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Christina R. Salem

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NOTES

THE NEW MANDATE OF THE CORPORATE LAWYER AFTER THE FALL OF ENRON AND THE ENACTMENT OF THE SARBANES-OXLEY ACT

*Christina R. Salem**

*"Until we see a CEO and general counsel march off together—
for a long, uncomfortable and no-country club sentence—capitalism
is at risk, because people are losing confidence."*

— Tom Stickel, Chairman, California Chamber of Commerce

INTRODUCTION

In just a brief period of time, a growing list of accounting scandals have shaken public and investor faith in corporate America, while simultaneously triggering the nose-dive of the stock market.¹ In light of the string of recent corporate financial crisis events that have transpired, the collapse of the Enron Corporation, the overstatement of WorldCom's earnings by over \$3.8 billion,²

* J.D., Fordham University School of Law, May 2003. B.B.A. Finance and International Business, The George Washington University, May 2000. Many thanks to my family for continuing to unquestionably support me throughout the years.

1. See Abraham C. Reich & Michelle T. Wirtner, *What Do You Do When Confronted With Client Fraud?*, 12-OCT BUS. L. TODAY 39, Sept./Oct. 2002, at 39.

2. See Simon Romero & Alex Berenson, *WorldCom Says It Hid Expenses, Inflating Cash Flow \$3.8 Billion*, N.Y. TIMES, June 26, 2002, at A1. On the day WorldCom announced its accounting adjustment, SEC Chairman Harvey Pitt announced an order under which CEOs and CFOs of approximately 950 companies were to submit sworn statements attesting to the accuracy of past company filings with the SEC when these companies filed their next reports before August 14, 2002 and further announced that he "was mad as hell and wasn't going to take it any more." Paul S. Maco, *Adapting to the "New Corporate*

and its subsequent corporate meltdown, one question remains lingering: where were the corporate lawyers? Lawyers, publicly perceived as having "deep pockets," are becoming attractive targets of accountability, in addition to accountants and business advisors, when a business runs afoul of the law.³

This Note will discuss the new mandate of corporate lawyers in light of recent corporate scandals and the enactment of the Sarbanes-Oxley Act ("Sarbanes-Oxley").⁴ Part I will highlight the general public dissatisfaction with the legal profession as a result of corporate lawyer involvement with, and lack of disclosure of ongoing unethical corporate behavior. Part II will compare the traditional understanding of the American corporate lawyer's role as that of the governing class, with those scholars who have made significant contributions to the field of business ethics, including Tom Dunfee, Tom Donaldson and Tim Fort.

Part III will discuss the enactment of Sarbanes-Oxley as a Congressional mechanism of expanding the scope of corporate lawyer liability when corporate lawyers fail to disclose a corporate client's unethical conduct. Part IV will discuss the newly mandated role of the corporate lawyer in light of Sarbanes-Oxley, and how Congress is beginning to redefine such role to comport with traditional American governing class notions and ideologies of business ethics. The conclusion will highlight that as a result of the enactment of Sarbanes-Oxley, there will become an inevitable resurfacing of the tension between the corporate lawyer's role as defender of common good and communal values, as evidenced by the traditional understandings of governing class and business ethics, and the presently accepted role of the corporate lawyer as that of hired-gun.

Order" and the Personalization of Corporate Responsibility, 21 NO. 10 OF COUNSEL 8 (2002).

3. See Reich & Wirtner, *supra* note 1, at 39.

4. 15 U.S.C.A. § 7245 (2003).

I. CORPORATE LAWYER INVOLVEMENT IN RECENT CORPORATE SCANDALS

The amount of negative publicity surrounding the role corporate lawyers played in the Enron debacle has fueled public distrust with the corporate legal profession.⁵ Highly publicized transaction work of blue chip law firms, such as Vinson & Elkins and Kirkland & Ellis, has forced the issue of a corporate lawyer's duty to disclose corporate wrongdoing into the spotlight.⁶ From 1997 through 2001, Vinson & Elkins handled transactions involving off-balance sheet Enron partnerships that are now the focus of the dispute surrounding Enron's collapse.⁷ Kirkland & Ellis did not represent Enron, but the firm faces lawsuits from shareholders and investors who allege that these off-sheet partnerships consisted of sham transactions and parties created to conceal Enron debt.⁸

While the public has a long-term documented distrust of the legal profession,⁹ the fallout of recent corporate entities has made, quite predictably, the public, particularly the government, more willing to hold corporate lawyers accountable for failing to disclose material information implicating corporate agents of corporate wrongdoing.¹⁰ Against this backdrop of public hostility towards

5. See John K. Villa, *How Will Recent Changes in Corporate Governance, Public Auditing, and the Role of In-House Counsel Affect You?*, 20 NO. 9 ACCA DOCKET 124 (2002) (noting that public attention is now focused on the adequacy of the financial reporting system and disclosure, and of corporate governance and ethics).

6. See Ellen Pollack, *Lawyers for Enron Faulted its Deals, Didn't Force Issue*, WALL ST. J., May 23, 2002, at 1, 18.

7. See *id.*

8. See *id.*

9. See Cliff Martin & T. Karena Dees, *The Truth About Truthfulness: The Proposed Commentary to Rule 4.1 of the Model Rules of Professional Conduct*, 15 GEO. J. LEGAL ETHICS 777, 779 (2002); Judith L. Maute, *Colloquium: What Does It Mean to Proactice Law "In the Interests of Justice" in the Twenty-First Century?*, 70 FORDHAM L. REV. 1745, 1756 (2002); Christine V. Williams, *Ethics Year in Review*, 41 SANTA CLARA L. REV. 1159, 1170 (2001).

10. See Villa, *supra* note 5, at 124 (explaining that the flurry of action on Capitol Hill is attributed to the publicity surrounding the collapse of Enron and the events involving WorldCom). It is worth noting that approximately twenty years ago, Senator Arlen Specter of Pennsylvania introduced legislation,

lawyers, there exists a body of ethical codes, promulgated primarily to maintain public confidence in the legal profession.¹¹ The underlying goals of these codes it to instill a mechanism of self-regulation, far removed from federal government policing, whereby disciplinary measures are instilled to ensure that the public is protected from unethical practitioners.¹²

The recent abundance of corporate mischief may now make it clear that lawyers are no longer capable of policing themselves and are in need of legislative oversight.¹³ However, at one point, such supervision would have been regarded as ludicrous, for the public's first encounter with the legal profession entailed utmost admiration, respect and trust.¹⁴

although never enacted into law, titled "Lawyers Duty of Disclosure Act of 1983" which obligated lawyers to disclose prospective crimes of their clients, in addition to prior crimes in the commission of which the client misappropriated legal advise, to law enforcement authorities. *See Reich & Wirtner, supra* note 1. Similar to Sarbanes-Oxley, those lawyers who failed to make the requisite disclosures would have faced federal criminal liability. *See id.*

11. *See* Stanley Pietrusiak, Jr., Comment, *Changing the Nature of Corporate Representation: Attorney Liability for Aiding and Abetting the Breach of Fiduciary Duty*, 28 ST. MARY'S L.J. 213, 221 (1996).

12. *See id.* at 221.

13. *See* Reich & Wirtner, *supra* note 1, at 39 (stating that the legal profession is in danger of losing its right of self-governance); Brian P. Kane, *The Sarbanes-Oxley Act of 2002: Something for Everyone to Worry About*, 45-OCT ADVOCATE (IDAHO) 16, Oct. 2002 (noting that Congress will continue to look over the shoulders of corporate lawyers more aggressively until their professional independence is completely eroded); James Podgers, *Seeking the Best Route*, 88-OCT. A.B.A. J. 68 (2002) (quoting SEC Chairman Harvey L. Pitt when he stated that "Sarbanes-Oxley reflects some skepticism about the degree to which the legal profession can police itself, by making explicit the commission's ability, and our obligation, to regulate how lawyers appear and practice before us, including minimum standards of professional conduct for corporate lawyers.").

14. *See* Russell G. Pearce, *Lawyers As America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 381 (2001) (noting that lawyers maintained a higher commitment to the public good than any other profession, permitting them to manage the relationship between law, power and society).

II. TRADITIONAL UNDERSTANDINGS OF THE CORPORATE LAWYER AND BUSINESS ETHICS

A. Lawyers As America's Governing Class

The original classification of the American lawyer's role was that of above self-interest, for lawyers were considered uniquely qualified to discern, establish and pursue the public common good.¹⁵ At the heart of this view was republicanism, the dominant ideological view fueling the American Revolution.¹⁶ Republicanism advocated the protection of individual liberty through the collective pursuit of the common good.¹⁷ A necessity to the republican government was a group of independent and disinterested citizens who would exchange the pursuit of self-interest for that of public welfare.¹⁸ The framers of the Constitution sought to appoint such powers to a virtuous political elite, free from legislative power, the interests of the market, and a profession which pressured its members to accumulate wealth.¹⁹

The Framers determined that lawyers, who were dedicated to the common good, and who were placed at the center of commerce and governance, would be perfectly suited to encompass this emerging class.²⁰ As scientists of justice, lawyers were considered wholesome in all their virtues, for without greatness in character, there would be no greatness in the law.²¹ Reigning as America's

15. See Russell G. Pearce, *Historical Perspectives on Pro Bono Lawyering: The Lawyer and Public Service*, 9 AM. U.J. GENDER SOC. POL'Y & L. 171, 171 (2001).

16. See Pearce, *supra* note 14, at 383.

17. See William Michael Treanor, *Taking the Framers Seriously*, 55 U. CHI. L. REV. 1016, 1033 (1988).

18. See Pearce, *supra* note 14, at 385 (citing GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, 68 (North Carolina 1969)).

19. See *id.* at 385-86.

20. See *id.* at 383 (noting that the legal profession was better equipped for political leadership).

21. See *id.* at 389 (referencing DAVID HOFFMAN, *COURSE OF LEGAL STUDY* (J. Neal 2d ed. 1836) who reasoned that "greatness in law required greatness in

governing class, the main pursuit of lawyers was that of ensuring the enforcement of the rule of law.²² Specifically, lawyers were to promote respect for the judicial branch, guard against legislation that benefited one societal class over another, and ensure that the majority rule did not suppress individual property and contract rights.²³ At the crux of the governing lawyer's agenda is to guarantee that the common good trumps financial self-interest.²⁴

The governing class, however, was not reserved for mere public welfare advocacy.²⁵ Lawyers were encouraged to represent the interests of individuals within society, with of course, a goal towards promoting the common good.²⁶ In fact, lawyers were perceived as uniquely positioned to exert governing class community goals upon their clients.²⁷ Private corporations, in exchange for state charter rights, were expected to yield certain benefits upon the state and lawyers were viewed as perfect facilitators of this exchange.²⁸ America's governing class were to exert influence on both clients and the greater society by yielding coexistence between obligations of representing clients, advocacy and governance.²⁹ Zealous advocacy was to occur within the confines of governing class obligations.³⁰ Where, however, agendas

every virtue" as the attribute enabling lawyers to fulfill their governing class role).

22. See Pearce, *supra* note 15, at 171 (noting that such perspective was the central ideology of both republicanism, the prevailing ideology of the legal elite in the nineteenth century, as well as professionalism, the prevailing ideology of the legal elite in the twentieth century).

23. See Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992).

24. See Pearce, *supra* note 15, at 173.

25. See Pearce, *supra* note 14, at 383.

26. See Pearce, *supra* note 23, at 255.

27. See Pearce, *supra* note 14, at 383.

28. See Don Mayer, *Community, Business Ethics, and Global Capitalism*, 38 AM. BUS. L.J. 215, 235 (2001).

29. See Pearce, *supra* note 14, at 383.

30. See Pearce, *supra* note 15, at 172 (noting that the governing class ideology can be traced to Alexis De Tocqueville's classification of lawyers as American aristocracy, George Sharswood's republican notion of lawyers as providing the enlightened political leadership which protects "life, liberty, and property," Louis Brandeis's contention that lawyers are to assume their rightful place as the

conflicted, the lawyer was to unquestionably uphold her duty to the common good.³¹

Although revered as the dominant ideology of its time, the governing class movement did not go unchallenged.³² The latter half of the nineteenth century gave rise to a wave of criticism, both inside and outside the legal community, as to whether lawyers were properly fulfilling their governing class obligations.³³ Those challenging the idea of governing class did so on the grounds that lawyers should be exclusively labeled as zealous advocates, arguing that self-interested lawyers would be uncommitted to the common good.³⁴ The demise of the governing class role became apparent, with lawyers beginning to place their financial self-interest above that of the common good.³⁵

Saddened by the transformation from a legal profession to a mere business, lawyers were being perceived as business men,

“people’s lawyers,” and Anthony Kronman’s plea for lawyers to fulfill their obligations as lawyer-statesmen).

31. See Pearce, *supra* note 14, at 383

32. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 110 (Simon & Schuster 2d ed. 1985); Pearce, *supra* note 14, at 392–93 (noting that the legislature began to override bar and judicial regulation of admission to practice law by easing admission requirements dramatically, and explaining that those who viewed lawyers as self-interested contributed significantly to the new legislative changes).

33. See Pearce, *supra* note 14, at 392.

34. See *id.* at 393–95. The role of zealous advocate could perhaps be best summarized by Lord Henry Brougham, leader of those in the House of Lords who were defending Queen Caroline against King George IV’s charges of adultery, who declared in 1820 that:

An advocate, in the discharge of his duty knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction he may bring upon others. Separating the duty of a patriot from that of advocate, he must go on, reckless of consequences: though it should be his unhappy lot to involve his country in confusion.

Id. at 394 (citing GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 75 (Fred B. Rothman & Co. 1993) (quoting Brougham)).

35. See *supra* Part II.A (discussing the traditional role of lawyers as America’s governing class, primarily in charge of pursuing the common good over that of self-interest).

selling stocks, bonds, brokering deals and negotiating lucrative business transactions.³⁶ To further capitalize on individual wealth, lawyers began to solely advocate for the maximum benefit of their clients as a means of securing future business.³⁷ In seeking to serve big corporations, their sense of duty to the common good became inevitably blurred.³⁸ Gone was the established duty to the general public, and in its place arose the accepted role of the corporate lawyer as hired gun.³⁹

The demise of the governing class role is evident, for lawyers are no longer classified as disinterested, neutral professionals, detached from the interests of their clients. No longer commanded to discern and pursue the public good, the lawyer as hired gun, particularly the corporate lawyer, stands as advocate of private interest and big business.⁴⁰ Yet, although the corporate lawyer is no longer obligated to pursue the good of the people, business ethicists have yet to abandon the underlying principles of the governing class. Although she is a hired gun, the corporate lawyer is operating within an entity which must nonetheless adhere to a community mandated structure of corporate social responsibility.⁴¹ Business ethicists have carved a special ethical role for corporations within the community,⁴² and corporate lawyers, by default, must tailor their roles to conform.

36. Pearce, *supra* note 14, at 396 (quoting John R. Dos Passos).

37. See Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 544 (1985).

38. See Pearce, *supra* note 14, at 397 (noting that lawyers have become "captives" of their clients, rather than servants of the public good).

39. See Nelson, *supra* note 37, at 527-27 (noting that "it is unrealistic to think of corporate lawyers as neutral professionals who are detached from the substantive interests of their clients.").

40. Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229, 1243-44, 1253-54 (1995).

41. See generally Mayer, *supra* note 28.

42. See *id.*

B. The Special Ethics of Business

Corporate lawyers employed by corporations owe their duty of loyalty to the corporation as an entity, not to its corporate agents.⁴³ Tangibles allow one to easily identify the corporate entity: established suppliers, stockholders, employees and property locations all serving as the sum of the entity's whole. Notwithstanding its seemingly physical nature, unearthing the essence of a corporation, its moral center, has been problematic for those in the field of business ethics.⁴⁴

Lacking in a unified theory by both scholars and practitioners, business ethicists are still searching for conformity with which a discipline for corporate social responsibility can be adhered to⁴⁵. Consequently, metaphors of perceived business roles inevitably ensue, such as the business as community, or business as a mediating institution.⁴⁶ Scholars posing these theories view businesses and corporations as engines of moral societal norms, all sharing in the concept of "community" as a fundamental element in understanding and developing sound corporate ethics.⁴⁷

Leading contributors to the field of business ethics are Tom Dunfee and Tom Donaldson.⁴⁸ They argue that individual businesses, working groups within such businesses, or a wider consortium of businesses with shared interest, could form a community with "authentic moral norms."⁴⁹ Dunfee and Donaldson introduced the doctrine of "Integrative Social Contract Theory" ("ISCT") which calls on managers and corporate enterprises to examine the customs and mores of a particular

43. MODEL RULES OF PROF'L CONDUCT R. 1.13 (1983) (stating that a lawyer representing an entity does not become the lawyer for any of the entity's members, agents, officers, or other constituents, but rather represents the entity itself).

44. See Mayer, *supra* note 28, at 222-23.

45. See *id.*

46. See *id.* at 223 (explaining that because the moral center of a corporation is so difficult to locate, it is a stretch to identify the "personality" of a corporation, as one would identify the "personality" of an individual).

47. See generally *id.*

48. See *id.*

49. See *id.* at 216.

community to discover practical ethical norms for corporations.⁵⁰ Rather than attempting to apply abstract moral theories to prevalent ethical dilemmas, such as Utilitarianism, Kantian Deontology, or Aristotelian Eudiamonism, ISCT calls for a closer look and application of rules and standards already operating within existing communities.⁵¹ Precisely because the moral crux of a corporate entity is practically impossible to locate, an analysis of business ethics is incomplete without a proper understanding of the organizational context in which corporate behavior takes place.⁵²

Along similar lines, Tim Fort has introduced the notion that businesses should transform into “mediating institutions” where morality is best learned.⁵³ Suggesting that a free society is in need of a medium to facilitate social justice and a flourishing free market, Fort characterizes mediating institutions as structures between individuals and the greater society.⁵⁴ Specifically, the presence of mediating institutions foster societal recognition of community, reciprocity, solidarity, and the realization of self-interest through the concern for others.⁵⁵

Businesses as mediating institutions generate well-needed formulations of stakeholder theory and laws on fiduciary duties of corporate agents.⁵⁶ Recognizing that work has become an inextricable element of daily life, Fort claims that the necessity to mold corporations into mediating institutions is self-evident.⁵⁷ Noting that the unyielding pursuit of material happiness has fueled social and moral decline, Fort recognizes that mediating institutions are becoming phased out.⁵⁸ Societal norms may be

50. *See id.* at 216–17.

51. *See id.* at 222.

52. Michael B. Metzger & Dan R. Dalton, *Seeing the Elephant: An Organizational Perspective on Corporate Moral Agency*, 33 AM. BUS. L.J. 489, 574–75 (1996).

53. *See* Mayer, *supra* note 28, at 217.

54. *See id.* at 223 (providing examples of mediating institutions, including families, guilds, volunteer organizations or religious groups).

55. *Id.*

56. *See id.* at 225.

57. *See id.* at 223.

58. *See id.* at 225 (noting that “the current legal/economic structures are working against the transformation of corporate business into mediating

working against the transformation of corporate business into mediating institutions, for the influence of the lucrative corporate culture has led to the ever-increasing consumption of material and financial growth.⁵⁹ The explosion of executive pay was a result of social change permitting enhanced financial wealth, rather than pure economic forces of supply and demand.⁶⁰

The societal role of the business as an entity, however, is not subject to a clearly acceptable definition.⁶¹ Often, the ethics of the entity will necessarily differ from those of its individual agents.⁶² The goal of profit-making tends to fuel corporate agenda and to sustain corporate growth, corporate agents must tailor their actions to further profit-making ends.⁶³ As one ethicist has noted:

For an individual to maintain this activity, and to succeed against significant odds with hard competition, various virtues, values, and attitudes come to the fore . . . an energetic spirit, a "bold front," a "can-do" mentality, loyalty, commitment, optimism, positive thinking, self-control, self-discipline, competitiveness, team playing, growth, material success, concealment of one's strengths and intentions with regard to one's competitors, distrust of competitors, self-protection, survival, willingness to exploit the psychological and financial weakness of one's competitors, and the importance of winning.⁶⁴

Although a morally astute corporation cares about its

institutions . . .").

59. See Paul Krugman, *For Richer*, N.Y. TIMES, Oct. 20, 2002, at sec. 6., p. 62 (Sun. Edition) (noting that the explosion in CEO pay over the past thirty years, the building of houses for the superrich, with their size as not much smaller than the White House, and the reemergence of yachts and personal servants has fueled a re-concentration of income and wealth in the United States).

60. See *id.*

61. See Mayer, *supra* note 28, at 222–23.

62. See *id.* at 232 (noting that while a corporation may care about the state of the community, any such caring, or even sense of corporate responsibility will ultimately be overshadowed by the desire for accumulated profits).

63. See Rick Warzman, *Nature or Nurture? Study Blames Ethical Lapses on Corporate Goals*, WALL ST. J., Oct. 9, 1987.

64. George Brenkert, *The Corporation and Its Culture*, 5 BUS. ETHICS Q. 681–82 (1995)

customers, the quality of its product, and the community which supplies it with workers, tax concessions and limited liability, such caring is ultimately limited by the internal pressure for accumulated profits.⁶⁵ Inevitably, tensions between the goals of the community and bottom-line corporate agenda will arise.⁶⁶

Those invisible corporate pressures guiding corporate managers to circumvent public good for that of corporate profit may similarly induce corporate lawyers to satisfy the managers in the company that can hire and fire them. Corporations are no longer chartered to meet and serve public needs and corporate lawyers as hired guns are expected to pursue and defend corporate agenda: profit maximization.⁶⁷ Agreeing that corporations often make good people do bad things, Ralph Estee, former senior accountant with Arthur Anderson & Co., has noted that:

Even the most upright people are apt to become dishonest and unmindful of their civic responsibilities when placed in a typical corporate environment The culprit is not personal value but corporate culture People's personal values are getting blocked by the needs of the corporation.⁶⁸

Congress, however, is using its legislative power to go back in time. New legislation now resembles old governing class mandates

65. Mayer, *supra* note 28, at 232 (noting that Ben and Jerry's is an excellent example of a company with a strong sense of ethics, although such goodwill may ultimately be subject to takeover pressures or a perceived need to "go public" in order to survive in an ever changing market).

66. *Id.* at 233 (noting that this is consistent with the dynamics of general moral decision-making in groups where dominant values compel individuals to do things they would otherwise avoid doing).

67. See Pearce, *supra* note 14, at 397. Pearce quotes commentators who now liken lawyers to business people, with one prominent lawyer noting that:

Our whole moral atmosphere is corrupted by a passion for sudden wealth. Can the lawyer escape the moral influence which has proved so fatal to tradesmen, to bankers, to all indeed in whom this passion is roused? His occupation brings him into daily contact with them . . . How few are superior to the passion for mere wealth without the terrible sacrifice its gain may demand.

SAMUEL HABER, *THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS 1750-1900* 7-8, 223 (Chicago 1991).

68. Rick Wartzman, *Nature or Nurture? Study Blames Ethical Lapses on Corporate Goals*, WALL ST. J., Oct. 9, 1987 (quoting Ralph Estee).

of corporate lawyer's as defenders of the public good in order to reclaim the kind of norm-generating communities that Dunfee, Donaldson, and Fort have been campaigning for. Congress is redrafting corporate agenda and remolding the corporate lawyer's role in order to instill values and ethics that comport with new communal standards, focusing less on material wealth, and more on corporate lawyer accountability.

III. POLICING THE LEGAL PROFESSION

A. Sarbanes-Oxley Act

Congress has responded to the perceived gaps in the current corporate and legal regulatory framework. In an attempt to avoid future Enron and WoldCom fiascos, Sarbanes-Oxley is designed to make it more difficult for executives and corporate lawyers to mislead investors about company performance.⁶⁹ Sarbanes-Oxley has been called the most significant securities legislation in more than a generation.⁷⁰ Among its stated objectives, Sarbanes-Oxley aims to provide the financial markets with more timely, transparent information and enhanced shareholder protection.⁷¹ The provisions in Sarbanes-Oxley are by far "new" or novel to the legal profession.⁷² Rather, they are merely restatements of conduct previously characterized as illegal, but seldom enforced.⁷³

The Act requires lawyers to report evidence of a material securities laws violation or breach of fiduciary duty to the company's general counsel or chief executive officer ("CEO").⁷⁴ The lawyer need not "know" for a fact of a violation, rather, the reporting obligation would be triggered when a lawyer merely

69. See Stephanie Francis Cahill, *Corporate-Fraud Law Forces Lawyers to Be Whistle-Blowers*, 1 NO. 29 A.B.A. J. E-REPORT 1, Aug. 2002.

70. See Maco, *supra* note 2.

71. See *id.*

72. Kane, *supra* note 13.

73. *Id.*

74. 15 U.S.C.A. § 7245 (2003). This reporting requirement seems to apply to both in-house and outside legal counsel.

“reasonably believes” that a violation has occurred, is occurring or is about to occur.⁷⁵ In the event that chief legal counsel agrees about the suspected violation, the company would then be required to adopt remedial measures and sanctions, including any appropriate governmental disclosures.⁷⁶

Upon receipt of an appropriate response from head counsel within a reasonable time, the reporting lawyer will be deemed to have satisfied all obligations under the law.⁷⁷ In the event that the general counsel or CEO do not respond appropriately to the presented evidence, the lawyer must then report the incident to the company’s board of directors or audit board.⁷⁸ If the allegations are not investigated by the board at this stage, the lawyer has the option of making a “noisy withdrawal.”⁷⁹ To further compel disclosure, reporting lawyers will not be held in violation of the attorney-client privilege.⁸⁰

The terms of Sarbanes-Oxley provides that the Securities and Exchange Commission (“SEC”) is responsible for administering the new regulations to be in accordance with the statute’s terms.⁸¹ The SEC welcomed participation by the American Bar Association (“ABA”) in implementing the new SEC rules for lawyers

75. See *SEC Proposes New Rules for Attorneys of Public Companies*, 8 NO. 13 ANDRES SEC. LITIG. & REG. REP. 3, Nov. 20, 2002. However, ambiguities certainly abound; when should a layer report alleged wrongdoing? How much evidence triggers reporting? Is an uncorroborated report by a former employee, or a wild, unsubstantiated allegation considered evidence?

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* Although this provision is not codified as part of Sarbanes-Oxley, the SEC instructs lawyers faced with board inaction to disavow any documents filed by the agency, but to still look forward to protection from any alleged violations of the attorney-client privilege. *Id.* A “noisy withdrawal” may nonetheless become problematic for it places counsel in the role of a whistleblower, which can ultimately erode the confidential aspect essential to the lawyer-client relationship. *Id.* (quoting Harold Ruvoldt of Edwards & Angell).

80. *Id.* Where, however, the SEC is given the authority to exonerate lawyers from the confidential rules of the attorney-client privilege is not addressed within the Act.

81. 15 U.S.C.A. § 7245 (2003).

practicing before it.⁸² SEC Commissioner Harvey Pitt stated that the ABA's Corporate Responsibility Task Force ("Task Force"), created in March, was as "an excellent example of how a professional organization willing to work cooperatively and voluntarily with us can help effect sensible reform."⁸³ In issuing its report just days before President Bush signed the Sarbanes-Oxley bill on July 30, 2002, the Task Force urged amendments to the Model Rules to allow lawyers to more easily disclose wrongdoing by corporations they represent.⁸⁴

The Task Force recommended that corporate audit committees, or other independent directors of the board, meet regularly with general counsel in executive sessions.⁸⁵ Additionally, outside counsel should establish a direct line of communication with general counsel, with an expectation that outside counsel will inform the general counsel of violations or potential violations of law.⁸⁶ In concluding that outside directors, outside auditors, and outside lawyers have fallen short in providing "active and informed stewardship of the best interests of the corporation," the Task Force's agenda is to modify and strengthen the current body of ethical rules guiding lawyer conduct.⁸⁷

82. See Podgers, *supra* note 13; Cahill, *supra* note 69.

83. See Podgers, *supra* note 13.

84. See *id.*

85. See Villa, *supra* note 5.

86. See *id.*

87. See *id.* Included in its recommended changes to the Model Rules, the Task Force suggested a number of changes, including:

- Amending Model Rule 1.13 to make clear that the rule requires a lawyer to pursue the remedial measures outline in Rule 1.13(c)(1) through (3), including referring the matter to higher corporate authority, in a matter either related to the lawyer's representation (as currently provided in the rule) or that has come to the lawyer's attention through representation, where the misconduct by a corporate officer, employee, or agent involves crime or fraud, including violations of federal securities laws and regulations, and change both the text and comments of Rule 1.13 to encourage counsel to take action to prevent or rectify corporate misconduct (the Task Force believes that the current rule unduly discourages such action by counsel);

- Extending permissible disclosure of confidential information under Model Rule 1.6 to reach conduct that has resulted or is reasonably certain to result in substantial injury to the financial interests or property of another and require disclosure under Model Rule 1.6 to prevent felonies or other serious crimes,

B. Rules 1.13 and 1.6 of the Model Rules of Professional Conduct

What Sarbanes-Oxley attempted to address, and what the Task Force is aiming to reform, are perceived faults within the ethical rules for lawyers. Rule 1.13 of the Model Rules of Professional Conduct ("Model Rules") states that the lawyer's allegiance is to the corporation as an "entity" and not the constituents comprising the corporation.⁸⁸ As a result, lawyer deference to policy choices rendered by the corporation's constituents, regardless of prudence, is mandated.⁸⁹ Rule 1.13 vests broad policy objective determination within the domain of corporate agents and charges the lawyer with merely the technical and tactical responsibilities of carrying out such objectives, absent any suspicion of illegal or fraudulent agent conduct.⁹⁰

The detached lawyer's role to corporate agent decision-making ends where the corporate entity may be undermined through illegal actions likely to cause the entity substantial injury.⁹¹ Specifically, Rule 1.13 imposes a mandatory duty on corporate

including violations of the federal securities laws (the Task Force criticizes the current rule for being permissive rather than mandatory);

-Expansion of rules 1.2(d), 1.13, and 4.1 to reach beyond actual knowledge to circumstances in which the lawyer reasonably should know of the crime or the fraud;

-Improving the linkage among the Model Rules relating to a lawyer's obligations when faced with illegal conduct or break of fiduciary duty in representing a corporate client.

Id.

88. MODEL RULES OF PROF'L CONDUCT R. 1.13 (1983). The Model Rules have been adopted by a majority of states. *See* Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 B.Y.U. L. REV. 959, 962 (1991). Through the promulgation of standards of ethical conduct, the ABA is a significant voice in defining a lawyer's proper role within the legal system. *Id.* Although the ultimate authority to adopt ethical codes rests with each respective state, virtually all lawyers and courts agree that lawyers have some sort of a generic duty to the legal system as a whole, even though such duty is often at odds with the client, with the broad, amorphous "legal system" or public interest, and inevitably, with oneself. *Id.* at 963.

89. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13, COMMENT 4; Pietrusiak, Jr., *supra* note 11, at 225.

90. *See* Pietrusiak, Jr., *supra* note 11, at 225.

91. MODEL RULES OF PROF'L CONDUCT R. 1.13.

counsel to take action in preventing a corporate director or officer from engaging in illegal conduct that is "likely to result in substantial injury to the organization."⁹² Unlike the loose knowledge standard imposed by Sarbanes-Oxley,⁹³ the mandate of Rule 1.13 applies only if the lawyer has knowledge that a corporate agent is engaging in or intends to engage in misconduct.⁹⁴

Underlying this rule is the notion that constituents within the corporate entity are not considered the lawyer's "clients" outside standard corporate policy decisions.⁹⁵ Rule 1.13 allows lawyers to disclose statements of a corporate agent, even if made with a perceived sense of confidential protection, by reporting wrongdoing to the highest authorities within the corporation.⁹⁶ However, lawyers are not permitted to blow the whistle on the corporation itself.⁹⁷ If no one within the corporation is willing to act on the lawyer's disclosures, the lawyer faces only one option: withdrawal from representation.⁹⁸

However, the options for corporate lawyers faced with corporate wrongdoing were not always so limited. Prior to the ABA's adoption of the Model Rules in 1983, existing ethical rules permitted lawyers to disclose any prospective crime of a client, regardless of its degree.⁹⁹ The Model Rules once allowed a lawyer to "reveal the intention of his client to commit a crime and the information necessary to prevent the crime."¹⁰⁰ Ultimately, the rules were modified and Model Rule 1.6 limited disclosure where the lawyer is "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."¹⁰¹ As currently promulgated, Model Rule

92. *Id.*

93. *See supra* Part III.A.

94. The Model Rules defines "knows" as "actual knowledge of the fact in question." MODEL RULES OF PROF'L CONDUCT R. 1.13.

95. Pietrusiak, Jr., *supra* note 11, at 225.

96. MODEL RULES OF PROF'L CONDUCT R. 1.13.

97. *See id.*; *see also* Reich & Wirtner, *supra* note 1.

98. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13; *see also* Reich & Wirtner, *supra* note 1.

99. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(c)(3) (1980).

100. *Id.*

101. MODEL RULES OF PROF'L CONDUCT R. 1.6. In August 2002, a proposed

1.6(b) only permits lawyers to reveal confidential client information to the extent necessary to prevent the commission of a crime that is likely to result in death or substantial bodily harm.¹⁰² Rule 1.6(b) does not authorize lawyers to blow the whistle on a client who perpetrates, or plans to perpetrate, fraud likely to result in substantial *financial* injury to third parties.¹⁰³

The promulgation of the Model Rules, partly in an attempt to restore public confidence in the legal profession, seemingly provide clear and reasoned guidelines required for the self-regulation of the legal profession.¹⁰⁴ Model Rule 1.13 suggests a number of ways in which a lawyer, who is suspecting harm to an organizational client as a result of illegal agent conduct, could act, including reporting the illegal conduct to the organization's board, or a responsible constituent.¹⁰⁵ Nowhere, however, does the rule

amendment to Model Rule 1.6, permitting discretionary disclosure of financial harm to third parties, was announced at the ABA Annual Meeting, but ultimately withdrawn. *See* Pietrusiak, Jr., *supra* note 11, at 222. This proposal illustrates how The American Bar Association ("ABA") is constantly attempting to keep abreast of the rapidly changing legal profession. For example, the ABA Canons of 1908 regulated the ethical considerations between the general-practice lawyer and a flesh-and-blood client seeking advice on a specifically-defined legal issue. *See id.* However, as an abundance of lawyers shifted to representing corporate clients, the typical attorney-client model was challenged and the Canons became quickly outdated. *See id.* Responding to pressure to redraft ethical standards to bring them in accordance with contemporary legal work realities, in 1969, the ABA promulgated the Model Code of Professional Responsibility ("Code"). *See id.* Critics nonetheless argued that the Code was archaic in that it was based on the traditional assumptions of the attorney-client relationship prevalent in the Canons of 1908. *See id.*

In its first attempt to address the client-identity problems lawyers face when representing corporate clients, the ABA released the Code's Ethical Consideration ("EC") 5-18, informing lawyers employed by an organization that their allegiance extended to the entity and not to individual constituents, such as stockholders or employees. *Id.* EC 5-18 was nonetheless criticized for its failure to adequately define the corporate "entity" and for its failure to recognize the entity as a byproduct of its agents' actions, all of whom may hold different, and possibly conflicting interests. *See id.* at 223.

102. MODEL RULES OF PROF'L CONDUCT R. 1.6.

103. *Id.*

104. *See* Pietrusiak, Jr., *supra* note 11, at 228.

105. MODEL RULES OF PROF'L CONDUCT R. 1.13.

require a lawyer to follow a specific course of action.

However, public outrage towards recent corporate scandals, and the potential for corporate lawyer involvement in these scandals, has tested the effectiveness of these self-regulation policies as a means to maintain public confidence in the legal profession.¹⁰⁶ In principle response to the general consensus that the current self-regulation mechanism of the legal profession has failed, Congress has gladly assumed the responsibility of expanding traditional contours of corporate-lawyer liability for lawyers whose clients are implicated in corporate scandals.¹⁰⁷

IV. THE NEW MANDATED ROLE OF THE CORPORATE LAWYER

At first glance, Sarbanes-Oxley does not appear to alter the reality that a lawyer's duty of loyalty lies with the corporation as an entity, rather than with the entities' constituents. However, what it does appear to alter, or in fact what it actually begins to create, are duties of corporate lawyer loyalty to outsiders of the corporate entity.

Traditionally, lawyers are granted the luxury of talking freely with anyone within the company they represent about anything.¹⁰⁸ Now, corporate lawyers who take no action when confronted with a client's fraud will certainly face significant liability, and potentially expose members of the investing public to significant financial losses.¹⁰⁹ Sarbanes-Oxley revamps the scope of lawyer liability and now beholds lawyers to the investing public, market regulators and the government.

In practically deputizing lawyers as quasi-governmental inspectors, some argue that Sarbanes-Oxley cuts right at the heart of the attorney-client relationship.¹¹⁰ Although lawyers are

106. See Reich & Wirtner, *supra* note 1; Villa, *supra* note 5; Kane, *supra* note 13.

107. See Podgers, *supra* note 13.

108. See Renee Deger, *Lawyers Gird for Fight over New SEC Rules Biggest Fear Is That Attorney-Client Privilege May Be Compromised*, S.F. RECORDER, Nov. 7, 2002, at 1.

109. See Reich & Wirtner, *supra* note 1.

110. See Deger, *supra* note 108.

retained as hired guns for the corporate entity, those comprising the entity are its agents.¹¹¹ Corporate lawyers must interact and communicate with such agents in order to zealously advocate for the entity's interests.¹¹² Sarbanes-Oxley may likely chill the flow of communication between corporate executives and counsel,¹¹³ for corporate agents will fear that future litigation may compel lawyer disclosure. Consequently, a lack of candor and forthrightness by corporate executives in their relationships with their lawyers, and subsequent flawed legal advice may inevitably ensue.¹¹⁴

Although the Model Rules do not currently mandate that lawyers disclose confidential client information to prevent or rectify financial injury to third parties, Sarbanes-Oxley nonetheless facilitates prosecution by regulatory authorities and civil suits by third parties who have suffered damages against those lawyers who fail to disclose.¹¹⁵ Without the threat of lawyer disclosure, devious corporate agents will likely be more susceptible to stray from the law. However, expanding the latitude of lawyers who disclose corporate client transgressions will likely curb the wave of government regulation, and place lawyers in a better position to protect themselves from financial or criminal liability.

Disclosure requirements of Sarbanes-Oxley may even allow

111. See generally discussion *supra* Part III.B.

112. See generally Cahill, *supra* note 69.

113. Compare Statement of Koji F. Fukumura, co-chair of the ABA Litigations Section's Securities Committee (stating that lower level management "will be afraid of seeking advice, because the expectation they will have is the lawyer will immediately turn around and tell the CEO or general counsel. I envision a chilling of communications at the lower level, because a lot of times when you're working on due diligence or a transaction, the success of which may have a material impact on the financial condition of the company, you're not dealing with the CEO on a day-to-day basis. You're dealing with someone below that."), with Statement of Michael Roster, past Chair of the American Corporate Counsel Association (stating that "[w]e need a system where officers, directors, employees and companies feel very comfortable seeking in-house legal advice. It would be a terrible mistake to ever cut that off. Based on what I understand about the legislation, I don't think it changes much of that at all."), in Cahill, *supra* note 69.

114. See Cahill, *supra* note 69.

115. 15 U.S.C.A. § 7245 (2003).

corporate lawyers to better serve the corporate entity. A lawyer should be obligated to inform a corporate client's directors of ongoing illegal conduct that senior management fails to rectify. Directors have the right to be aware of illegal corporate conduct and consequences of that conduct. Since a corporation is run by or under the authority of its board of directors,¹¹⁶ it can be argued that a corporate lawyer should be ethically bound to communicate with corporate directors, the highest authority within a corporate entity, about matters regarding the entity's representation of which they should be keenly aware. Corporations should not employ their lawyer's services to pursue criminal or fraudulent conduct and reporting requirements allow lawyers to better comply with their ethical obligations when serving corporate clients.

Acknowledging that America lacks a national standard of legal ethics,¹¹⁷ Sarbanes-Oxley now calls for the SEC to determine appropriate regulatory conduct.¹¹⁸ As if adhering to a mandated, governmentally defined role wasn't novel enough, the underlying policy of Sarbanes-Oxley summons the legal profession to retreat to a role abandoned nearly a century ago. The guiding principle behind the reporting requirement of Sarbanes-Oxley comports with the original understanding of lawyers as America's governing class. The loyalty of corporate lawyers is now shifting—from the corporate entity to the investing public. The corporate lawyer who is aware of corporate scandal is now obligated to uphold the common good by disclosing information obtained in the course of the attorney-client relationship.¹¹⁹

The traditional understanding of the American lawyer's role as that of governing class is beginning to reemerge. In the wake of recent corporate scandals, the government is now beginning to legislate that a corporate lawyer's civic duty is to uphold societal public good. Lawyers operating within the confines of a business entity should nonetheless do so with corporate social responsibility in mind. Dunfee and Donaldson's ISCT theory¹²⁰ now has some

116. See DEL. GEN. CORP. LAW 141(A).

117. See McMorrow, *supra* note 88 at 962.

118. 15 U.S.C.A. § 7245.

119. *Id.*

120. See Mayer, *supra* note 28, at 217.

standing, for recent Congressional enactments are forcing corporations to mold business practices in conformity with communal norms.

Fort must also be equally satisfied, for the public now yearns for corporations to serve as their mediating institution between the suppression of corporate misconduct and the promotion of public good. No longer will corporate attorneys be allowed to turn a blind eye to questionable corporate conduct. While lawyers will unlikely be subjected to discipline for simple unawareness, they will no longer be permitted to ignore obvious corporate wrongdoing.¹²¹

Sarbanes-Oxley has served to satisfy Congress, investors and the community. Unfortunately, corporate lawyers may go to work confused and displaced, for they were accustomed to their role as zealous advocate for the corporate entity. The Model Rules further codified this accustomed view by assuring corporate lawyers that their sole loyalty did not extend beyond the corporate entity to outsiders.¹²²

CONCLUSION

American lawyers are no longer behaving like stewards of republicanism. The corporations they represent are turning into cutthroat capitalist enterprises, with executive compensation packages growing lavishly by the minute.¹²³ The obsession with increased consumption has led many seemingly sound institutions down the path of corporate collapse. However, communal expectations have changed, and no longer will corporate accumulation of wealth at the expense of public and investor financial loss be tolerated. Congress has responded to recent corporate debacles and is ready to police an industry that is perceived as failing to uphold its own policing standards.¹²⁴

121. 15 U.S.C.A. § 7245.

122. See generally discussion *supra* Parts II.B, III.B.

123. See Krugman, *supra* note 59.

124. "With Enron and WorldCom, and all the other corporate misconduct we have seen, it is again clear that corporate lawyers should not be left to regulate themselves no more than accountants should be left to regulate themselves."

The fall of Enron has fueled Congressional alteration of familiar corporate lawyer settings by imposing and defining new communal and public duties. The enactment of Sarbanes-Oxley will inevitably heighten the tension between the newly mandated corporate lawyer's role as defender of communal values and the presently accepted role as that of hired-gun. Once again, the public good is to trump financial self-interest or client loyalty.

Reich & Wirtner, *supra* note 1 (statement of Senator John Edwards of North Carolina during Senate debate over Sarbanes-Oxley).

Notes & Observations