

American University Law Review

Volume 52 | Issue 3

Article 5

2003

Panel Three: Ethical Dilemmas Associated with the Corporate Attorney's New Role

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Recommended Citation

Carle, Susan D., Jeffrey D. Bauman, Arthur D. Burger, Susan Hackett, and Sheldon Krantz. "Panel Three: Ethical Dilemmas Associated with the Corporate Attorney's New Role." *American University Law Review* 52, no.3 (2003): 655-692.

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Panel Three: Ethical Dilemmas Associated with the Corporate Attorney's
New Role

THE EVOLVING LEGAL AND ETHICAL
ROLE OF THE CORPORATE ATTORNEY AFTER
THE SARBANES-OXLEY ACT OF 2002

PANEL THREE: ETHICAL DILEMMAS ASSOCIATED WITH
THE CORPORATE ATTORNEY'S NEW ROLE

Washington, D.C.

Friday, November 22, 2002

MODERATOR:

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* * * * *

PROCEEDINGS

PROFESSOR CARLE: Hello everybody. Welcome to the afternoon session. I am Susan Carle. I teach legal ethics here at the Washington College of Law and am very pleased to be introducing our very distinguished panel for the symposium entitled, *The Evolving Legal and Ethical Role of the Corporate Attorney After the Sarbanes-Oxley Act*.

I understand that the morning panels, the second panel especially, explored some of the provisions of Sarbanes-Oxley¹ and the new SEC proposed regulations² that have been issued under Section 307.³ So, we have decided as a panel to skip over some of that and to start to discuss from several perspectives what this is actually going to mean for lawyers who are representing corporate entities.

Each of the panelists will speak for about ten minutes, raising their issues and concerns. I am going to let the panelists define the scope of their topics as they take their turn to speak. Then we hope to have plenty of time left over for interesting discussion and debate among different perspectives on these issues.

What I will do now is introduce all of the panelists and then we will jump right into it.

First of all, to my immediate right is Professor Jeffrey Bauman from Georgetown University Law Center. His specialty is corporate law. He joined Georgetown University Law Center in 1973 and before that spent four years at the Securities and Exchange Commission, and five years in private practice. He served on the Executive Council of the Securities Law Committee of the Federal Bar Association, on the Committee on Federal Regulation of Securities of the American Bar Association ("ABA"), and the Committee of Corporations, Partnerships and other Business Organizations of the D.C. Bar Association. His writings include several law review articles concerning 10b-5,⁴ and he also is the co-author of a casebook on corporations.

1. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (to be codified at 15 U.S.C. §§ 7201-7266).

2. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71670 (proposed Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205) (establishing standards of conduct for attorneys who represent issuers before the SEC).

3. Sarbanes-Oxley Act of 2002 § 307, 116 Stat. at 784 (to be codified at 15 U.S.C. § 7245).

4. 17 C.F.R. § 240.10b-5 (2002) (proscribing the use of manipulative and deceptive devices in connection with the purchase or sale of a security).

2003]

PANEL 3

657

PROFESSOR BAUMAN: Which I hope you will all use.

PROFESSOR CARLE: In the best of the traditions of the bar, Professor Bauman also serves in a number of public interest and public service capacities, including on the Board of Directors of the Washington Legal Clinic for the Homeless.

To his immediate right is Arthur Burger, who is a Director at Jackson & Campbell, P.C. where he chairs the firm's Professional Responsibility Practice Group and the firm's Ethics Committee. He is a member of the D.C. Bar Rules of Conduct Review Committee and frequently lectures and teaches on ethics issues for the D.C. Bar. He is an adjunct faculty member at George Washington University Law School and co-teaches a course entitled, "Ethics in Adjudication and Settlement." Mr. Burger represents attorneys in law firms on matters related to professional responsibility.

To his immediate right is Susan Hackett, who is the Senior Vice-President and General Counsel for the American Corporate Counsel Association ("ACCA"). She lectures regularly before a wide variety of legal audiences and is the author of numerous articles on professional and managerial topics.

She serves on the Board of Directors of Equal Justice Works and was a former member of the Board of the Minority Corporate Counsel Association. Her public service work includes serving as liaison to a number of ABA presidential commissions, on issues such as multi-jurisdictional practice, alternatives to the billable hour, and, on something many students in this room may be concerned with, loan repayment assistance programs. She also serves on the ABA Center for Professional Responsibility.

To her immediate right is Sheldon Krantz, who is a partner at the law firm of Piper Rudnick LLP. His practice emphasizes preventative and litigation services in corporate and white collar criminal matters. His particular areas of focus include environmental law, healthcare, Food and Drug Administration ("FDA"), exports, Racketeering Influenced and Corrupt Organizations ("RICO"), legal ethics, and legal malpractice.

He is a former Chair of the Criminal Justice Center of the ABA and has had extensive experience in white collar crime prevention and investigation. He also, early in his career, was a prosecutor for the Organized Crime and Racketeering Section of the Justice Department. He was a law professor at Boston University School of Law—where I hear from my husband that he was an excellent professor—and then was Dean of the University of San Diego law school.

I have the privilege of serving with Mr. Krantz on the D.C. Legal Ethics Committee and can say that he is a very deft and diplomatic committee member who has negotiated us through a number of difficult ethics issues.

PROFESSOR BAUMAN: I guess as the existing academic as compared to a former academic, I get to start.

Actually it has been your privilege, such as it is, to have heard from a number of fugitives from the real world, of whom I am the last to speak today. You have heard from Professor Karmel, Professor Painter, Professor Guttman, Judge Sporkin—although Judge Sporkin has retreated back to the real world. Sheldon is now back in the real world also.

This is a warm-up—this discussion of Sarbanes-Oxley. Another way of thinking about Sarbanes-Oxley is to think of it as the “Continuing Legal Education Relief Act of 2002.” I can promise you that there will be a large number of Continuing Legal Education (“CLE”) programs with people—large numbers of people paying huge amounts of money—to hear people like us who are very good at asking questions but end up with no answers.

MS. HACKETT: I’ll be taking all those registrations.

PROFESSOR BAUMAN: There you go. This is a Godsend. I do not have to get business because I am only an academic, but the people out in the practicing bar do. In case you think that I am jesting, I am old enough to remember when, in 1966-67, Judge McLean, Southern District of New York, decided the *BarChris* case.⁵ One thousand lawyers paid a huge amount of money to find out how to avoid liability under Section 11 of the Securities Act.⁶ We all knew that we, the Wall Street bar, were not going to be nailed for any kind of wrongdoing. It was “them”—those people who turned out opinions with mimeograph machines who were going to get nailed. Judge McLean instead said, “No, it’s the lawyers who are very much at fault for not doing sufficient due diligence.”⁷

5. *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968) (concluding that defendants’ gross overstatements of sales, profits, and customer orders; understatements of liabilities; and the failure to disclose officer loans, customer delinquencies, and application of proceeds constituted material matters on which the court could base liability).

6. See 15 U.S.C. § 77k (2000) (detailing the civil liabilities when a registrant omits a material fact from a securities registration statement or if the registration statement contains an untrue statement about a material fact).

7. See *Escott*, 283 F. Supp. at 692 (finding that an attorney of the law firm, which counseled BarChris Construction Corporation in matters concerning the registration of securities, “was obliged to make a reasonable investigation” but he failed to satisfy that obligation because “there [were] too many instances in which [he] failed to make an inquiry which he could easily have made . . .”).

2003]

PANEL 3

659

When *Texas Gulf Sulphur*⁸ was decided, a thousand people showed up at a Practicing Law Institute forum. I have no doubt that Sarbanes-Oxley will generate just this kind of response.

I want to start with my own background. As Susan said, I spent four years at the SEC, five years in private practice at Arnold & Porter, and I have been teaching since what my children refer to as the “pre-Civil War days,” for thirty years.

I also want to go back to some of what Chuck Davidow talked about in the first panel this morning. I think all of us practicing corporate and securities law bring with us our own set of cultural biases and assumptions.

I left the Commission in 1968. I was a relatively young lawyer. I had spent four years at a very exciting time in the Commission’s career, right after the legislation, the special study, it was very much a golden age. It is not just that as I have gotten older that things look better than they ever really were. It really was a great moment in the Commission’s history.

I believed very firmly in the Commission’s mission to act in the public interest and for the protection of investors, the mantra that runs throughout the securities laws.

When I went to Arnold & Porter, my mentor, the senior partner for whom I did most of my work, was Milt Freeman, who was also the author of Rule 10b-5 when he was at the Commission. Milt told me early in my stay that it had taken him nearly two years before he stopped referring to the SEC as, “we.” I think that a number of us, and it is probably still true, who worked at the Commission are fiercely loyal to the Commission and very much buy into many of the values that the Commission has over the years stood for—the protection of the investors, whatever that may mean.

It has not necessarily interfered with being a zealous advocate, but it certainly affects the way we have thought about the practice law. It does not make us better or worse, but I think it does make us somewhat different from people who have never had the “inside the building” experience.

I know that it is easy to focus on the gatekeeper role and either defend it or criticize it. But I think it was implicit in what we did, and I think it is still true that, if you work on disclosure documents, as distinct from giving opinions as to whether securities need to be registered, if you work on disclosure documents you are very much

8. See *SEC v. Tex. Gulf Sulphur Co.*, 401 F.2d 833, 842 (2d Cir. 1968) (determining that several individuals, including one of Texas Gulf Sulphur’s attorneys, participated in insider trading).

determining or advising on the materiality of disclosure. You are saying, “Yes, this has to be disclosed; no, this doesn’t.” You do it from the perspective of having as full disclosure as possible.

I have not read the Enron 10K, but when I listened to Chuck this morning describe it, I am prepared to believe it. There is Supreme Court law in *Mills v. Electric Auto-Lite*⁹ that talks about materiality as not simply getting the information out there, but getting it in a readable, meaningful way.¹⁰ You can not put something on page 30, something else on page 50, and something else on page 199, and say, “I disclosed it all.” It has to be more than that. I think that we as lawyers believe that, and, coming from the culture I came from, that was the way I acted.

Putting this in Sarbanes-Oxley terms, I am struck by what it means for the lawyers out in the trenches. I am not talking about, “Oh my God, I’ve discovered the greatest scandal in the world. Do I go to the board of directors?” I do not think that is going to happen very often. I think that’s going to be the very rare case. Rather, I think Sarbanes-Oxley is important, much as *BarChris*¹¹ and *Texas Gulf*¹² and some other cases—*Student Marketing*,¹³ that was another 1000 person CLE program—are important as wake-up calls, as reminders to the bar that we have to take what we are doing seriously.

I am struck by how difficult the questions are and how very much Sarbanes-Oxley leaves open—and I’ll be interested in what you all have to say—what seem to me very much the kind of warp and woof of daily practice.

As a young lawyer working on a registration statement, I would—well, take an insurance company. I would spend several days immersed in the State Insurance Commission reports, and I would learn about the life insurance business, whatever it was. I would go and I would spend time, however much time I needed, with top company officials getting all the data I needed to draft the registration. I would ask questions, and they would explain. I would say, “You know, I think we have to disclose that.” The president, the

9. *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970).

10. *See id.* at 385 (stating that courts tend to find materiality when the shareholder demonstrates that the proxy solicitation, rather than a misrepresentation in the solicitation materials, is responsible for the corporation obtaining the votes required to authorize an action).

11. *Escott*, 283 F. Supp. at 643.

12. *Tex. Gulf Sulphur Co.*, 401 F.2d at 833.

13. *See Wachovia Bank & Trust Co. v. Nat’l Student Mktg. Corp.*, 650 F.2d 342, 352-53 (D.C. Cir. 1980) (concluding that buyers of newly issued securities had an implied right of action under section 10(b) of the Securities Exchange Act of 1934 against the securities issuer and its accounting firm, as well as outside counsel).

2003]

PANEL 3

661

CEO, would put his arm around me, and he would say, “Jeff, you’re really a very smart, *young* lawyer.” Emphasis on the young. And he says, “Frankly I’ve been in this business for thirty years, you don’t understand. You really don’t. It isn’t material. If you knew it better, you would see that. We’ve thought about that.”

He was right, I did not understand. Unless I had been doing insurance law all of my life, I might never have understood. But if you go from insurance, to cattle feeding, to oil and gas, you do not understand anything. You understand just enough to get the registration statement done, and you move on.

If I had been a young lawyer and I really was suspicious or concerned—because I had been talked out of the disclosure, because I had been told by someone that I don’t understand, by someone who clearly does—am I now obligated to go up the ladder, starting with the senior partner in my firm, and then the partner has to make the decision to go to the general counsel of the client, and so on?

If I don’t do that, am I now subject to—. Am I now subject to liability under 307?¹⁴ Am I 307’ed or 102(e)’ed or whatever the phrase is going to turn out to be? I don’t know what the answer to that is.

There are a lot more questions than there are answers. I think all of us sitting here could talk at great length about all of the issues that were talked about in the first two panels, whether it is the desirability of federalization, federalizing the state ethics, making it mandatory, or you name it. We could all talk about it.

I asked the question in the first session, “if Sarbanes-Oxley, section 307 had been on the books, would Enron have come out any differently?” Without knowing what Vinson & Elkins knew, or said, or was asked to do, my instinct is no. It would not have changed anything at all.

I think the virtue of Sarbanes-Oxley, as has been the case from time to time, is to ask the question, “Where were the lawyers?” It serves a useful function. Whether it ought to go as far as it goes or how far it will go, I leave to my fellow panelists.

PROFESSOR CARLE: Thank you.

MR. BURGER: Thanks, Professor, for leaving it up to us.

PROFESSOR CARLE: I think we will just go right down the line.

MR. BURGER: Good afternoon. I come at this having a sort of natural sympathy for the lawyer who is on the ground as the Professor

14. See Sarbanes-Oxley Act of 2002 § 307, Pub. L. No. 107-204, 116 Stat. 745, 784 (to be codified at 15 U.S.C. § 7245).

said, having represented lawyers, and being one, and having faced many dilemmas. I am pretty comfortable with the traditional paradigm that the lawyer has full loyalty and confidence to the client, and that in return for that, the client freely has a flow of information to the lawyer. It is kind of a cozy relationship, and it works because the involvement of the lawyer will tend to improve the ultimate product.

That is the notion of the attorney-client privilege.¹⁵ It is that the free flow of information is considered beneficial. Yes, the person who holds the privilege would have some pretty good tales to tell as would a priest or a doctor or anybody else who has a privilege. But there is an ultimate benefit to it.

So, I am brought a bit kicking and screaming into this notion that the SEC has promulgated, but I am a little bit more optimistic that this may make sense. I have as a sort of an axiom, in order to keep my sanity, the mantra that I always have in addressing an ethical dilemma—there always has to be some place on the cat walk that you are allowed to place your foot. There has got to be someplace. Because the alternative is, obviously, a big fall.

There always has to be some right answer for a lawyer. For me, and this is as a member of the D.C. Bar Rules of Professional Conduct Review Committee where the rules get revised, is, whatever rule there should be for a lawyer, at least make it clear. At least point to where that spot is on the catwalk and then I know where to place my foot. Of course, that whole notion of there being a place on the catwalk gets awfully narrow when we are talking about a situation in which the lawyer as advocate instantly has to become watchdog based upon some ephemeral series of events.

The statute was quite brief in terms of what these rules ought to encompass.¹⁶ They really took these and filled in an awful lot of

15. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (“Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.”).

16. See Sarbanes-Oxley Act of 2002 § 307, 116 Stat. at 749-50 (to be codified at 15 U.S.C. § 7245) (stating that an attorney must “report evidence of a material breach of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company” and “if the counsel or officer does not appropriately respond to the evidence . . . requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors”).

questions. I think there are some answers to the questions, and there are very specific circumstances which mandate an outside lawyer to withdraw¹⁷ and circumstances with an in-house counsel as not having to resign for instance.¹⁸ But the length that you can fall from this catwalk has really gotten pretty steep. I do not know if anybody in the earlier panels that Section 205.6¹⁹ says that a violation by the lawyer of this section is subject to the same penalties and remedies as a violation of the Act.²⁰ So, that is a big difference for lawyers who have, up to this point, assumed that there was some degree of immunity for aiding and abetting situations.

The reason why I say it may make sense is two things. One, an SEC practice, more than other types of attorney representation, does involve a very high degree of the attorney actually participating in the product. The lawyer is right in there, in the trench with the client, inherently in an SEC-type practice. Two, I have to say that the SEC staff obviously put a great deal of work and a great deal of thought into pretty specific rules. To me, one of the most interesting provisions here is that it gives—this is very interesting in terms of the dynamic between lawyer and client. A client can fire a lawyer at any time for any reason or for no reason.²¹ That will never change. The client can fire the lawyer. But, the lawyer is permitted, if the lawyer thinks that they were fired for complying with these provisions, to take that fact to the Commission.²² That is a real power shift. The

17. See Implementation of the Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71670, 71689 (proposed Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205) (requiring the “noisy withdrawal” of an outside attorney who believes that a material violation is occurring or is going to occur and who finds the issuer’s response inappropriate, after reporting the breach to the issuer).

18. See *id.* at 71674 (to be codified at 17 C.F.R. § 205.3) (requiring an issuer’s in-house attorney who believes that a material violation is ongoing or is about to occur and will cause substantial injury, to disaffirm any work product associated with the violation but is not required to withdraw).

19. See *id.* at 71696 (to be codified at 17 C.F.R. pt. 205) (stating that an attorney practicing before the SEC, while representing an issuer, is subject to the same penalties of the Securities Exchange Act of 1934).

20. Securities Exchange Act of 1934, 15 U.S.C. § 78t-u (2000) (“The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found by the Commission, after notice and opportunity for hearing in the matter—(1) not to possess the requisite qualifications to represent others; (2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations issued thereunder”).

21. See MODEL RULES OF PROF’L CONDUCT R. 1.16(a)(3) (2002) (stating a lawyer shall not represent a client when the lawyer is discharged); *id.* R. 1.16 cmt. 4 (explaining that a client has the right to discharge a lawyer at any time, with or without cause).

22. See Implementation of Standards of Professional Conduct for Attorneys, 67

lawyer is in a position, a dangerous position, to fight back in a pretty big way.

PROFESSOR BAUMAN: There is a material omission in the statement.

MR. BURGER: It is a material—and, of course, the real crux of the issue will be that the lawyer will need to make the call, is there a material violation? If yes, there is a place on the catwalk. But, if the lawyer says, “No, there is not a material violation,” then there is a long way to fall. If the lawyer says, “Yes, there is a material violation,” there is also a long way to fall, but there is still a place on the catwalk.

MS. HACKETT: I am going to address the, “who is the client issue,” since that is an issue that is very near and dear to my membership at the American Corporate Counsel Association.

Before I do, I wanted to first of all make my caveat that we are still formulating our opinion at ACCA. We plan to be filing comments on this issue with the Commission, so what I am talking about today may or may not end up actually representing the opinion of the association on this. We’re still working on it.

PROFESSOR BAUMAN: It may not even be your opinion.

MS. HACKETT: Exactly. The other thing that I would note before I begin these comments is that, especially in listening to the discussion today and in thinking about this issue for the last several weeks and even months, I have gone back to look at the fundamental purpose of lawyer regulation and professional responsibility. I think it is important as we hold these dialogues and have these discussions to recognize that there is a difference between professional responsibility and lawyer regulation. There are some professional rules in the code that are about professional responsibility: 1.1—competence;²³ 1.6—attorney-client privilege;²⁴ 1.7—conflict of interest questions.²⁵ But when it comes right down to it, the vast bulk of the Model Code of Professional Responsibility is not really about professional responsibility, it is about lawyer regulation of the bar by ourselves.²⁶

Fed. Reg. at 71706 (to be codified at 17 C.F.R. pt. 205) (proposing that an attorney who reasonably believes that a corporate client fired him for reporting a material violation, may notify the SEC of this belief).

23. MODEL RULES OF PROF'L CONDUCT R. 1.1 (stating that a lawyer must provide competent representation).

24. *Id.* R. 1.6 (stating the general rule that a lawyer shall not reveal any information relating to the representation of a client).

25. *Id.* R. 1.7 (stating that a lawyer may not represent a client if that representation would be in conflict with the representation of another client except in a few explicitly stated circumstances).

26. *See, e.g., id.* R. 8.3 (stating that lawyers have a duty to regulate other lawyers).

2003]

PANEL 3

665

I think that it is important as we look at these questions to keep in mind, what is professional responsibility and what is lawyer regulation? Or put another way, within my membership, what is about the lawyers and what is about the clients?

Within the American Corporate Council Association, this is a very regular debate. We constantly remind ourselves as we are working on issues like this that we need to remember that this is not about novel contemplation for lawyers and their self-regulatory needs. This is also about the representation of clients and what they expect, demand, and have a right to expect from their lawyers.

I think the other thing I would note before we begin is something that came up a little bit earlier. There is an assumption out here that these rules are really applying to people who are within the corporate structure or in law firms representing clients and working on securities matters. I think that we do not know yet how far these rules will go, but I would be willing to bet you dollars to donuts that what is going to happen is that a lot more lawyers are going to be subject to these rules than you may be believing if you are thinking this is really about people who are working on 10Ks.

PROFESSOR BAUMAN: I agree with that. If you are an anti-trust lawyer, there are securities implications to the anti-trust work you are doing even if you are not working on the disclosure documents.

MS. HACKETT: Remember, these are going to go beyond securities laws. The SEC is mandating an “up the ladder” reporting obligation if an attorney reasonably believes that a material violation of securities law or breach of fiduciary or similar violation has occurred, is occurring, or is about to occur. Now that is a heck of a lot more than securities law for which the SEC is going to be requiring mandatory reporting. Breach of fiduciary duty could be about environmental law. I think you should keep in mind that this is not just about securities law or people who work on securities law. This is potentially far more reaching than that.

Having said that, I had wanted to talk a little bit about who is the client in order to bring to you some of the practical perspectives that I think we are hearing from our members and that we have been polling and doing some survey work on, so that you might hear what some of the buzz on the street actually is within the corporate community, the corporate legal community, on this issue.

First of all, everyone that we are talking to—when I am talking about this, I am generally talking about general counsel. I know that there are many other people involved in the legal business of in-house counseling beyond the general counsel. But, for all intents

and purposes, since the general counsel is the person who sets the tone within the organization's legal department and since it is that person who will determine the "up the ladder" crawl, I am generally focusing on what our general counsel are saying.

What's the buzz on the street? Everyone admits that we need to do something post-Enron to restore public trust in corporations and, more particularly, public trust in corporate financial results. The problem lies in understanding what solutions will actually address the concerns that Enron raises about the role of lawyers. In truth, it appears that the vast majority of post-Enron proposals are really designed to give more comfort to the public, but will do little practically to impact clients and may have a perversely deleterious effect on the likelihood that lawyers will be able to prevent such debacles in the future.

This is a common refrain that we are hearing right now within the corporate community. It is not that they are not willing to embrace reforms or that they do not believe that reforms are needed. But working around the Rules of Professional Responsibility or going through this kind of rulemaking process at the SEC is missing the point. It is not going to create an environment where Enrons will be prevented in the future.

If you talk to most sophisticated in-house general counsel, they will tell you that the SEC proposals, as they understand them at this stage, are not really very threatening in a practical manner. Many of them already live in highly regulated worlds and the concept of reporting up the ladder and even reporting up and out of the corporation are well-established and will not change the way they work with their management or staff.

The concerns that we are raising at ACCA tend to be concerns that we have as a bar association and on behalf of our members because we are involved in longer term questions about what is happening with the rules and where that will lead us in ten years than our members may be focused on right now.

Most folks within the in-house community that we are talking to do not feel overly threatened by what is being proposed because they do not think it is going to affect them. Indeed, most general counsel at larger companies are taking their cue from their management and are seeking to embrace changes in an effort to re-instill confidence in corporate America and live up to higher standards of responsible corporate citizenship.

2003]

PANEL 3

667

That does not mean that they are thrilled by Sarbanes-Oxley or the SEC's proposed regulations.²⁷ But, because Enron-like debacles are not widespread problems, in spite of the amount of coverage they receive and the size of these recent failures, I think that most assume that it is unlikely that they will ever have to grapple with a situation that would give rise to the reporting requirements of the Sarbanes-Oxley Act.

In a practical world, I do not know of a single general counsel who honestly believes that they would report up the ladder of their management, and even beyond their management to the board, and that any board in the Western world at this point would say to them, "We choose not to take your advice, we'd rather have an SEC investigation triggered." It's just never going to happen. So, while ACCA as an organization is likely to protest the diminution of the attorney-client privilege presented by the rules in their reporting out requirements, we are certainly not hearing our members telling us that this is a huge issue that they believe is really going to impact the way they practice. It will only happen in the organization where the general counsel is absent and has not really focused on this issue or where you are perhaps in a small organization that is very closely held and that does not really understand the realities of the environment.

What is wrong with these proposed rules then from the perspective of the bar? Even if you do not ever plan to report under the rules, there are a few issues that we believe in-house counsel are concerned about and that certainly as an organization we are taking a stand on. These are the issues that concern the bar because they make policy changes that go beyond, way beyond, the desire to change the practice of lawyers working in a few errant companies, and indeed change the design of our ethics rules.

John Villa, who we work with quite regularly and who practices at Williams & Connolly, puts it in a very succinct manner. He says that what these rules do is threaten to change us from focusing on prohibiting lawyers from getting involved in or facilitating client misconduct to creating rules that focus on making lawyers prohibit clients from committing misconduct. There is a significant difference. The model rules, traditionally, have been about making sure lawyers do not do illegal things.²⁸ Instead, these are changes that would make model rules for lawyers to make them responsible for prohibiting their clients from engaging in illegal conduct—a

27. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71670, 71670 (proposed Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205).

28. See generally MODEL RULES OF PROF'L CONDUCT.

policeman's role.

These proposals, therefore, offer a rather novel approach to the age-old in-house question of, who is the client? By making a lawyer a policeman, in order to get to that role, you have to do some pretty careful acrobatics. The technical answer to the question of who is the client is the entity. Most in-house counsel know that the practical reality is that the entity only works on a day-to-day basis through the flesh and blood actions of management and the board. They treat the management of the company as the day-to-day client as long as the management stays within the law. If the management acts inappropriately and will not change course, the lawyer reminds the managers in question that the client is actually the company and they start the climb up the 1.13²⁹ ladder of authority seeking redress.

If management is intransigent, the lawyer goes over their head to the board. If the board does not take responsible action, then the in-house lawyer has to consult the rules in his or her state to understand what the options and mandates are. We talked a little bit earlier about the 1.6 issues that are currently in play between the ABA, which has a model rule in conflict with what forty-one states have as their model rule for 1.6,³⁰ or for their rule 1.16.³¹

The SEC's regulations, however, say that the entity's best interests require the lawyer to report to the SEC, because management and the board cannot represent the client's interest if they are acting illegally.³²

That argument may be intellectually appealing, but it suffers from a few pesky faults. First, if the board and the management are no longer a valid representative of the client, who exactly is the lawyer

29. See *id.* R. 1.13(b)(3) (stating that if a lawyer knows that a person associated with the client organization has or is likely to violate a law, which will likely result in a substantial injury to the organization, then the lawyer has a duty to refer the matter to a higher authority, including the highest authority in the organization).

30. Compare *id.* R. 1.6 (stating a lawyer's duty of confidentiality, but *permitting* lawyers to reveal confidential information to protect the public's safety or to establish a defense in a suit against the lawyer), with *e.g.*, CONN. RULES OF PROF'L CONDUCT R. 1.6 (2002) (stating that it is *mandatory* for a lawyer to reveal confidential information if the lawyer reasonably believes it is necessary to prevent his or her client from committing a crime that the lawyer believes is likely to result in death or bodily harm).

31. Compare MODEL RULES OF PROF'L CONDUCT R. 1.16 (detailing a lawyer's duty concerning declining or terminating representation of a client), with *e.g.*, D.C. MODEL RULES OF PROF'L CONDUCT R. 1.16 (2002) (stating that a lawyer may withdraw from representation in certain situations, but not including the situation in which the lawyer believes that the client's objective is repugnant or imprudent).

32. See Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71690-91 (to be codified at 17 C.F.R. § 205.3) (stating that reporting the alleged material violation to the SEC is for the purpose of protecting the issuer's interest).

2003]

PANEL 3

669

reporting to and representing? That is actually a pretty difficult question to answer if you are the lawyer who is sitting in the shoes of the person who has now gone up the ladder and found an unresponsive management and an unresponsive board.

It certainly is not the SEC that you are representing, even though these rules of conduct create a very difficult conflict of interest for most lawyers who are now charged with either reporting to the SEC or continuing to maintain what they had traditionally thought were their client's interests. In an era when stockholders can number in the millions, is it reasonable to assume that the stockholders are the client so that the lawyer has the representation interest in the stockholders interest and should seek to avoid any action which might cause the company's stock to tumble? If the stockholder is the client and the management and the board are no longer the client, what will we be asking lawyers technically to do, protect the stock price? That is certainly a perverse answer that we do not want lawyers to be involved in. That is not at all what the goal of any of this legislation was supposed to be.

It seems indeed that the only answer is that the client ends up being the public interest. Now we have a situation, if you work this to its logical conclusion where we have really put the legal profession and our assumptions of what the attorney-client privilege and professional responsibility to the client are, we now have lawyers who do not represent the clients that they are retained by, but who represent the public. That is the definition of a prosecutor or a policeman—not the definition of a corporate lawyer.

I think that is where we are starting to run into some of the difficulties in figuring out how it is—the “who is the client” question. The way the SEC has answered it is going to play out in the corporate role.

By deputizing lawyers who are employed or retained by corporate clients to act as remedial policemen, what we are doing is diminishing the client's trust in the lawyer and his role. Rather, we should be looking for ways to increase the influence of lawyers as compliance counselors who specialize in preventive loss skills. Instead of deputizing in-house counsel as legal police to wipe out crime where it exists, the SEC's proposals could have the perverse effect of marginalizing the role of lawyers who could prevent crimes from arising.

What would likely happen is that, in order to practice preventive law, you have to be a welcome and respected participant in creating the corporate culture. You must be invited to meetings. You need to

be rewarded for your leadership with positions on strategic teams where company policies and decisions are being made. There is no way a lawyer can force herself into client activities where she is not welcomed or she is not trusted and expect to hear anything important. How much less effective and included will those counsel playing the potential role of deputy on-the-spot for the SEC be in performing their functions preventatively?

It is important to note that in this context “trusted” is not synonymous with “complicit.” Trusted in-house counsel are advisors who have the confidence and respect of their management, which includes standing up to management where actions under discussion do not measure up.

Indeed, our surveys of CEOs that ask what roles they wish their in-house counsel to play tell us that there was only one role that was more important to the CEO for the in-house counsel to play than that of ethics advisor and that was as legal educator.³³ The roles that lost out on those surveys were roles that included acting as a personal consultant to the CEO or representing other members of management on specific issues.³⁴ Clients want their in-house lawyers to prevent legal problems from arising. That is why they hire them to be full-time employees, rather than retaining them as outside counsel only after a legal mess hits the fan.

When I came to work at ACCA, I learned what it is that makes the thousands of in-house counsel unique from their outside counterparts. It is their primary interest in keeping the client’s milk in the glass and not cleaning it up or reporting it after it has been spilled. Preventive loss practices are premised on the confidence of the client in the lawyer as an effective and trusted part of the corporate team. Post-Enron, this kind of preventive focus and service will be twice as desirable for the public and far more desirable than the too late service of a lawyer who reports wrongdoing already done.

ACCA’s attention is going to be focused on creating and disseminating compliance-based resources for corporate lawyers to help them target the needs and preventive concerns of their clients. We are developing a full line of CLE initiatives,³⁵ and also a variety of

33. See *Special Report: The View from the Top: CEOs Give Their In-house Counsel an “Excellent” Report Card*, ACCA DOCKET, May 2001 (listing the top eleven roles of in-house counsel given by corporate Chief Executive Officers), <http://www.acca.com/Surveys/CEO/> (last visited Mar. 3, 2003).

34. See *id.*

35. See Am. Corp. Counsel Ass’n Website, *CLE Online-Long Distance Learning* (listing a plethora of online programs aimed at aiding and assisting in-house counsel), at <http://www.acca.com/education/cle.php> (last visited Mar. 3, 2003).

2003]

PANEL 3

671

collected best practices, Website resources, and what we call “bully pulpit” and mentoring outreach that will help lawyers help clients prevent future Enrons.

We think it is misguided to focus so much attention on changing the Model Rules of lawyer conduct when we could be offering the means to achieve realistic and workable solutions that foreclose ethical lapses in modern corporate cultures. When we comment to the SEC on these issues, we plan to remind the SEC that they are making some very important choices when they publish these rules. We believe it is unwise to change the rules of legal ethics without an established connection between those changes and the corresponding behaviors that are of concern. Absent such evidence of a corresponding behavior change, we believe it is far wiser to spend our time focused on how to prevent future Enrons from arising.

Lawyers are and should remain vital parts of the corporate team who can function to prevent corporate criminal activity by virtue of their role as trusted advisors. No one calls a policeman until after the crime is committed.

MR. KRANTZ: My role here today is going to be a little bit different. I am a white collar criminal defense lawyer, and I will say at the outset that I am an extremist on the sanctity of the attorney-client privilege. Let me tell you why by using an example, a personal example.

Let’s say hypothetically that Dean Andy Pike is under criminal investigation for a Ponzi scheme. He comes to my office. My view as a criminal defense lawyer is that I need a client to tell me everything that he can about his situation so I can figure out how to best represent him. If I tell my client, Dean Pike, “Listen you can confide in me, tell me everything so I can represent you effectively,” and he does, and then I also serve as a surrogate of the government to turn over miscreants, you can see the impact that would have on Dean Pike.

But the other illustration is, let’s say I’m more forthcoming as a lawyer, and I say to my client, “Listen, I want you to tell me everything there is that I need to know to represent you, but on the other hand I may confide in the government in terms of what you tell me.” What is he going to do?

Now it seems to me—and I will get to the point of how this plays out in a corporate context—it frames the issue of why the attorney-client privilege is so important. I would say at the outset that I agree with other members of the panel—if you take a look at Sarbanes-

Oxley or the proposed SEC rules,³⁶ for the most part, they do not raise the fear that some of us who really care about the attorney-client privilege would have up to this point. But I want to look down the road a few years. Corporations are not the favorites of either members of Congress or even the American public. It is easy to hate corporations and, by the way, it is easy to hate lawyers.

On that basis, and we have certainly seen evidence of this in the area of street crime over the period of the 1990s, once Congress gets going, they will keep going. You can begin to anticipate what additional requirements may be imposed upon lawyers and on corporations just as a political matter. So, I am less concerned about today. I am very concerned about where we are going to be going tomorrow.

I want to give you one illustration of what is going on right now that is a precursor, in my view, of the problem. There is something called the "Holder Memorandum."³⁷ Eric Holder was the former Deputy Attorney General of the United States. During the Clinton Administration, the Department of Justice issued the Holder Memorandum, which provided guidelines to federal prosecutors on situations when you prosecute companies or when you do not.³⁸ This is a very important set of guidelines for federal prosecutors.

There is a provision in the Holder Memorandum that says the following: when someone comes in on behalf of a company and attempts to convince you that you should not prosecute the company, or comes in to talk to you in plea negotiations, it may be appropriate for you to require waiver of attorney-client privilege as a condition of having those discussions.³⁹

I want to tell you from personal experience, including an experience that has been going on the last four months and even was existing this morning before I came here, that I am in the midst of talking to a U.S. Attorney's office to try to convince that office that my client is not guilty of any crime and they ought to decline prosecution. The government's response to me has been that the way you do so is you waive attorney-client privilege and you give us

36. See Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71670 (to be codified at 17 C.F.R. pt. 205).

37. See Memorandum from The Deputy Attorney General, to All Component Heads and United States Attorneys (June 16, 1999) (discussing the issue of bringing criminal charges against corporations), at <http://www.usdoj.gov/criminal/fraud/policy/chargingcorps.html> (last visited Mar. 17, 2003).

38. See *id.* (delineating twelve principles to be referenced when determining whether to prosecute corporations).

39. See *id.* ("[T]he prosecutor may request that the corporation waive the attorney-client and work product privileges").

2003]

PANEL 3

673

every document, the results of your internal corporate investigation. Then we will decide whether or not it is appropriate either to decline prosecution or to come up with a minor sentence that will not, in effect, bankrupt your company.⁴⁰

This is not kind of an isolated situation. As I talk to members of the white collar criminal defense bar around the country, there is a common theme in U.S. Attorney's offices that we need to get waivers of attorney-client privilege because these lawyers are hiding something, the companies are hiding something, and frankly, it is a very easy way to investigate a crime.⁴¹

Let me just tell you very quickly what the implications are of this besides the impact on the sanctity of the attorney-client privilege. It really picks up on something Susan said, which is, if the role of responsible companies today is to try to get to the bottom of problems when they hear allegations, either through a hotline or through a subpoena, that there is a problem—a responsible company wants to get to the bottom of it. When they retain outside counsel, the direction to outside counsel is, get to the bottom of it, so we can make informed decisions about what we have to do internally, whether we have to provide information to the government.

The impact of requiring waivers of attorney-client privilege or extending out the requirements of Sarbanes-Oxley or SEC rules will be this, very simply. Again, if I go into a company saying, "I've been retained to engage in this internal investigation, and by the way, I either tell you or you find out from some other source, that what you provide to me in the form of documents and statements will be turned over or potentially could be turned over because the government is going to require it," the impact of that is that witnesses inside a company are not going to level with us when we are doing our internal investigation. People stop taking notes. They don't write things down. They destroy documents, which makes it impossible for a company to demand accountability from its personnel and ultimately makes it difficult for companies to engage in self-policing.

Because at the end of the day, if corporations are going to behave, it is largely because of responsible management and lawyers who give them the kind of advice other people on the panel were talking about. If we are denied access to the truth because of rules that are developed by the government, which in effect discourage honesty in

⁴⁰ See *id.*

⁴¹ See *id.* Note that the Holder memo was widely distributed to "All Component Heads and United States Attorneys." *Id.*

the process of investigation, we are in serious difficulty.

As I said, I am less worried about today. I am very worried about where we are going and its impact. I would say, as a final matter, I can understand the attitude that lawyers who participate in criminal conduct in effect and then get to hide behind the shield of the attorney-client privilege is a troublesome factor. I think that in whatever system you devise there are going to be lawyers who misbehave.

But I want to tell you also that the federal government, in my experience is not afraid to prosecute lawyers who engage in misconduct and for the most part, there will be ways to deal with those problems. With that in mind, I think, Ms. Chair, we can open the thing up for questions.

PROFESSOR CARLE: Thank you all very much. I think that was a wonderful introduction to the many issues we can talk about. As I suspected, I think that there is a lot of similarity, especially as we got closer to the end of the table here, of situated perspectives of people who represent either in-house or act as outside counsel to corporate entities.

I want to sort of get things started by playing devil's advocate in a way—thinking about it from the other side. My situated practice perspective before becoming a law professor was as a plaintiff's lawyer and a union side labor lawyer. I have been on the other side of this question about attorney-client privilege and what kinds of facts can be withheld in an investigation situation by cloaking them in attorney-client privilege or by bringing in counsel to investigate wrong-doing.

My question is, what do you all think about the possibility that there is something seriously wrong with the legal culture surrounding legal compliance counseling by corporate lawyers in the sense that—and I have certainly seen this with management-side labor lawyers—instead of counseling compliance with the spirit of federal regulation, the culture has become one where the counseling is to go as far as you can to the line? To disclose as little as possible, to find a way to massage the situation or massage the facts in a very aggressive kind of anti-regulation perspective.

The SEC is feeling frustration about this. Because there is not a culture of compliance, they feel that they need to figure out some way to mandate the culture of compliance, and its best targets are the lawyers who, of everybody representing the organization, should be the ones who are most concerned about preserving the spirit of the statute.

2003]

PANEL 3

675

I think this goes back to Professor Bauman's earlier discussions about a culture that existed, at least among lawyers who had formerly worked for the SEC, of really caring about preserving the spirit and the intent of the statutory structure. Is that gone? Is that really what the problem is here? I will just open it up for everybody.

PROFESSOR BAUMAN: I guess I wonder, particularly listening to Sheldon, whether your question lumps together litigation and transactional work. I understand that ultimately transactional work can wind up in litigation. As my first boss, Manny Cohen, who was then the Chairman of the SEC, used to begin his talks by saying, "Yes, securities laws are criminal statutes," and indeed they are. A willful violation is that. But, for the most part, clients do not come to transactional lawyers doing the deal the way they come to Sheldon.

Susan, when you talk about compliance, I wonder whether your question looks more to transactional compliance. In what context are you asking the question?

PROFESSOR CARLE: I think that is a very good point. One of the problems is that we have the same set of rules that apply to "after the milk is spilled" representation, representation post wrongdoing. We apply the same rules to those lawyers as we do to the lawyers who are supposed to be keeping the milk from coming out of the glass in the first place.

Maybe what the SEC is saying here is, to the extent that you are situated as a lawyer to prevent the problem, you need to be a lot more aggressive than you seem as a matter of your professional culture to feel you need to be at this point.

MS. HACKETT: I think that it is actually even broader than that. I mean you have gone from terms of litigation versus litigation and transactional work. I would take it even further. I think the bulk of what I see in-house counsel doing these days does not even fall into either one of those categories. It falls into something that us more broadly termed "counseling." It may not be around any specific deal. It may not be around any specific matter. It may not be in response to milk that has spilled. It may be the day-to-day workings that have functional strategic teams working on the development of products, working on the provision of services, working on the administration of the corporation's assets, the personnel and everything else.

Lawyers are involved in an in-house basis as managers in the same regard, or in the same way, that other corporate managers are involved. They have a business function to perform. The in-house counsel, if they are doing their role well in the modern corporation, does not wait for the client to request advice. That person is in the

trench every day developing the product and service, and they wear a business hat almost as often as they wear a legal hat. Another ethical problem is the issue of when are you doing business versus when are you acting as a lawyer? One that we have a lot of \$1000 seminars on if you are ever interested in attending. But all that aside—

PROFESSOR BAUMAN: You are into teaching.

MS. HACKETT: It is a pattern here, isn't it? I think it is important to note that the role of counseling has dramatically changed, and I think you have hit it right on the head, Susan, by noting that the same rules are created to try to regulate all of that behavior. They were written in the context of assuming a litigation, state court based, not federally legal mandate. They were written in an era when lawyers waited until clients came to them to request advice.

I think that we, at least within our organization, have come to the informal conclusion that one of the things we have to work on is proposing new Model Rules for the attorney-client privilege. I think there have been gross abuses of how the attorney-client privilege has been used inappropriately in recent years, at least in the ways we believe that lawyers are supposed to function in today's organizations.

Having said that, I still believe that it is the linchpin or the foundation of the lawyer-client relationship and should not be diminished. It is just necessary for us sit down and have a very informed dialogue, away from the heat of this kind of post-Enron corporate financial debacle, to talk about what the attorney-client privilege should be and how it should be used in today's environment—decide how it should be regulated in a way that is not in response in Sarbanes-Oxley.

MR. KRANTZ: Susan, if I could just add one comment. From my experience, even though I am primarily focused on litigation, we do a lot of preventive compliance work too that we have brought into companies to try to steer them through things.

I think the tensions over the last ten years that have created some of the problems are: one, there is no doubt there has been corporate greed over a good number of years and the question is how do you control people who want to make as much money as they can because this is America? Versus another stress, that is, in effect, we are over-regulated in many ways in this country. We have complex regulations for every aspect of business life, whether it is environmental regulations, or healthcare regulations, or government contract regulations, where even very sophisticated counsel and companies cannot understand what the rules are. Violations of those rules used to be dealt with as civil matters. They have now become criminal

2003]

PANEL 3

677

matters with virtually strict liability connotations.

It is within that spirit that we begin to address some of these problems. I think to a certain extent there are companies or people in companies up to no good. In other situations, there are people that simply do not understand the rules, and they are trying to get guidance. I think you really have to think about issues with that in mind.

MS. HACKETT: Let's start first with the fact that most lawyers do not understand the rules of their own profession. We are beyond talking about regulation. Since this is a law school program, let's begin at the law school level.

My members consider themselves to be very ethical people and people who are very proud of their commitment to professional responsibility in the way that they represent their clients. I know from my work that most of them are not intimately familiar with the Model Rules or the rules in their states or the rules in the many states in which they are practicing where they are not even admitted.

I think it is an increasing problem that we look at addressing these kinds of issues through changes of the regulations which lawyers themselves admit that they do not pay attention to anyway. It seems almost that, if you want to be sure that there will be no change in the way that lawyers behave, the best way to do it might be to change the rules of professional behavior since most lawyers learn what they know about ethics in a practical manner, not by reading the rules every day. Most of them do not have a copy of the rules, do not know where they could find a copy of the rules, and they learn what they learn at the hands of the people who trained them.

That starts in law school and it goes on through your journeyman type experiences whether it is in a government position, in a law firm, or working in a clerkship. Some people get great ethical training, some people get seat of the pants ethical training, and some people never think twice about it. But very few of them from any of those categories have any knowledge of what the rules actually say.

That was pointed to earlier by the person who talked about how 1.13 is not seen as the mode of reporting within most organizations, because most lawyers who work with organizational clients do not know what 1.13 says. They are not bad people. They do not consider themselves unethical.

PROFESSOR BAUMAN: Could I follow-up on that?

PROFESSOR CARLE: Yes, sure.

PROFESSOR BAUMAN: I guess I am interested in listening to what the two of you just said. At the extent to which decisions like

Delaware's Chancellor Allen's decision in *Caremark*⁴² or the federal sentencing guidelines⁴³ have set up the kinds of cultures that lean more toward up the ladder reporting, setting up procedures within a company for legal compliance systems and reporting. In a sense they do not blunt section 307, or the SEC's rules, but they make the SEC's rules not the only story that is going on. To what extent does what the SEC's doing, apart from the going to the Commission part, change much?

MR. KRANTZ: First of all, I think that the statement that the SEC's rules are not dramatically different than 1.13 makes no sense. Because if you take a look at the process—

MS. HACKETT: Yes, it is a horrible rule.

MR. KRANTZ: It is very difficult—

MS. HACKETT: Its intentions are good, but it is really a very bad rule for purposes of guidance.

MR. KRANTZ: It is very difficult to understand. In large public companies the thought that you would be working your way up the ladder from president to board; it just would not happen in most situations. As a practical matter, I do not think that the fight that goes on is going to focus on how many steps along the way within a company you have to go.

Let me just give you another illustration about how ridiculous 1.13 is, because most of the companies in America are relatively small companies. I have a situation now where there is a president of the company and the sole stockholder. He asked me to do an internal corporate investigation. I did the investigation and what I determined is, he is the problem.

First of all, my view is, I guess I have to report that to him. Then the question is, do I then discuss the fact that he has to step aside when he is the sole owner of the company or I am going to somehow

42. See *In re Caremark Int'l*, 698 A.2d 959 (Del. Ch. 1996) (approving a proposed settlement agreement in a suit involving claims that Caremark's Board of Directors breached their fiduciary duty of care). Chancellor Allen approved the proposed settlement agreement after stating that the claims asserted against the Caremark Board at this point were very weak, and that there was a low probability that the board breached any duty. *Id.* at 961. The settlement required Caremark to establish a "Compliance and Ethics Committee" consisting of four directors, two of whom had to be non-management, to meet a minimum of four times a year and report to the board annually. *Id.* at 966.

43. See generally U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1, 2C1.8, 2E5.3, 2J1.2, 2T4.1, 3D1.2, 5E1.2 (2002 & Supp. 2003) (amending the sentencing guidelines under emergency amendment authority granted by Congress and implementing provisions under the Sarbanes-Oxley Act and the Campaign Finance Reform Act through establishment of penalty levels and individual fines for various white collar crimes, violations of permissive election practices, etc.).

2003]

PANEL 3

679

turn him in?

PROFESSOR BAUMAN: This is the Lord Chancellor and—

MR. KRANTZ: There are variations of that where you are dealing with very small companies, or family operated companies, in effect, where cousins have to decide what to do with somebody who is related to them and is also the president. And 1.13 just—again the SEC rules would not deal with that.⁴⁴

MS. HACKETT: The SEC rules would not cover that because it is not a public company.⁴⁵

MR. KRANTZ: It is not a public company, right.

PROFESSOR CARLE: We have a question out here in the audience.

SPEAKER: I just want to help the Commission here. We are going to be writing comment letters, and I am trying to pinpoint where the concerns are about these rules. There are three areas. One, the mandatory report to the board if senior management won't do anything about that. What I am hearing is that most of the lawyers are going to want to do that anyway, and I have not heard any credible argument as to why the board of directors of a client should not be told that senior management won't rectify a violation.

MS. HACKETT: They should be told that. There is no question.

SPEAKER: Okay. That is the first part. Second part is the

44. See MODEL RULES OF PROF'L CONDUCT R. 1.13 (2002) (listing a lawyer's responsibilities when the client is an organization). Rule 1.13 contemplates a situation in which the lawyer represents an organization with a multi-tiered management system, rather than a small or family run company. For example, if a lawyer discovers a violation of a legal obligation to the organization, Rule 1.13(b) provides measures the lawyer might take, such as:

- (1) asking for reconsideration of the matter;
- (2) advising that a separate opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

Id. R. 1.13(b).

45. See U.S. Securities and Exchange Commission Website, *The Laws that Govern the Securities Industry* (stating that public companies must register with the SEC under the Securities Act of 1933 in order to offer securities to the public, and that companies with more than \$10 million in assets whose securities are held by more than 500 owners must file annual and other periodic reports under the Securities Exchange Act of 1934), at <http://www.sec.gov/about/laws.shtml> (last modified Aug. 8, 2000). When an attorney represents a public company that must either register or report under the Securities Act of 1933 or the Securities Exchange Act of 1934, section 307 of Sarbanes-Oxley will provide the minimum standards of professional conduct for those attorneys who appear and practice before the SEC. See Frederick K. Koenen, *Sarbanes-Oxley and the SEC: New Dilemmas for Attorneys*, 17 No. 3 WHITE-COLLAR CRIME REP. 17, 17 (2002).

mandatory noisy withdrawal.⁴⁶ It seems that is what most lawyers would want to do, anyway, to get the heck out of there and disaffirm any documents they had given to the Commission that had their name on it and that just simply now they know are not true. Is that a concern?

And/or the third part, which is where the SEC just says the lawyer may—does not have to—disclose outside the client organization to the Commission, which is what as you correctly point out, forty-one states permit.⁴⁷ I think two, New Jersey and Florida, actually require it if there is a client crime—to present information necessary to prevent a client crime.⁴⁸ A very few go along with the ABA rule which is only if there is death, grievous bodily injury at stake, and/or the lawyer's fee isn't paid under Model Rule 1.6.⁴⁹

46. See Implementation of the Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71670, 71706 (proposed Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205) (requiring an attorney who has reported evidence of a material violation to the issuer, and has not received an appropriate response, to: withdraw from representing the issuer; give written notice to the Commission of the withdraw; and promptly disaffirm any document that the attorney has prepared and filed with the Commission that may be materially false or misleading).

47. See Larry P. Scriggins, *Legal Ethics, Confidentiality, and the Organizational Client*, 58 BUS. LAW. 123, 128 (stating that forty-one states permit or require disclosure outside the client organization to prevent a client from committing a fraud that constitutes a crime, while eleven also permit or require disclosure of non-criminal fraud if it is "likely to result in substantial injury to the financial interests or property of another").

48. See Jolyn M. Pope, *Transactional Attorneys—The Forgotten Actors in Rule 1.6 Disclosure Dramas: Financial Crime and Fraud Mandate Permissive Disclosure of Confidential Information*, 69 TENN. L. REV. 145, 173 (2001) (discussing various states' approaches to the lawyer's disclosure of client's confidential information). The professional responsibility codes in Florida, New Jersey, Virginia, and Wisconsin all provide that an attorney must disclose criminal fraud. *Id.* Only Virginia and Wisconsin's codes provide that an attorney must disclose non-criminal fraud. *Id.*

49. See *id.* at 158 n.88, 173 (citing the states that track the ABA rule as Alabama, Delaware, Kansas, Kentucky, Louisiana, Missouri, Montana, Rhode Island, South Dakota). Additionally, the District of Columbia follows the ABA rule. *Id.*; see also MODEL RULES OF PROF'L CONDUCT R. 1.6 (listing situations under which a lawyer may disclose client's confidential information). Rule 1.6(b) reads:

- (b) a lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
 - (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
 - (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceedings concerning the lawyer's representation of the client.

The 2002 version of Rule 1.6(b), adopted by the ABA House of Delegates, but not currently adopted by any state reads:

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

2003]

PANEL 3

681

PROFESSOR BAUMAN: That will also lead to death and bodily harm.

MS. HACKETT: Handling those two together, the issue that they may report outside of the corporation and the issue of the disaffirmation of any information reported to the SEC. I understand what you are talking about, but both of those situations involve what I would say is a violation of the attorney-client privilege.

It is impossible for a lawyer to go to the SEC and say to them, "I am not divulging anything that is attorney-client privileged or in any way violating the trust of my client by telling you that I disaffirm everything that has appeared in this company's 10K for the last five years."

Are those secret code words that if I say I am withdrawing from representation for professional reasons or I am disaffirming information filed that we do not all know what that means? It means that the SEC should trigger an investigation. They should launch an investigation.

SPEAKER: Okay. But you have not lost the privilege. I do not think there is a court in the land that—

MS. HACKETT: Well, practically, I think you have lost the privilege because there is not a single organization out there that is not going to say that the lawyer has violated the trust of management by reporting that there is illegal activity going on at this company.

SPEAKER: The privilege is different. It is that a court would actually say, "Now that all the documents that the lawyer has that are communications between the lawyer and the client are now discoverable."⁵⁰ I do not think that noisy withdrawal sacrifices the privilege at all under the rules of evidence. Correct me, if I am wrong.

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- (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to secure legal advice about the lawyer's compliance Rules;
 - (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
 - (4) to comply with other law or a court order.

50. See EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE* § 1.3.1, at 25-26 (Aspen Law & Business 2002) (explaining that while Rule 1.6 governs a lawyer's ethical duty to keep the client's confidences, this does not govern the judicial application of the attorney-client privilege where a judge may issue a subpoena against a lawyer to reveal certain client information).

PROFESSOR CARLE: As an ethics professor, I just want to introduce the distinction between the evidentiary privilege⁵¹ and the ethical mandate of confidentiality.⁵² So we could just switch and talk about that, the ethical issue of keeping a client's information confidential.

SPEAKER: Yes, see I do not think that you have lost the privilege when you do the noisy withdrawal. The ABA under its own Model Rules even allowed, under a comment to 1.6, the noisy withdrawal.⁵³ It says that it is not an ethical violation. Even the ABA said that it is permissible.

You do lose the privilege when you go to the SEC and do what they say you may do which is to describe what happened. Now you have lost the privilege. I think the SEC is wrong to say you have not when you go. That is the third part of that which is the optional disclosure.

MR. KRANTZ: I can understand the distinction that you are making. But you are still talking about a situation where a lawyer is becoming an instrument to be used against a client.

It is a fundamentally important question. Maybe you are right. Maybe it goes a little bit beyond attorney-client privilege. But we have seen a number of situations of that in other contexts, and I frankly am very uncomfortable with the idea of a lawyer becoming an instrument that can be used against a client.

SPEAKER: But you have not lost the privilege.

MR. KRANTZ: I agree that, to frame it this way, you have not lost the privilege.

SPEAKER: That is the noisy withdrawal. The third step you have.

PROFESSOR CARLE: I think there is a question over here.

SPEAKER: I want go back to something that Professor Bauman said earlier, we have all been focusing on legal departments, and lawyers, and general counsel. There is a lot else going on outside that box. In a previous life, I did environmental law that was in-house for a corporation, and my greatest ally was the risk management department and our insurance carrier. I am curious to know what

51. *See id.* at 25-26 (emphasizing that the evidentiary privilege only arises during a judicial proceeding when a litigant attempts to compel the disclosure of information allegedly protected by this privilege).

52. *See id.* at 25 (describing the ethical privilege as applying to a broader range of information than the evidentiary privilege). Ethical duties prohibit disclosure of a client's information not only in-court, but also out-of-court. For example, if a lawyer discusses a client's confidential information during a casual conversation, this will breach the ethical duty but not the evidentiary duty. *Id.* at 26.

53. MODEL RULE OF PROF'L CONDUCT R. 1.6 cmt. 14 (indicating that this rule does not prevent a lawyer from giving notice of withdrawal, and does not prohibit withdrawing or disaffirming any of the lawyer's work product).

2003]

PANEL 3

683

Ms. Hackett's response is to this, which is, what do your clients or members say is happening to their O & D insurance premiums? I bet you they are going up right now. Has the insurance carrier started to look at certain behavior as being more risky today than it was viewed as being a year ago? That's a major check. That's a liability that boards and management understand.

MS. HACKETT: I think that what we have seen is that certainly rates will be going up. I cannot say that we have done a lot of surveying on this or have a lot of very technical information. What I think the greater concern is, however, is that it is going to be harder and harder to attract the right people to be directors of organizations.

There already are a dearth of really highly qualified, extremely participatory, and well-informed directors who are available out there. Those people who do perform the role of independent directors or directors who take part in corporate activity in a meaningful way. There are going to be fewer and fewer of them who are willing to work with a larger number of organizations. They will probably limit the number of organizations that they work with so they can do that much more diligence, if you will, in working with those organizations they stay with.

I suppose at some level that is good. I have never been overly fond of the model of the director who works with forty-seven different corporations because it is virtually impossible for them to really, truly be a director at any one of them. Having said that, a lot of people who do not need to do this, because they are either personally wealthy or they have come to a point in their careers when they do not need to take the hassle of these kinds of requirements that have now come out, will simply step away from being directors at all.

I think that is a shame because very often the best directors are the people who have been out in public life for quite a few years, have had a broad number of experiences at different organizations, and they are simply going to say, "Hey, look, I can't spend the time necessary to certify what I need to certify now for every one of the organizations I'd work with, so I'm stepping back."

I think that there will be insurer carrier issues. But I think that most people who I am talking to are most concerned about attracting the right talent nowadays, because people just won't want to accept the potential for liability that they could have working with organizations where they can not be aware of the day-to-day workings of these megalithic cultures.

PROFESSOR CARLE: While we are on that topic, there is one thing that struck me that I thought lawyers might like, either lawyers who counsel other lawyers in malpractice cases, ACCA, or criminal defense lawyers, which are the provisions that provide that a lawyer who does not want to report outside the organization can use the other route of referring the matter to the Qualified Legal Compliance Committee (“QLCC”)⁵⁴, which is supposed to have two independent directors on it.

Isn’t that a solution to all of these problems with 1.13? You pass the buck to somebody else—to somebody who is being paid to monitor, paid to direct the organization. This is an easy bright-line, a safe harbor.

MS. HACKETT: It is a perfect way to provide cover for lawyers.

PROFESSOR CARLE: Why aren’t you happy about that?

MS. HACKETT: That assumes that clients are going to be all that interested in establishing one. Why is it that, practically, if I am the CEO of a company and my general counsel comes to me and says, we should, as a result of Sarbanes-Oxley, institute this QLCC because it is the perfect way to insure that I will have no liability for any problems that might arise? Indeed, we’ll put that liability instead on a couple of our directors. They will be the ones who will report to you, and then you will be the ones making the decisions together about whether you are going to trigger an SEC discussion.

MR. KRANTZ: Then look at their insurance premium.

MS. HACKETT: Exactly.

PROFESSOR BAUMAN: But they would present the proposition a little differently.

MS. HACKETT: Of course they would. But I am just trying to create for you what I think is the practical problem with it. It is a brilliant solution to the lawyer liability and the lawyer professional responsibility issues. I think from an earlier conversation someone said it was the idea of Harvey Pitt to add this in there. I think it could offer some companies great relief for the legal function.

But you have got to come back to the client. Why is the client all that interested in establishing yet another audit committee type function in an era where they are struggling to understand how to

54. See Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71670, 71704 (proposed Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205.2) (providing that a qualified legal compliance committee must “consist[] of at least one member of the issuer’s audit committee and two or more members of the issuer’s board of directors who are not employed, directly or indirectly, by the issuer and who are not, in the case of a registered investment company, ‘interested persons’”).

2003]

PANEL 3

685

deal with and how to properly work with the audit committees they are or aren't working with well already? I just do not see that there are going to be an awful lot of clients who are going to rush to embrace this.

PROFESSOR BAUMAN: Isn't it possible that it will be like so much else in state corporate law, where a court says, "You know, you should have an independent negotiating committee."

MS. HACKETT: Absolutely.

PROFESSOR BAUMAN: A special litigation committee, and all of sudden, there it is? The court has said it—it sets up an umbrella. Although nobody says that there will be no liability if you do that, everybody understands it as such. That is the impetus, because the SEC as an agency is giving its blessing to it and that is why you do it.

MS. HACKETT: Presumably it is too late to set one up after you have already started "up the ladder," and decided you do not want to be responsible for what happens when you get to the top rung.

PROFESSOR BAUMAN: Sure.

MS. HACKETT: By definition, if a court is doing it, it means that someone has already fallen afoul of this.

PROFESSOR BAUMAN: The SEC has now set out the road map.

MS. HACKETT: Okay.

PROFESSOR BAUMAN: Just as the first case affirmed the validity of the special litigation committee—it was too late to set up the committee once you'd been sued, except in some cases but generally speaking. Thereon you knew you'd set up that kind of a committee. The SEC is now saying, set up a QLCC.

MS. HACKETT: I think that the SEC is not saying set up a QLCC, though. I think the SEC is saying, if you wish to avoid attorney-client privilege problems, you can go this other route. At least I do not read the rules or what is coming out here as saying—it is saying this is an option. They are not saying this is the best practice.

It may be that, in a couple of years, it will clearly be the best practice. For the shorter term at least, even though it is a very bright solution to the problem for lawyers, it is a lawyer created solution for a lawyer problem as opposed to a corporate issue that companies seem to think they should be addressing.

I am a little bit worried that, although I think it may be very bright, I do not think a lot of people are going to rush to adopt them yet. They may over time.

MR. BURGER: If I was a corporate officer and the president of a company asked me, "Art, how would you like to be a member of the QLCC—in fact, we'll let you chair it." I think I would say, "I will

volunteer for any other committee and I will blow up every balloon for the annual New Year's Party, but I think I have brain surgery scheduled for that day that you're setting up the"

PROFESSOR BAUMAN: Art, your choice is you choose between the audit committee or the QLCC. You can be the chair of one. What's your pleasure?

MR. BURGER: I quit.

PROFESSOR CARLE: We have a question from the audience.

SPEAKER: There was a suggestion earlier that perhaps the QLCC in essence would be the audit committee in many instances. It fits within the statutory definition, for instance. It is already something that exists. What is your sense of how that may play out?

MS. HACKETT: I have to spend more time getting cozy with the pages that were issued last night, but my understanding is that the QLCC that is in this regulation is defined as a three-member organization. While you could say that you were going to create an audit committee that had three members who happened to be the same three members of the QLCC, I just do not think a lot of companies are going to rush to make their audit committee fit this role.

The audit committee right now is by everybody's standards, in the media as well as within the corporate world, the focal point of all activity right now. You want to get the audit committee right. So, the idea of creating a three-person group because that is what is mandated here, so it could also serve a double duty as being QLCC, just does not seem terribly likely to me.

But I really have not reviewed this in depth enough to know whether it could be composed differently. I do not know enough about audit committee or corporate governance issues to tell you whether there are any problems with a three-person audit committee. I would presume that, if I was having an audit committee within a board, I would probably want the audit committee a little bit larger. Not a lot larger but a little bit larger than three members. I think that is a pretty small group.

I have a feeling the QLCC will be a topic of much discussion in the comments that go into the SEC over the course of the next thirty days. It is a new concept out there.

PROFESSOR BAUMAN: It ought to be scary to pick up on what Judge Sporkin said at lunch to those of you who are students here. It ought to be scary to you how many of us already have the ninety-three pages that came out on the Web last night. Scariest of all is that Art has underlined it; he's got yellow markings all over the place. That

2003]

PANEL 3

687

ought to be a really scary object lesson.

PROFESSOR CARLE: I have a lot of other questions I would love to ask the panel, but I am wondering if there are any from the students? I think the comments are well taken. This is something that is going to affect your practice lives.

I am interested in the distinction that is drawn between in-house counsel and outside counsel and the idea that in-house counsel's outside reporting obligations are less strict. My understanding of the U.S. system of professional regulation is that the decision was made not to draw these distinctions, to recognize the same standards of professional responsibility and not create sort of a second class category of lawyers who do not really have professional independence. So I would imagine that there is some ambivalence about that. I am just wondering, what's your position on it?

MS. HACKETT: As an organization we were founded on the principle that there were too many places within the profession, both codified and uncoded, where there was disparate treatment between the inside bar and outside bar. So, clearly it is something that I am paying very close attention to.

I think there are an awful lot of people within the in-house community who would like to have some kind of buffer written that will provide them some level of job security. I am not speaking on their behalf when I tell you that the position of the ACCA has always been that in-house counsel do not have any different professional obligations and that one of the responsibilities of going in-house—there are a lot of attendant perks to being an in-house counsel. There are different kinds of work environments and different kinds of challenges, and different types of career enhancements that are available to you.

One of the difficulties is that if you fall out with your client, it is not just one client off the roster of the firm. Your livelihood has now ended, and potentially it can be a career ending issue, not just a question of going out and getting another one. You may be damaged goods now in the in-house market.

We firmly believe as an organization that there are certainly legitimate concerns for people who are employed by their clients about job security and what their rights as employees may be in contradiction to their responsibilities as attorneys. You are right not to be able to exercise whistle-blower kinds of provisions without having some kind of repercussion.

Ultimately, at the end of the day the Association's stance has always been that the client has the ultimate right to choose the counsel of

their choice. If the client does not wish to retain you as counsel, it does not matter whether you get your paycheck on a retainer or whether you get your paycheck on a corporate stub, you're out. You should have no ability to force that client to continue to work with you.

I think that, while the rules may have offered a different track, the practical implication outside of the reporting is that both lawyers are going to end up without work from that client in the future. It is inconceivable to me that a lawyer who chooses to report to the SEC is going to be a welcome colleague on the team in the future, even if that person had an obligation to do so. That is unfortunate, but that's just reality. Even if they are not fired outright, they will probably be constructively unemployed by that corporation pretty soon.

MR. BURGER: I think that is just a practical reality and was one of my concerns about the statute as it was written. But I think that in the rules giving the lawyer the right to report the fact that they think that they were fired for complying with this law⁵⁵—and here is one express reference to attorney-client privilege. It says it is not a violation of attorney-client privilege for this discharged lawyer to report that fact to the Commission.⁵⁶ It gives the lawyer an awful lot of power in that relationship although that's a heck of a way to hold on to a client.

MS. HACKETT: I do not know anyone who would want to continue to work in that environment. Your resume is on the street as soon as this happens no matter whether you are inside or you are outside on this.

PROFESSOR CARLE: Do you have a question over there?

SPEAKER: Is Sarbanes-Oxley really a regulatory vehicle for correcting what is a lack of concern for the public interest in our existing professional responsibility principles?

MR. BURGER: Yes.

MS. HACKETT: Yes.

PROFESSOR BAUMAN: A strong letter follows.

MR. BURGER: Let me just say that I think that it is possible to overstate the differences that are being made. As everybody here

55. *See id.* at 71706 (to be codified at 17 C.F.R. § 205.3(d)) (stating that an attorney who "has reported evidence of a material violation under this section and reasonably believes that he or she has been discharged for so doing may notify the Commission that he or she believes that he or she has been discharged for reporting evidence of a material violation under this section.").

56. *See id.* (indicating that "[t]he notification to the Commission prescribed by this paragraph (d) does not breach the attorney-client privilege.").

2003]

PANEL 3

689

knows, as long as there has been an attorney-client privilege, there has been an exception for crime fraud.⁵⁷ Plus, this does not go much further than Rule 1.13, which I think is a good rule.

In terms of the federalization of the rules, it will be interesting to see if that goes any further. Now, these rules are limited to just what they say and they go out of their way to say that state bar rules still apply on everything else that might govern an SEC practice, including advertising and the whole panoply.⁵⁸

But I think, under the Supremacy Clause,⁵⁹ it is pretty clear that if there were to be an inconsistency between what the rules of professional conduct of a particular state require and what a federal regulation would require, I think the federal rule would govern.⁶⁰

SPEAKER: If you are dealing with different jurisdictions, aren't you obligated to follow the stricter jurisdiction? I mean, like advertising. West Virginia has various regulations on advertising.

MR. BURGER: Advertising is one area in which you clearly are going to—the phrase is “jumping the higher hurdle.” When you advertise, in effect you are engaging in conduct wherever the advertisement can be read,⁶¹ so the choice of law is that you better run scared and comply. But, no, I think the choice of law answer for an SEC lawyer, wherever they are licensed is that their conduct would

57. See David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443, 445 (1986) (tracing the history of the crime-fraud exception, and indicating that it is traceable to at least 1743).

58. See Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71673 (to be codified at 17 C.F.R. pt. 205) (commenting that the SEC does not “intend to supplant state ethics laws unnecessarily, particularly in areas (e.g. safeguarding of client assets, escrow procedures, advertising) where the Commission lacks expertise.”).

59. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

60. See Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71703 (to be codified at 17 C.F.R. § 205.1) (stating “[w]here the standards of a state where an attorney is admitted or practices conflict with this part, this part shall govern.”). See generally Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 151-60 (2002) (analyzing whether the Supremacy Clause would give Congress the power to establish a uniform system of attorney-client privilege).

61. See GREGORY H. SISKIND ET AL., *THE LAWYER'S GUIDE TO MARKETING ON THE INTERNET* 161 (2d ed. 2002) (discussing internet advertising, indicating that it is important for lawyers to understand all state rules that will supply to their website advertisements as there is no current consensus on jurisdiction); see also LOUISE H. HILL, *LAWYER ADVERTISING* 137 (1993) (highlighting the issue of potential unauthorized practice of law when a lawyer advertises nationally or advertisements reach into jurisdictions other than the one in which a lawyer practices, and indicating that there is currently no consensus on jurisdictional issues).

have to be in compliance with SEC regulations.⁶² If there were an irreconcilable conflict, then I think I would have to go with the SEC rules.

SPEAKER: But my point is, let's take the rule for D.C. I am advertising in D.C. I can get sanctioned by West Virginia, but then the D.C. Bar comes after me for reciprocity there—

MR. BURGER: Right. For advertising, you are right. For anything else, I think you are not right, because there is no way in other contexts to say necessarily which is more strict. If D.C. says that you can not violate a client confidence, and the SEC says, "oh, yes, you can," then they are different. I do not know how you would say which one is more strict, but I think you would need to comply with the federal. Do you agree, Susan?

PROFESSOR CARLE: Yes.

MR. BURGER: Yes.

PROFESSOR CARLE: We just have a couple of minutes left. Is there anybody who has not had a chance to ask a question who wants to comment or ask a question?

PROFESSOR BAUMAN: I wanted to respond to the questioner over there.

PROFESSOR CARLE: Okay.

PROFESSOR BAUMAN: To refer you to a very interesting article that Richard Painter wrote on the moral interdependence of corporate lawyers, that essentially Sarbanes-Oxley is only one part of a much more complex—the practice of corporate and securities law is a complex business.⁶³

Sarbanes-Oxley, in the sense that it comes out of Enron, focuses on a very, very, very narrow slice. The broader issues of the role of the lawyer, gatekeeper, whatever it is, raise quite seriously issues where there are legitimate differences of opinion as to what the appropriate role of the lawyer is in the corporate setting.

SPEAKER (PROFESSOR PAINTER): The purpose of the optional disclosure to the SEC I think is precisely this. That there are a minority of jurisdictions, say about eight or nine, that have adhered to the view that the lawyer may not disclosure the client confidences, even to prevent a financial fraud.⁶⁴ The ABA's own Ethics 2000

62. See Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71670 (to be codified at 17 C.F.R. pt. 205).

63. See Richard W. Painter, *Congress Tells Corporate Lawyers to Tell Directors About Fraud*, 6 No. 3 WALLSTREETLAWYER.COM 6 (2002) (emphasizing that it is the duty of the SEC to tell corporate lawyers what their responsibilities entail when they discover their corporate clients commit fraud).

64. See Pope, *supra* note 48, at 158 n.88, 173 (indicating that Alabama, California,

2003]

PANEL 3

691

Commission recommended that that be changed in 1.6.⁶⁵

Over forty jurisdictions say, in effect, what the SEC is saying.⁶⁶ If you are a securities lawyer representing a publicly traded company, then you ought to play by the rule that over forty states have adopted, which is that you may disclose. You do not have to, but you may, and California shouldn't be able to hassle you for this or D.C.

I think you are exactly right, that this is a trumping of those few jurisdictions.

MS. HACKETT: Let's just remember that—we were talking about this earlier, one on one. Permissive disclosure has its warts as well. In making a decision as the lawyer as to whether or not you wish to report you are going to run into some difficulties as well if you do not report and hindsight is always twenty-twenty. If it looks like you should have, you will now be, I believe, held to a higher standard of persecution than you would have otherwise.

I think the other thing that is key to remember here is that if you choose to report and you did not have to, how is it that your relationship with your client can ever be reconciled? You have now chosen to report them when you didn't have to report them. So, you have violated the fundamental trust between them whether you like that result or not, and that is a practical reality for the people who you're representing.

I am not an advocate of mandatory disclosure by any stretch of the imagination. But I think we have to be careful about jumping onto the boat of saying, "Oh, well, permissive disclosure is the answer as

Delaware, Kansas, Kentucky, Louisiana, Missouri, Rhode Island, South Dakota, and the District of Columbia do not permit a lawyer to disclose client confidences to prevent financial fraud).

65. The Ethics 2000 Commission's Report recommended amending Rule 1.6 to include the following subsections to (b) of the confidentiality rule:

- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (6) to comply with other law or a court order.

American Bar Association, *Ethics 2000 Commission*, available at http://www.abanet.org/cpr/e2k-report_home.html. The ABA House of Delegates rejected (b)(2), and the Ethics 2000 Commission withdrew (b)(3) form consideration. The delegates accepted (b)(4) and (b)(6). *Id.*

66. See sources cited *supra* note 45 and accompanying text.

the result," because I think it does have warts as well.

MR. BURGER: I think there is an argument to be made that if you are going to have disclosure, make it mandatory, so the lawyer knows, I am supposed to do this, or I am supposed to do that. At least you would have clarity.

PROFESSOR CARLE: I see our time is up. If we could just thank our panelists, and then I think the Editor-in-Chief has something to say.

MS. CHLOPAK: If you could just give me about one more minute of your time. I would like once again to thank all of the people who have helped make today possible. In particular, I'd like to thank all of the panelists, Dean Pike, Professors Guttman, Wallace, Quinn, and Carle, and the editors and staff of the *Law Review*, especially Julie Wilson and Lisa Wetzel Ross, whose extraordinary efforts helped make this event a success.