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David G. Leitch

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COUNSELOR AT LAW AND POST-LEGAL ISSUES

DAVID G. LEITCH*

*The UNC Banking Institute continued a longstanding tradition of hearing after-lunch remarks from a bank counsel. David G. Leitch shared thoughts about his employer, Bank of America, as of the date of his speech—March 23, 2017. The remainder of his remarks, on the role of a counselor at law in counseling his or her client on post-legal issues, is timeless. The editors are delighted to publish these remarks so that they are available to all lawyers.*¹

I. INTRODUCTION

Thank you very much for inviting me to be with you today. I returned to North Carolina last year after a thirty-five-year absence from the state, since my time as an undergraduate at Duke.

II. BANK OF AMERICA IN NORTH CAROLINA

I'm very happy to be back in the state as the General Counsel of Bank of America. As you know, the Bank has a long history in the state and in the city of Charlotte. I first encountered what was then NCNB,²

*DAVID G. LEITCH is global general counsel for Bank of America, responsible for overseeing the company's legal functions around the world. Based in Charlotte, he is a member of the bank's executive management team. Mr. Leitch joined the bank from Ford Motor Company, where he was general counsel and group vice president from 2005 through 2015. Previously, he served as deputy counsel to President George W. Bush; chief counsel for the Federal Aviation Administration; deputy assistant attorney general in the U.S. Department of Justice, Office of Legal Counsel; and partner with Hogan & Hartson, L.L.P. (now Hogan Lovells) in Washington, D.C. He served as law clerk to former Chief Justice of the United States William H. Rehnquist, as well as to Federal Circuit Judge J. Harvie Wilkinson III. He graduated first in his class from the University of Virginia School of Law and received his undergraduate degree from Duke University.

1. These remarks by Mr. Leitch are adapted and modified from remarks made in January 2008 at a roundtable discussion as part of the General Counsel Leadership Series. David G. Leitch, Gen. Counsel & Senior Vice President, Ford Motor Co., Remarks at the General Counsel Leadership Series, *The Evolving Role of General Counsel: Leadership in Challenging Times* 3–7 (Jan. 2008), <http://www.directorsroundtable.com/wp-content/uploads/2015/02/GC-Ford-NLJ.pdf>.

2. North Carolina National Bank.

striving to be the “Best Bank in Your Neighborhood,” as a student, but Bank of America’s roots in the state are much deeper.

In fact, our predecessor institutions first began serving North Carolina more than 140 years ago, and of course Bank of America maintains its principal place of business in Charlotte. We employ 208,000 people around the world, and nearly 10% of them work here in North Carolina.

We are proud to have more than \$167 billion in retail deposits in the state, and we continue to grow loans in the state year over year, amounting in 2015 to nearly \$750 million in total home loans, \$500 million in new loans to commercial businesses, and \$146 million in new loans to small businesses.

Like the other many fine corporate citizens of our state, Bank of America is also committed to the communities in which we operate. Our charitable foundation provides about \$9 million annually in grants and matching gifts to local nonprofits, and our employees in North Carolina collectively volunteer more than 240,000 hours to local community organizations every year.

With all that in mind, we should be grateful that the UNC School of Law has established the Center for Banking and Finance to recognize and further the important role of banking and finance to the economy of North Carolina as well as “to play a leadership role in the continual evolution of the financial services industry.”³

III. THE EVOLUTION OF THE FINANCIAL SERVICES INDUSTRY

We gather at a very important time in that continuing evolution. It is, by most accounts, a time of transition, reexamination, and optimism for our industry. As the economic crisis of 2008 recedes further into the rearview mirror, and as financial services companies have engaged in massive efforts to ensure that they are well-prepared to avoid anything approaching a repeat of those traumatic days, we also have a new Administration in Washington that has offered the promise of a fresh approach to regulation and examination.

This optimism is perhaps most starkly reflected in the valuation of financial services companies by the stock market. Since the election

3. *Ctr. for Banking & Fin.*, UNC SCHOOL OF LAW, <http://www.law.unc.edu/centers/banking/> (last visited Dec. 18, 2017).

in November 2016, the KBW bank stock index is up about 40%, and Bank of America stock has nearly doubled in value over the same period. The Administration, meanwhile, is hard at work carrying out the President's Executive Order to conduct a review of regulations on the financial sector that may inhibit economic growth, efficiency, and competition.⁴

We of course welcome this new enthusiasm for our industry and our companies, and we expect 2017 will be a time of continuing change and development. We may see changes to banking laws, or to how regulations are implemented, both in the United States and in other jurisdictions where we operate. Reasonable regulation is important for the safety and soundness of our financial system, and we support a review by policymakers and elected officials to ensure they strike the right balance to drive responsible economic growth.

But it is important to note that as we sit here today, very little has actually changed. Dodd-Frank is as fully binding as it was on November 7, 2016, and the OCC, the Fed, the CFPB and others are still conducting examinations and identifying matters requiring attention.⁵ And we must continue to do our part to comply and respond.

Even if the content and structure of regulations were to change overnight, however, it is critical that financial institutions continue to build and nourish the kind of culture, incentive structure, and organizations that will insist on and ensure strong ethical conduct and compliance in the future. And it is on that imperative, and in particular on the role of lawyers in helping our institutions pursue that imperative, that I want to focus my remarks today.

4. Exec. Order No. 13772, 82 Fed. Reg. 9965 (Feb. 3, 2017). Since the date of the speech, the Treasury Department has issued two major reports in response to the Executive Order. See U.S. DEP'T OF TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: BANKS AND CREDIT UNIONS (June 2017), <https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf>; see also U.S. DEP'T OF TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: ASSET MANAGEMENT AND INSURANCE (Oct. 2017), https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-That-Creates-Economic-Opportunities-Asset_Management-Insurance.pdf.

5. See H.R. 3312, 115th Cong. (2017) (increasing the threshold status for determining which financial institutions are designated "Systemically Important Financial Institutions" ("SIFIs") from \$50 billion to \$250 billion). In addition, examination and enforcement priorities may shift as a result of newly appointed agency heads, such as Jerome Powell of the Fed and whoever replaces Richard Cordray as Director of the CFPB.

IV. ETHICAL CONDUCT AND CULTURE IN THE FINANCIAL SERVICES INDUSTRY

Before doing so, however, in case it is not self-evident, let me briefly state *why* it is important that we pursue ethical conduct and culture in the financial services industry. Or better yet, let me quote Bill Dudley, President of the New York Fed, who has been a driving force in examining the question of culture in the industry:

We do this to achieve better outcomes in terms of conduct and behavior—and, with that, greater trustworthiness in our nation’s financial system. Greater trustworthiness will make it easier for the financial industry to perform its role in supporting economic activity and rising living standards. Greater trustworthiness will also make it easier to attract top talent into the industry. Without that, the industry will suffer.⁶

That’s certainly not something that any of us in this room want to experience. At Bank of America, our efforts to drive the right behaviors are communicated under the umbrella of something we call “Responsible Growth.”⁷ Our interest in growth should of course be clear; like every business, we look to continue to grow and thrive so that we better serve the interests of our customers, our shareholders, our employees, and our communities. Thus, we make no apology for wanting to “grow and win in the market—no excuses.” That is the first principle of Responsible Growth.

But, we must achieve that growth in a responsible way: We must grow with a customer-focused strategy. We must grow within our risk framework. And we must grow in a sustainable manner. Focusing on growing *the right way* is critical to Responsible Growth.

Bank of America is of course not alone in its focus on growing the right way. Coming out of the tumult of the economic crisis, the entire industry has been engaged in an examination of culture and conduct to insure the lessons learned are absorbed, embedded, and not forgotten.

This is an effort not just organically led by the banks, but also encouraged by regulators around the world. Most notably, perhaps, the

6. William C. Dudley, President & Chief Exec. Officer, Fed. Reserve Bank of N.Y., Remarks at the Culture Imperative—An Interbank Symposium at the Convene Conference Center, New York City (Jan. 11, 2017), <https://www.newyorkfed.org/newsevents/speeches/2017/dud170111>.

7. *Driving Responsible Growth*, BANK OF AM., https://about.bankofamerica.com/en-us/who-we-are/our-strategy.html?bcen=8a6b#fbid=yUjWEp8FK_H (last visited Dec. 18, 2017).

Federal Reserve Bank of New York has led a series of conferences and continuing dialogue on Reforming Culture and Behavior in the Financial Services Industry.⁸

As a result, there is a rich and expanding library of materials available online on the issue of culture and conduct in the industry, and I encourage those of you who are interested in the topic more broadly to explore those materials.⁹

This month, March 2017, alone has seen at least three noteworthy speeches on the subject: (1) William Dudley, President of the Federal Reserve Bank of New York, *Reforming Culture for the Long Run*;¹⁰ (2) Andrew Bailey, CEO of UK Financial Conduct Authority, *Culture in Financial Institutions: It's Everywhere; and Nowhere*;¹¹ and (3) Michael Held, Executive Vice President of the Federal Reserve Bank of New York, *Reforming Culture and Conduct in the Financial Services Industry: How Can Lawyers Help?*¹²

As I said, it is on the topic considered in this last speech—the role of lawyers—that I want to focus my remarks today.

In a very real sense, our core role—lawyers giving legal advice—is critically important in making sure our organizations and clients

8. See, e.g., *Reforming Culture and Behavior in the Financial Services Industry: Expanding the Dialogue*, FED. RESERVE BANK N.Y., <https://www.newyorkfed.org/governance-and-culture-reform/culture-conference-expanding-the-dialogue> (Feb. 8, 2018).

9. See William C. Dudley, President & Chief Exec. Officer, Fed. Reserve Bank N.Y., Remarks at Panel Discussion at Thomson Reuters, New York City: Banking Culture—Still Room for Improvement? (Feb. 7, 2018), <https://www.newyorkfed.org/newsevents/speeches/2018/dud180209>; see also FED. RESERVE BANK N.Y., MISCONDUCT RISK, CULTURE, AND SUPERVISION (Dec. 2017), <https://www.newyorkfed.org/medialibrary/media/governance-and-culture-reform/2017-whitepaper.pdf>; Lloyd Firth & Anna Gaudoin, *Culture and Conduct in Financial Services*, ECONOMIA (Oct. 17, 2017), https://www.icaew.com/sitecore/content/economia/home/opinion/october-2017/culture-and-conduct-in-financial-services?sc_lang=en; STEPHANIE CHALY ET AL. See generally *Governance & Culture Reform*, FED. RESERVE BANK N.Y., <https://www.newyorkfed.org/governance-and-culture-reform> (last visited Feb. 8, 2018).

10. William C. Dudley, President & Chief Exec. Officer, Fed. Reserve Bank N.Y., Remarks at the Banking Standards Board, London, United Kingdom, Reforming Culture for the Long Run (Mar. 21, 2017), <https://www.newyorkfed.org/newsevents/speeches/2017/dud170321>.

11. Andrew Bailey, Chief Exec. Officer, UK Fin. Conduct Auth., Remarks at the HKMA Annual Conference for Independent Non-Executive Directors, Hong Kong, Culture in Financial Institutions: It's Everywhere and Nowhere (Mar. 16, 2017), <https://www.fca.org.uk/news/speeches/culture-financial-institutions-everywhere-nowhere>.

12. Michael Held, Exec. Vice President, Fed. Reserve Bank N.Y., Remarks at Yale Law School's Chirelstein Colloquium, New Haven, Connecticut, Reforming Culture and Conduct in the Financial Services Industry: How Can Lawyers Help? (Mar. 8, 2017), <https://www.newyorkfed.org/newsevents/speeches/2017/hel170308>.

conduct themselves ethically, for whatever else ethics may mean, it certainly means compliance with the law.

But as NY Fed President Bill Dudley has observed, “[rules] are necessary, but not sufficient.”¹³ For one thing, clear rules can’t possibly cover every situation. If they could, our jobs would be easy. Or unnecessary.

And, as Dudley also observes, “too many brightline rules may prove counterproductive in encouraging a good culture,” for they may imply that meeting the rules is sufficient not just for strict legal compliance but also for the broader concept of ethical conduct.¹⁴

While this observation obviously has implications for the broader organization, my question today is what does it mean for lawyers? What is our role, once we’ve identified the correct legal rule? Do we simply ensure that our clients know the rule and make sure they’re going to follow it, or is there something more?

V. COUNSELOR AT LAW AND ON POST-LEGAL ISSUES

My thesis today—as it was when I was at Ford Motor Company—is that providing the correct legal advice is only the very beginning of our obligation to our clients. Being a *counselor* in the fuller sense means not only providing sound legal advice, but also having a strong voice on what I would refer to as “post-legal issues”—those issues that remain even after we have offered our legal advice. It means being a trusted advisor on significant matters like finance, human resources, regulatory investigations, risk management, and business strategies.

In considering the lawyer’s role with respect to post-legal issues, it is perfectly appropriate—indeed, some would say necessary—for a lawyer to consider questions such as these: (1) The proposed course of action is legally defensible, but is it ethical or moral? Do we want to defend it? (2) You’d be on solid legal ground if you take the course of action you propose, but will it be misunderstood or disapproved by the public or by the press? (3) And finally, will regulators, shareholders, employees, or congressional committees think you’re making a bad decision, despite its legal propriety?

13. Dudley, *supra* note 6.

14. Dudley, *supra* note 6.

These considerations—which come into play after giving our best legal judgment—are, and ought to be, a common part of the role of those who provide legal counsel to today’s corporate clients. As Held puts it, lawyers “must argue not just for what is legal, but for what is sound and right.”¹⁵

Simply put, lawyers do not have the luxury of offering legal advice and walking away. At least the good ones don’t. Instead, they are expected to offer judgments beyond the legal answer. If they participate in critical decisions and meetings without being willing to volunteer thoughts or respond to questions about other than legal considerations, they are woefully unprepared, and may be embarrassed by their narrow approach to the whole problem in all its complexity. A wise counselor must instead be prepared to discuss a broader range of advice.

This is not just a question of having an opportunity to offer policy judgments, ethical views, public affairs advice, or common sense; we are expected, particularly those of us who serve as senior lawyers, to provide a wide spectrum of advice to our clients, so that they are not criticized or embarrassed or harmed *despite* the legality of their actions. They may not always accept our views, but we are derelict if we are not prepared to offer them, especially when we think something important is being overlooked.

The lesson for lawyers is that the advice we must be prepared to give our clients—CEOs, CFOs, board members—has to be informed by the fact that resolution of issues in our companies can be compliant with every law and every regulation, yet utterly non-compliant with the best advice and best resolution, with the best *interests* of our clients.

Indeed, I can tell you that in my current role as well as in past leadership positions, I am expected not just to offer my views on the legality of what the company intends to do, but also to give my views on ethics, morals, public affairs, strategy, policy, and other post-legal issues.

As the ABA Model Rules of Professional Conduct state, “in rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social, and political factors that may be relevant to the client’s situation.”¹⁶

15. Held, *supra* note 12.

16. MODEL RULES OF PROFESSIONAL CONDUCT r. 2.1 (AM. BAR ASS’N 2017).

How, then, should a lawyer prepare himself to be in a position to offer this kind of advice? Let me offer five suggestions for both in-house lawyers and outside counsel.

First, constantly sharpen and refine your ethical antennae. To fulfill your broader role as a counselor, you need to develop the moral compass that tells you what is right and what is wrong in any particular situation. Resolve to yourself never to set aside your moral and ethical compass when you are giving legal advice to a client.

Second, be a student of the press and of public perception. Both the press and the public are notoriously fickle and hard to predict. To truly serve our clients, we must have a strong sense of how things will be judged in the event they are made public.

When I worked in the White House, we called this the “*Washington Post* Standard”: Is the decision you or your client is about to make something that you would be comfortable reading about in the *Washington Post* the next morning?

Younger members of our audience might understand the concept better if I refer to it as the Twitter standard. But whatever proxy you use, be sure you’re prepared to consider how the decision being made might appear to others if made public. This doesn’t mean you let public perception dictate all of your decisions. Sometimes the best decisions are unpopular. But you ought to be in a position to raise and evaluate the issue.

Third, learn about politics and politicians and—particularly in the banking industry—regulators. When issues touch on public policy, be aware of the views held by influential political players. Who are they, and what do they think? Is there a particular constituency that would be offended by an action? Should someone reach out to them for consultation, or at least give them a heads up about what’s to come? Be smart and savvy about relationships in the political and regulatory arena.

Fourth, develop a backbone, because you’ll need it. It’s often not easy to speak up in the management committee or in the halls of a government agency and say to your client that you believe a proposed course of action is immoral, unwise, or politically risky. Some decision makers or experts in politics or public affairs will resent what they believe is an intrusion on their turf. You are playing in their sandbox, and they’d appreciate it if you’d stick to the legal sandbox. But if you are to be effective in fulfilling a broader role for your client and your duties to your

client, you have to be willing to speak up and offer your views on these other issues.

And fifth, know your business, or your client's business, inside and out. In order to have credibility with senior leadership, you will need to earn a seat at the table. You must be interested in and educated about the business itself, not just known as the person who offers legal guidance when the client thinks it's appropriate.

Finally, a word of caution. A lawyer should be careful not to view her role as counselor as a license to become a crusader. She should choose her battles wisely. We must recognize that while we can and should share views on the non-legal aspects of issues with our client and the team, it is only on legal questions that we are the true expert and authoritative.

On other matters, we must be willing ultimately to defer to the expertise or authority of others. If we are unwilling to show some restraint and humility, we will become the proverbial noisy gong or clanging cymbal, and will be ineffective as a lawyer, not to mention as a counselor. Or, as Held warned, "lawyers should be cautious in venturing too far afield from their core expertise and fundamental role as advisors on the law. . . . Lawyers may be perceived as giving authoritative advice on issues for which they should be only one of many voices. . . . 'We are not priests or rabbis.'"¹⁷

It is of course a daunting task to develop just the right voice and deft touch to play your core role of legal advisor while also making the kinds of contributions I've described here today. But it's important that each of us work hard on this task, not only because we can be of broader service to our clients, but also because being a wise and trusted counselor on post-legal issues makes us more effective on our core legal tasks as well.

Indeed, the roles of counsel and counselor are mutually reinforcing. It's a given that a lawyer must be in the room and have a seat at the table to offer legal advice when major decisions are made—as Lin-Manuel Miranda famously wrote in the musical *Hamilton!*, "in the room where it happens."¹⁸

17. Held, *supra* note 12 (quoting Thomas C. Baxter, Jr., Remarks at the Bank of England, London, The Rewards of an Ethical Culture (Jan. 20, 2015)).

18. LIN-MANUEL MIRANDA, *HAMILTON* act 2.

Once in the room, however, the lawyer is expected, both by wise management and by those who might be examining the process in retrospect, to be fully a member of the team and offer judgments and opinions on a wider range of perspectives that must be considered. And if he is not in a position to do so, he will not be considered a valuable member of the team, and may not even be included in the room, even for the benefit of his legal views when important decisions are made.

VI. CONCLUSION

So, in conclusion, I urge you even as I remind myself to strive to be fully a member of the teams we're privileged to serve; of course be a lawyer, but also be a trusted counselor, a wise voice, and a valued partner in the shared enterprise. I can assure you, the effort is worth it. It not only enriches our own experience, but will make those institutions we serve more fully realize and fulfill their role in our economy and in our communities.