Nancy, Neil and Julie:

In light of the SEC's recent press release announcing the commission's decision to propose rules implementing provisions of the Sarbanes-Oxley Act to establish minimum standards of professional conduct for attorneys representing public companies, I read your article, *The Social Obligation of Corporate Counsel: A Communitarian Justification for Allowing In-House Counsel to Sue for Retaliatory Discharge*, 11 Geo. J. Legal Ethics 665 (1998) and have some comments.

First, having served as senior in-house counsel at two public companies, I thoroughly understand the pressures faced by lawyers with only a single client. Yet, I believe that the professional obligations - and associated rights - of the attorney should not depend on the number of clients served. While the *Balla* case was not necessarily the best case factually to establish the rule, I believe that it was correctly decided.

You characterize the Balla court's argument that lawyers recognize (or should recognize) that maintaining the integrity of the profession may cause them to experience economic loss as "strained", yet it seems to me sound. In-house lawyers are, generally, paid significantly in excess of other executives at comparable organizational levels and usually greatly in excess of what traditional compensation systems (the Hay point system, for example) would dictate. Although lawyer compensation is based on a number of factors - market rates, greater education, etc. - in no small part it reflects the greater professional obligations of the lawyer, including the economic risk.

I do not believe it is correct, or wise, to view a lawyer as "just another employee." In fact, I do not believe that in-house lawyers are properly seen as employees at all. Most companies have "severance" plans under which they promise to pay employees who are terminated for the convenience of the employer. As applied to lawyers, however, I believe such plans impermissibly impede the client's absolute right to counsel of its choice (essentially by imposing a monetary penalty on the client desiring a change in counsel). Such compensation could be seen as an "unreasonable" fee. This is not to say that companies cannot pay lawyers under such plans or that lawyers cannot accept such payments (Heaven forbid. I just finished collecting under such a plan.), just that they cannot be compelled to honor such plans in the case of lawyers and payment under the plans is properly seen as gratuitous. Also, while obtaining other employment is always difficult, the in-house lawyer has a "just-hang-out-a-shingle" option that, whatever it is worth, is more than most other employees have.

Most corporations indemnify directors, officers and employees for liabilities arising from acts and omissions within the scope of their employment, including ordinary negligence. I have not looked at the issue, but my sense is that lawyers cannot ethically disclaim liability for, or demand indemnity from the client for, ordinary negligence arising from the performance of professional services. The benefits of indemnity may not be among the benefits of employment that an attorney can accept.

Finally, the right of a client - including a corporate client - to the attorney of their choice is broader than the right of an employer to select an employee. Thus, in retaining counsel, a company may take into consideration factors that would be impermissible in deciding whether or not to hire an employee. The company may, for example, overtly decide that a lawyer from a minority group will be better able to represent the company before the EEOC, or that a female lawyer would be a better choice to investigate and defend sexual harassment claims.

The lawyer has, under certain circumstances, the obligation to withdraw and may, in appropriate circumstances, disavow documents or assertions known to be incorrect or misleading. This is probably what Mr.. Balla should have done. Additionally, lawyers are subject to remedies that other employees are not, specifically the risk of being disbarred. In my experience, explaining to management (in an appropriate manner) that failure to take a course of action will necessitate withdrawal (resigning) because otherwise the lawyer risks being disbarred if the conduct is

discovered is usually enough to affect the decision in question (and I have personally faced the issue on more than one occasion, although not recently). The lawyer cannot "cry wolf", and there is an element of judgment that must be brought to bear in such situations. But, in appropriate circumstances, such conversations are usually efficacious, if difficult, and do not threaten the lawyer's engagement.

It is important - indeed critical - to distinguish in-house lawyers from other employees, because failure to do so will result in an erosion of the attorney client privilege. I am personally the subject of a decision in the Southern District of New York on the scope of in-house attorney - client privilege in the transactional context (a decision that did not bode well for the in-house bar). [You can find the opinion on my Web site: <http://scott-juris.blogspot.com/>] The privilege is under pressure largely because the lines between the in-house lawyer and the traditional employee have blurred. (Of course, as one firm lawyer said to me in this context, "Judges just don't understand the realities of law firm practice today.")

The risk of disbarment is critically important from a corporate governance point of view. As Berle and Means discussed 70 years ago, aligning the interests of managers with owners economically is not possible once ownership and control have been separated. Let's say management owns 40% of a company. If management can enrich itself by $1 million at a cost to net income of $1 million, management benefits because 60% of the cost will be borne by the shareholders who are not managers. Also, unless the government seeks incarceration, there is no effective remedy against most employee misconduct. Either the firm indemnifies the employee or the employee is sufficiently judgment proof that the transaction costs of litigation are not worthwhile. So, employee and management risk tolerance is too great. Lawyers can be disbarred. If they are correctly viewed as non-employee, professional members of management with independent professional obligations and a realistic risk of losing their means of livelihood, they can be a powerful policing force within the corporation. Their loss risk cannot be shifted to non-management shareholders.

I enjoyed your article.