosure type of situation where you have to be self-aware and you have to say, "I am directly reporting to the president of Europe. So I have to be conscious of the fact that I may have to make some tough calls and maybe stand up to the president of Europe and say, look, we need to re-prioritize this." And be sensitive to reaching out to your colleagues across the pond and getting back up in support whenever it is necessary because at the end of the day, we are, in fact, still all attorneys and we cannot lose sight of that fact.

We at Eaton are going through a major transition right now. We are up to around seventy attorneys. After the Cooper transaction that just closed, the company has \$21.6 billion in sales. As we do this, as we enter into what we call a metric environment, where we've got business units, regions, and specialties and subspecialties located across the globe with multiple lines of authority, we do so with this desire that we all work together to figure out the best way to go. Almost like a law firm in some ways, we're adapting to that new reality. The question becomes: How do you balance your obligations as an attorney, your obligations as a control function? This is an important question because we do have

those obligations as a control function, with the pressures and the desire, and quite frankly the fun of being a business partner. It is an ongoing exercise, but it's a fun exercise as we engage in it, and I'm looking forward to speaking some more about it.