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Public Independent Fact-Finding: A Trust-Generating Institution for an Age of Corporate Illegitimacy and Public Mistrust

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Public Independent Fact-Finding: A Trust-Generating Institution for an Age of Corporate Illegitimacy and Public Mistrust

*R. William Ide III**

*Douglas H. Yarn***

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The Consortium is a theory-building program that focuses on the institutionalization of conflict-handling mechanisms. The authors wish to thank Plamen Russev and Georgia State Law Librarian, Elizabeth Adelman, for their research assistance.

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... [O]ur market system depends critically on trust—trust in the word of our colleagues and trust in the word of those with whom we do business.

*Federal Reserve Board Chairman Alan Greenspan*¹

I. INTRODUCTION

Confronted with allegations of either wrongdoing or incompetence, many business corporations are facing crises of social legitimacy and the loss of public trust. For some, it is already too late. As we write this Article, revelations over the misleading accounting practices of Enron, WorldCom, Global Crossing, and others have destroyed jobs and shareholder value. Such fraud and other instances of malfeasance have destroyed Arthur Andersen, exacerbated an economic recession, and provoked an almost unprecedented market downturn. In his July 2002, presentation to Congress, partially quoted

1. *Federal Reserve's Second Monetary Policy Report for 2002: Hearing Before the Senate Comm. on Banking, Hous. and Urban Affairs*, 107th Cong. 44 (2002) (statement of Alan Greenspan, Chairman, Fed. Reserve).

Well-functioning markets require accurate information to allocate capital and other resources, and market participants must have confidence that our predominately voluntary system of exchange is transparent and fair. Although business transactions are governed by laws and contracts, if even a modest fraction of those transactions had to be adjudicated, our courts would be swamped into immobility. Thus, our market system depends critically on trust—trust in the word of our colleagues and trust in the word of those with whom we do business. Falsification and fraud are highly destructive to free-market capitalism and, more broadly, to the underpinnings of our society. . . . Lawyers, internal and external auditors, corporate boards, Wall Street security analysts, rating agencies, and large institutional holders of stock all failed for one reason or another to detect and blow the whistle on those who breached the level of trust essential to well-functioning markets.

Id.

above, Alan Greenspan succinctly described the root cause of the broader unfolding problem—a lack of trust.²

Public trust is the essential ingredient lost by those companies and currently by the market system as a whole. Policymakers are now wrestling with the appropriate restructuring of the regulatory institutions designed to generate trust in publicly traded corporations,³ and groups such as the American Bar Association⁴ and the New York Stock Exchange⁵ are examining how to reestablish trust in “corporate governance,” a term previously foreign to the common vocabulary.⁶

Although the problem of public trust is particularly salient today for publicly traded business corporations, all organizations, both public and private, may face social legitimacy crises. A single damning allegation, whether true or false, has the potential to undermine seriously, or even to destroy, a business, charity, government office, school, congregation, community, or any other organization that requires the public’s trust. That fate may be well deserved in some instances, but in others it may be unfair to the organization. In either case, most of the individuals and constituents within the beleaguered organization are innocent and suffer without cause. Nevertheless, the voracious appetite of the news media for possible wrongdoing, its role in forming public opinion, and its technological capacity to

2. See generally *id.*

3. Most notable is the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002). For a discussion of the Sarbanes-Oxley Act, see John F.X. Peloso & Stuart M. Sarnoff, *The Sarbanes-Oxley Act of 2002: Whom Does It Affect and How?*, N.Y.L.J., Aug. 14, 2002, at 3. For an example of emerging state legislation, see S.B. 1452, 2001-01 Sen., 2001-02 Sess. (Cal. 2002) (pending in the Senate Judiciary Committee), available at http://info.sen.ca.gov/cgi-bin/postquery?bill_number=sb_1452&sess=PREV&house=B&site=sen (last visited Mar. 14, 2002); *California Senate Committee Passes Enron Reform Bill: Whistleblower Legislation Protects Dissenting Voices*, U.S. NEWswire, May 23, 2002, 2002 WL 4577870 (describing Cal. S.B. 1452); see also *Legislation and Regulations Spurred by Enron*, KIPLINGER LETTER (Kiplinger), Mar. 22, 2002, 2002 WL 20621797 (discussing Enron’s impact on policymakers and businesses).

4. The American Bar Association assembled the Task Force on Corporate Responsibility to focus on core issues of corporate governance, including the role of lawyers “in creating an environment designed to assure corporate integrity and responsibility.” *Task Force to Probe Enron Debacle*, ABA J. E-REP., Apr. 26, 2002 (quoting Robert E. Hirshon, ABA President). The ABA task force presented its findings to its House of Delegates in August 2002. *Id.*

5. The New York Stock Exchange assembled the Corporate Accountability and Listing Standards Committee to review matters involving corporate governance, noting that “[i]t is imperative that we reinforce trust and confidence in our publicly traded companies and in our markets.” Press Release, N.Y. Stock Exch., NYSE Appoints Special Board Committee to Advise on Corporate Governance (Feb. 13, 2002) (quoting NYSE Chairman and CEO Dick Grasso), available at <http://www.nyse.com/press/NT00072CAE.html> (last visited Mar. 12, 2003).

6. Corporate governance refers to the relationship between the shareholders, directors, and management of a company, as defined by the corporate charter, bylaws, formal policy, and rule of law.

disseminate information widely and instantaneously can cause an immediate and irreparable loss of trust if the organization is not prepared to respond quickly and decisively to end the social legitimacy crisis and to regain the public's trust.

In the current environment, traditional methods of organizational response to allegations of wrongdoing and incompetence are proving less effective. Some organizations are responding by hiring well-known public figures with reputations for integrity to conduct internal investigations and report their findings to the public—a process we refer to as “public independent fact-finding” (“PIFF”).

In this Article focusing on trusted entities and individual lawyers as fact finders, we describe the vital role that trust, reputation, and social legitimacy play in the health of organizations. Using business corporations as our primary example, we explore the phenomena of corporate legitimacy crises and traditional responses, apologia. We examine factors present in the current environment that undermine the effectiveness of both corporate apologia and other trust-generating institutions. We turn our attention to PIFF as an alternative trust-generating process, distinguish it from other forms of fact-finding, and consider the benefits and inherent problems of attempting to institutionalize the process better. Focusing on lawyers as fact finders and the American Arbitration Association's new Independent Fact-Finding Service (“IFFS”), we analyze the procedural and ethical issues associated with possible institutionalization models.

Although many recommendations for rebuilding public trust will be made by task forces and the inevitable scores of law review articles spawned in the wake of Enron,⁷ we conclude that fact-finding

7. See, e.g., Michelle Chan-Fisher, *After Enron: How Accounting and SEC Reform Can Promote Corporate Accountability While Restoring Public Confidence*, 32 ENVTL. L. REP. 10,965 (Aug. 2002); Roger C. Cramton, *Enron and the Corporate Lawyer: Professional Responsibility Issues*, in ADVANCED SECURITIES LAW WORKSHOP 841 (PLI Corp. Law & Practice Course, Handbook Series No. B-1315, 2002); William F. Dietrich, *Legal and Ethical Issues for Attorneys Dealing with Financial Data: Heightened Scrutiny After the Enron and Andersen Debacle*, in BASICS OF ACCOUNTING & FINANCE: WHAT EVERY PRACTICING LAWYER NEEDS TO KNOW 925 (PLI Corp. Law & Practice Course, Handbook Series No. B-1325, 2002); Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L. REV. 1233 (2002); Kevin P. Kennedy & Deanna Chechile, *Waiting for Enforcement: How to Manage Risks for the Audit Committee in the Post-Enron World*, in SECURITIES LAW & THE INTERNET 2002: DISCLOSURE PRACTICES IN LIGHT OF ENRON & CURRENT SEC DISCLOSURE INITIATIVES 641 (PLI Corp. Law & Practice Course, Handbook Series No. BO-01BB, 2002); Jonathan C. Lipson, *Enron, Asset Securitization and Bankruptcy Reform: Dead or Dormant?*, 11 J. BANKR. L. & PRAC. 101 (2002); Marissa P. Viccaro, *Can Regulation Fair Disclosure Survive the Aftermath of Enron?*, 40 DUQ. L. REV. 695 (2002) (discussing the effectiveness of Regulation Fair Disclosure after Enron).

conducted with the public trust in mind can provide institutions with a more effective response to social legitimacy crises.

II. TRUST, REPUTATION, AND CORPORATE SOCIAL LEGITIMACY

To better understand the contextual problem of public trust, we start by exploring three interrelated concepts—trust, particularly in the public sphere, reputation, and social legitimacy as applied to juristic, as opposed to natural, persons. These concepts have attracted the attention of scholars from a variety of disciplines,⁸ including law,⁹ and are useful in examining the nature of the problem and appropriate responses to it.

A. Trust and Cooperation

Trust has emotional, behavioral, and cognitive components and many definitions, most of which recognize a situation in which there are at least two actors, one of whom is vulnerable to the other.¹⁰ Trust

8. See, e.g., CHARLES J. FOMBRUN, *REPUTATION: REALIZING VALUE FROM THE CORPORATE IMAGE* (1996) (applying reputation analysis to marketing); FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (1995) (using economic theory to analyze trust); JACK R. GIBB, *TRUST: A NEW VIEW OF PERSONAL AND ORGANIZATIONAL DEVELOPMENT* (1978) (examining trust in the context of group relations and organizational behavior); NIKLAS LUHMANN, *Trust: A Mechanism For the Reduction of Social Complexity*, in *TRUST AND POWER: TWO WORKS BY NIKLAS LUHMANN 1* (1979) (discussing trust in the context of sociology); JONATHAN MERCER, *REPUTATION AND INTERNATIONAL POLITICS* (1996) (discussing the importance of reputation in international relations); *REPUTATION: STUDIES IN THE VOLUNTARY ELICITATION OF GOOD CONDUCT* (Daniel B. Klein ed., 1997) (discussing reputation in the context of economics and cognitive studies); PETER SHELDON GREEN, *REPUTATION RISK MANAGEMENT* (1992) (discussing public relations as a means to protect a firm's reputation and manage risk); PIOTR SZTOMPKA, *TRUST: A SOCIOLOGICAL THEORY* (1999) (examining trust within political sociology); *TRUST AND GOVERNANCE* (Valerie Braithwaite & Margaret Levi eds., 1998) (considering trust from a political science perspective); *TRUST AND CIVIL SOCIETY* (Fran Tonkiss et al. eds., St. Martin's Press, 2000) (examining trust from the perspective of various social sciences); *TRUST AND ECONOMIC LEARNING* (Nathalie Lazaric & Edward Lorenz eds., 1998) (discussing trust and business ethics); Denise M. Rousseau et al., *Not So Different After All: A Cross-Discipline View of Trust*, 23 *ACAD. MGMT. REV.* 393, 394 (1998) (finding common elements of trust as viewed among various disciplines).

9. See, e.g., Avner Ben-Ner & Louis Putterman, *Trusting and Trustworthiness*, 81 *B.U. L. REV.* 523 (2001) (examining trust in traditional commerce and trust in Internet commerce); Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 *U. PA. L. REV.* 1735 (2001) (discussing trust in the corporate setting and corporate law); Mark A. Hall, *Law, Medicine and Trust*, 55 *STAN. L. REV.* 463 (2002) (analyzing the role of trust in health care law); Larry E. Ribstein, *Law v. Trust*, 81 *B.U. L. REV.* 553 (2001) (analyzing various forms of trust and the conflict between trust and law).

10. See, e.g., JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* 97-98 (1990) (maintaining that trust has four components: First, trust allows actions that otherwise are not possible; second, if the trusted person (trustee) is trustworthy, then the trustor will be better off than if he had not trusted, but if the trustee is not trustworthy, then the trustor will be worse off

or trustworthiness is a factor only if you know or believe that someone else's behavior can affect you or that your behavior can affect the behavior of another.¹¹ Because trust involves the vulnerable person's optimism about how the other will behave, it is largely a psychological and emotional state.¹² If *A* trusts *B*, *A* expects or believes that *B* will behave in an other-regarding manner that will not exploit *A*'s vulnerability. In this sense, trust is an attitude concerning the benevolent motivations and intentions of another more than a prediction of positive results or outcomes.¹³

Projected outcomes and degree of risk are not unimportant, however. Predictability and control may be independent variables influencing the degree of trust required along a continuum—the greater the risk, the greater potential for trust or distrust.¹⁴ Trust is not necessary when you can calculate how others will act accurately—the more accurate the calculation, the less trust required.¹⁵ Nor is it necessary when you can monitor and control the other's behavior—the more control, the less trust required.¹⁶ It is impossible, however, to calculate risk with complete certainty or control behavior totally; therefore, some degree of trust is always required to bridge the gap. Ultimately, trust is independent of risk, i.e., it can exist in the absence of rational calculation and social control, while it might not exist even when behavior is highly predictable or closely controlled.¹⁷ In this way, trust differs from confidence and reliance, which also involve the calculated prediction of risk and outcomes, and is dependent more on the perceived intentions and motivations of the trusted party than on results and outcomes.¹⁸

than if he had not trusted; third, trust is an action that involves the voluntary placement of resources (physical, financial, intellectual, or temporal) at the disposal of the trustee with no real commitment from the trustee; and, fourth, a time lag exists between the extension of trust and the result of the trusting behavior); see D. Harrison McKnight & Norman L. Chervany, *The Meanings of Trust* (MISRC Working Paper Series, Working Paper No. 96-04, 1996) (attempting to categorize various meanings of trust), available at <http://www.misrc.umn.edu/wpaper/wp96-04.htm> (last visited Mar. 12, 2003).

11. Rousseau et al., *supra* note 8, at 395 (describing interdependence as a necessary condition of trust).

12. *Id.* at 394-95.

13. See John G. Holmes & John K. Rempel, *Trust in Close Relationships*, in CLOSE RELATIONSHIPS 187, 202-03 (Clyde Hendrick ed., 1989) (discussing motivation in relationships).

14. Rousseau et al., *supra* note 8, at 395.

15. *Id.*

16. *Id.*

17. See *infra* notes 87-88 and accompanying text (regarding the Tylenol scare). The risk of purchasing contaminated Tylenol was almost zero, but consumers distrusted the product until Johnson & Johnson acted to reassure them.

18. See TRUDY GOVIER, SOCIAL TRUST AND HUMAN COMMUNITIES 6 (1997) (comparing trust in intimate relationships with trust in the context of social roles); ADAM SELIGMAN, THE PROBLEM OF TRUST 14-30 (1997) (distinguishing trust from confidence and understanding trust

Trust is essential to efficient cooperation. Cooperation allows for the production of benefits exceeding those achievable by an individual acting alone; however, cooperative behavior by one individual usually confers benefits on another with the risk that the recipient will fail to reciprocate.¹⁹ If *A* cannot trust *B* to reciprocate, then either *A* will not cooperate and will forfeit the potential benefits or *A* will expend resources to monitor and control *B* to ensure *B* reciprocates. Alternatively, *A* can spend resources to punish *B* for *B*'s failure to reciprocate.²⁰ The more *A* can trust *B* to reciprocate, the less *A* must spend to ensure reciprocation or to punish *B*.²¹ One way interpersonal or mutual trust develops between individuals is through repeated interactions that allow the actors to generalize the expectation of continued cooperative behavior in subsequent interactions.²² Distrust arises when behavioral expectations are violated in one interaction so as to create a generalization to subsequent interactions,²³ giving the violator a reputation for being untrustworthy. The strong emotive sense of betrayal when experiencing a breach of trust together with the tendency of people to be trustworthy in the absence of sanctions indicates an evolved preference or taste for trust and trustworthiness.²⁴

as role fulfillment); Lawrence C. Becker, *Trust as Noncognitive Security About Motives*, 107 ETHICS 43, 54 (1996) (using the government as an example of trust depending on intentions and motivations).

19. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984) (examining broadly the concept of cooperation in social and biological contexts); Robert L. Trivers, *The Evolution of Reciprocal Altruism*, 46 Q. REV. BIOLOGY 35 (1971). This problem of inducing beneficial cooperation when individuals have incentives to cheat, or not to cooperate, is at the core of law and economics. See CHARLES J. GOETZ, *CASES AND MATERIALS ON LAW AND ECONOMICS* ch. I (1984) (discussing the prisoner's dilemma, free-rider problem, and external effects created).

20. GOETZ, *supra* note 19.

21. Trust increases the propensity for cooperation, but is not necessary for cooperation. See *id.* at 182.

22. See generally LUHMANN, *supra* note 8. This social theorist stresses the trial-and-error nature of the development of trust, suggesting that people began with a readiness to trust which is then put to the test in transactions with others, where it is either confirmed or undermined by their experience.

23. See Lynne G. Zucker, *Production of Trust: Institutional Sources of Economic Structure, 1840-1920*, in 8 RESEARCH IN ORGANIZATIONAL BEHAVIOR 53, 59 (JAI Press, Inc., 1986) (noting that generalizations sometimes occur after trust is breached). But see Sim B. Sitkin & Nancy L. Roth, *Explaining the Limited Effectiveness of Legalistic "Remedies" for Trust/Distrust*, 4 ORG. SCI. 367, 372 (1993) ("Even repeated violations of trust can be excused as personal quirks as long as the violations are confined to a particular domain and are not interpreted as threatening to 'spill over' into other domains, . . . thus delimiting the perceived generalizability of the violation.").

24. See generally Blair & Stout, *supra* note 9 (summarizing this point). For an evolutionary behavior explanation of the emotions surrounding trust and the emotional precommitment to act

B. Trust-Generating Institutions in Impersonal Societies

Social trust is an extension of, or perhaps merely the aggregate of, interpersonal trust.²⁵ A society may develop a culture of trust if a sufficient number of mutually trusting individuals is engaging in microlevel interactions.²⁶ This social trust becomes a public good upon which others draw to make transactions with strangers more efficient.²⁷ However, when the likelihood of repeat encounters is significantly reduced, as is the case with one-shot encounters with strangers, it is tempting to “cheat,” i.e., to take advantage of the other person’s trust.²⁸ In complex, more impersonal societies, the reduced likelihood of repeat interactions and the individual’s reduced ability (or increased cost) to monitor or to punish strangers, requires other ways to control cheating. Thus, social trust and trustworthy behavior are reinforced by trust-generating institutions, including social norms and other regulatory mechanisms buttressed by external, social sanctions.²⁹ If functioning properly, these institutions make it less risky to trust, either because they inhibit cheating (by increasing the cost of cheating) or reward trustworthiness (by making it more profitable not to cheat).

In this context, law is a trust-generating institution that can serve to reinforce or to help produce trust. It can serve a regulatory function by either mandating or prohibiting trust-related behaviors, or it can serve a more hortatory function by expressing trust-promoting ideals;³⁰ however, it cannot eliminate the need for trust. The law’s

trustworthy using game theory, see ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* (1988).

25. Stephen Knack & Paul J. Zak, *Building Trust: Public Policy, Interpersonal Trust, and Economic Development*, SUP. CT. ECON. REV. (forthcoming 2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304640 (discussing the impact of public policy on interpersonal trust levels).

26. ROBERT PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 170 (1993).

27. See Paul J. Zak & Stephen Knack, *Trust and Growth*, 111 ECON. J. 295, 295 (2001) (comparing social, economic, and institutional environments with high trust levels to less efficient environments with low trust levels).

28. See generally AXELROD, *supra* note 19.

29. See generally Zucker, *supra* note 23.

30. This aspect is the “expressive function” of the law in promoting social values, norms, and mores. See generally Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995) (discussing the construction of social meanings found in laws); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000) (arguing that law expresses the underlying attitudes of communities and society); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996); Matthew D. Adler, *Expressive Theories of Law*, 148 U. PA. L. REV. 1363 (2000). For an excellent discussion of the tension between the regulatory and expressive functions of the law in promoting trust in the medical setting, see Hall, *supra* note 9.

regulatory function is simply inadequate to ensure trustworthy behavior. First, the costs of enforcement are too great to police every interaction. Second, too much regulation begets untrustworthiness. One of the more curious aspects of trust is that trust reinforces trustworthiness and distrust undermines trustworthiness. In other words, people are more likely to be trustworthy when other people trust them;³¹ the more external sanctions and restraints on individual discretion signaling distrust, the less trustworthy the behavior.³² This relation has particular implications in the context of fiduciary and asymmetric power relationships³³ and implies that the regulatory function of the law is limited in its ability to generate trust. Law's hortatory function is not easily enforceable, its force lying only in the actor's sensitivity to moral suasion. Therefore, even in the presence of trust-generating institutions, trust remains a necessary ingredient in social and economic cooperation.³⁴

31. Bestowing trust is a social cue to the trusted person as to how they should behave. Hall, *supra* note 9, at 510. Thus, when someone makes clear that they trust another person, it gives that person a reason to continue the trustworthy behavior. See P. Pettit, *The Cunning of Trust*, 24 PHIL. & PUB. AFF. 202, 204-08 (1995) (explaining interactive trust). By fulfilling a trust, one exhibits prudence, virtue, or loyalty. See *id.* at 217. Therefore, people fulfill trust either because they are in fact prudent, virtuous, or loyal, or because they are pretending to have these virtues to secure the good opinion of others or to feel good about themselves. *Id.* at 212-17 (discussing attitude-dependent goods in the context of trust-responsiveness).

32. This result is sometimes referred to as the "crowd out" phenomena by which extrinsic motivations displace intrinsic motivations. See Hall, *supra* note 9, at 510. Too much regulation can replace intrinsic motivation thereby undermining the perception and reality of trust and trustworthiness. See Sitkin & Roth, *supra* note 23 at 369. As Sitkin and Roth conclude:

[A]ttempts to 'remedy' trust violations legalistically frequently fail because they paradoxically reduce the level of trust rather than reproducing trust. The adoption of legalistic 'remedies' (i.e., institutionalized mechanisms that mimic legal forms and exceed legal/regulatory requirements) imposes a psychological and/or an interactional barrier between the two parties that stimulates an escalating spiral of formality and distance and leads to a need for more rules. And so the process is perpetuated.

Id.

33. Fiduciary trust becomes relevant in relationships in which trust and power are asymmetric (i.e., the settlor needs to trust the trustee, but the trustee need not trust the settlor; the settlor is unable to monitor or control the behavior of the trustee and therefore is particularly vulnerable to trustee malfeasance). See Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 808-16 (1983) (discussing the risk of abuse in fiduciary relationships). Asymmetric distribution of knowledge exists in relationships between professionals and their clients/patients thereby creating a situation requiring fiduciary trust. See BERNARD BARBER, *THE LOGIC AND LIMITS OF TRUST* 15 (1983) (arguing that fiduciary trust prevents abuse when a disparity of knowledge and power exists).

34. Thus, Greenspan's observation: "Although business transactions are governed by laws and contracts, if even a modest fraction of those transactions had to be adjudicated, our courts would be swamped into immobility." *Federal Reserve's Second Monetary Policy Report for 2002*, *supra* note 1. We note the debate between contractarians, who believe that the corporation consists of a set of contractual relationships controlled by legal and market incentives, and anticorporationarians, who believe that the corporation must be governed by more than contract law. For the contractarian view, see Henry N. Butler & Larry E. Ribstein, *Opting out of*

C. Reputation as Formed by Trust-Generating Institutions

Another way to reinforce social trust and trustworthy behavior is through public dissemination of information about the character of individuals, essentially, their reputations as being either trustworthy or not. Reputation is "what is generally said or believed about [a] person's or thing's character"³⁵ or an "attribute ascribed to one . . . by another."³⁶ Thus, persons who have had positive trust relations with A might say that A is trustworthy, an empirical statement based on observation of A's past behavior. Operationally, reputation is predictive, and to the extent that past behavior is an indicator of future behavior, one might suppose that A is likely to be trustworthy in future relationships.³⁷ Lacking prior direct observation of a person's trustworthiness, the most important determinant of interpersonal trust may be that person's reputation among others who have had ongoing exchange relations with that individual. One is exposed to exploitation in a situation involving uncertainty or lack of information about another's intentions and motivations or the quality of goods or services to be exchanged. Faced with greater risks, people prefer to deal with individuals of known reputation even in the presence of other trust-generating institutions.³⁸ This preference makes a reputation for trustworthiness extremely valuable for the holder.³⁹ As uncertainty increases, reputation becomes an even more important determinant;⁴⁰ therefore, it is in a person's interest to manage her reputation.⁴¹

Fiduciary Duties: A Response to the Anti-Contractarians, 65 WASH. L. REV. 1 (1990). For a trust-based refutation of contractarian approaches, see Blair & Stout, *supra* note 9.

35. OXFORD DICTIONARY OF CURRENT ENGLISH 634 (R.E. Allen ed. 1984).

36. Robert Wilson, *Reputations in Games and Markets*, in GAME-THEORETIC MODELS OF BARGAINING 27 (Alvin E. Roth ed., 1985).

37. *Id.* at 27-28.

38. Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481, 490-91 (1985):

The widespread preference for transacting with individuals of known reputation implies that few are actually content to rely on either generalized morality or institutional arrangements to guard against trouble . . . [Instead] social relations, rather than institutional arrangements for generalized morality, are mainly responsible for the production of trust in economic life.

39. When discussing reputational value, game theorists refer to a reputation for keeping trusts; however, a more expansive perspective might include "a reputation for being motivated by moral commitments—a reputation for possessing a certain kind of character." Daniel M. Hausman, *Trustworthiness and Self-Interest*, 26 J. BANKING & FIN. 1767, 1777 (2002).

40. See generally Peter Kollock, *The Emergence of Exchange Structures: An Experimental Study of Uncertainty, Commitment, and Trust*, 100 AM. J. SOC. 313 (1994) (examining uncertainty and the role of reputation in exchange relations).

41. This concept is sometimes referred to as image or "impression management." See generally BARRY R. SCHLENKER, *IMPRESSION MANAGEMENT: THE SELF-CONCEPT, SOCIAL*

Likewise, knowing someone's reputation is valuable to the extent that it decreases the risk of trusting. In this sense, the social institutions through which information about a person's character is exchanged are trust-generating institutions that reduce the risk of trusting. To the extent that someone has a public reputation, in essence, it is the public opinion of that person's character which is rhetorically constructed through public discourse. This discourse may take place in the public sphere through news, advertising, entertainment, and other media. An interesting information age example is found on the Internet auction site, eBay, which provides buyers the opportunity to rate the trustworthiness of sellers.⁴² Individuals that rely on such reputation-mediating institutions are placing their trust in those institutions to convey accurate information about an individual's trustworthiness; however, such information is not necessarily accurate⁴³ and could be shaped by the individual's own reputation management efforts.

Society's interest in the accuracy of this information is reflected in the development of defamation law, which gives individuals a mechanism to respond to inaccurate and damaging information about their character.⁴⁴ Society has a deeper interest in reputation to the

IDENTITY, AND INTERPERSONAL RELATIONS (1980) (discussing impression management); WILLIAM L. BENOIT, ACCOUNTS, EXCUSES, AND APOLOGIES: A THEORY OF IMAGE RESTORATION STRATEGIES (1995) (examining ways that individuals attempt to minimize damage to their reputations focusing on apologies, excuse-making, and accounting for behavior). In some societies, reputation is so valuable that individuals are willing to risk their lives to preserve it. See Douglas H. Yarn, *The Lawyer as Duelist's Friend: Lessons From the Code Duello*, 51 CASE W. RES. L. REV. 69 (2002) (using the duel as an example of a model of civility and pattern of behavior for lawyers)

42. See, e.g., Sulin Ba & Paul A. Pavlou, *Evidence of the Effect of Trust Building Technology in Electronic Markets: Price Premiums and Buyer Behavior*, MGMT. INFO. SYS. Q., Dec. 2002, at 243 (arguing that trust feedback mechanisms can encourage trust); Chrysanthos Dellarocas, *Analyzing the Economic Efficiency of eBay-Like Online Reputation Reporting Mechanisms* (M.I.T. Sloan Sch. of Mgmt., Sloan Working Paper No. 4181-01, 2001) (discussing the rating system in which e-Bay buyers judge sellers), available at <http://papers.ssrn.com/abstract=289968> (last visited Mar. 12, 2003). But see Mary M. Calkins, *My Reputation Always Had More Fun Than Me: The Failure of Ebay's Feedback Model to Effectively Prevent Online Auction Fraud*, 7 RICH. J.L. & TECH. 33 (2001) (arguing that eBay's feedback system is unreliable), available at <http://www.richmond.edu/jolt/v7i4/note1.html> (last visited, March 17, 2003).

43. See, e.g., Werner Raub & Jeroen Weesie, *Reputation and Efficiency in Social Interactions: An Example of Network Effects*, 96 AM. J. SOC. 626, 626 (1990) (arguing that the efficiency of reputation in social interaction is dependent upon the "embeddedness" of the social system, that is the timeliness within which actors are informed on the behavior of their partners).

44. See Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 692-93 (1986) (arguing that defamation law protects three distinct conceptions of an individual's reputation).

extent that reputation, like social trust, is a public good.⁴⁵ The reputations of our leaders and public figures facilitate their fulfillment of the public trust and their effective performance.⁴⁶ These reputations also reflect the represented community's reputation and help form its identity.⁴⁷

D. Application to Different Objects of Trust

Applying the concepts of trust, trust-generating institutions, and reputation to different objects of trust, one can conclude that what produces trust in those objects may vary. An object of trust might be a natural person to whom I make myself vulnerable.⁴⁸ I may place interpersonal trust in my lawyer because of our previous interactions, because my lawyer has a good reputation, or because lawyers are required to complete a specialized education, pass the bar exam, and adhere to a professional code of conduct. In the first instance, the previous encounters provide firsthand experience by which I could confirm my lawyer's trustworthiness. In the third instance, social institutional trust leads to interpersonal trust. I trust my lawyer because I trust the external social mechanisms created to promote trustworthy behavior among all lawyers, such as educational requirements, ethical codes, and malpractice law. Conversely, I may develop trust in those mechanisms because my satisfactory encounters with my lawyer confirm the social institution's trustworthiness. In the second instance, I trust the source of the reputation which could either be a trusted individual—for example, a relative who used the same lawyer—or a trusted institution—a bar referral service, for example. Ultimately, I may be relying on much more nebulous reputation-mediating institutions, including public opinion, which could be expressed, for example, in a magazine article on the "city's top lawyers," or the lawyer's own advertising.

It is unclear whether trust is caused and experienced differently when the object is an institution rather than a natural person.⁴⁹ I may trust my bank, a classic object of institutional trust, because, from previous encounters, I trust the person who runs the

45. See generally Robert Bellab, *The Meaning of Reputation in American Society*, 74 CAL. L. REV. 743 (1986) (contending that reputation is an interpersonal relationship that shapes how one functions in society).

46. See *id.* at 744-75 (discussing the importance of reputation to public figures).

47. See *id.*

48. See Russell Hardin, *Trusting Persons, Trusting Institutions*, in STRATEGY AND CHOICE 187 (Richard J. Zeckhauser ed., 1991) (using an example to illustrate trusting an individual).

49. See *id.* at 187 (comparing trusting individuals with trusting large numbers of people or institutions).

bank, or I may trust the banking regulation system and the FDIC and therefore choose to deposit my money, or I choose the bank based on its reputation, whether generated by word-of-mouth, business news, or the bank's own advertising. While I may never develop a personal relationship of trust with a particular employee or manager of the bank, I may come to trust the bank itself as a result of the satisfactory service I experience. Although the trust experiences may not differ among these objects of trust, natural persons and institutions, there are some differences arising from the fact that a corporation is not human. A corporation has culture rather than character. It has no intentions or motivations upon which to base trust, nor can it feel a compulsion to be trustworthy. A corporation exhibits intent, motivation, integrity, and trustworthiness only to the extent that the natural persons who own, manage, direct, or work for it do so and create a corporate culture that is responsive to those who place their trust in it.

Whatever the object of trust, natural person or corporation, we trust because we are merely inclined to do so, our previous experience confirms the object's trustworthiness, and trust-generating institutions, including those that mediate reputation, reduce the risk of trusting. In the latter case, the object of our trust includes the trust-generating institutions themselves.

So how do these concepts of trust, trust-generating institutions, and reputation apply to a large, publicly traded business corporation like Enron? Stated simplistically, a business corporation is a collective, commercial venture formed to make profit and recognized by law as a distinct entity.⁵⁰ Persons who can affect or are affected by corporate activities are "stakeholders," of which there are two categories: those in the transactional environment and those in the contextual environment.⁵¹ Transactional stakeholders are composed

50. A corporation is:

An entity (usu. a business) having authority under law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely; a group or succession of persons established in accordance with legal rules into a legal or juristic person that has legal personality distinct from the natural persons who make it up, exists indefinitely apart from them, and has the legal powers that its constitution gives it.

BLACK'S LAW DICTIONARY 341 (7th ed. 1999); *see also supra* note 34 (discussing contractarian and anticontractarian views of corporations).

51. *See* MATTHIAS WINTER & ULRICH STEGER, *MANAGING OUTSIDE PRESSURE: STRATEGIES FOR PREVENTING CORPORATE DISASTERS* 9-13 (1998) (explaining the stakeholder concept and two types of stakeholders). *See generally* William M. Evan & R. Edward Freeman, *A Stakeholder Theory of the Modern Corporation: Kantian Capitalism*, in *ETHICAL THEORY & BUSINESS* 97 (Tom L. Beauchamp & Norman E. Bowie eds., 3d ed. 1988).

of internal and external cooperating constituents.⁵² Internal constituents include directors, managers, employees, and shareholders.⁵³ External constituents include lenders, vendors, suppliers, and customers.⁵⁴ Some of these groups are particularly vulnerable to corporate abuses of trust exemplified by Enron's loss of employee pensions and stock values. Lenders and suppliers exposed themselves to uncollectible loans.⁵⁵ Customers risk either receiving substandard products and services or never receiving these products or services at all.⁵⁶ Trust among these internal constituents and external cooperators is necessary for corporate efficiency.⁵⁷

Unfortunately for most transactional stakeholders dealing with a corporation, large corporations with their limited liability and personal anonymity provide ample opportunity for abusing trust.⁵⁸ Because of the impersonal nature of such corporations, individuals and constituencies within a large corporation are less accountable and less exposed to personal retribution by individuals harmed by the corporation's abuse of trust.⁵⁹ The costs of guarding against untrustworthy behavior are often so high that the only solution is to extend trust to others. For example, most shareholders must place their trust in corporate management because they do not have the resources to determine whether or not the executives of a publicly held corporation are acting in a way to maximize shareholder value or

52. See WINTER & STEGER, *supra* note 51, at 11.

53. See *id.* at 11-12.

54. See *id.* (providing some examples).

55. See *id.* at 12 (providing chart with possible demands on these groups).

56. See *id.* (providing chart with possible demands on these groups).

57. See, e.g., Richard Butler, *A Transactional Approach to Organizing Efficiency: Perspectives from Markets, Hierarchies, and Collectives*, 15 ADMIN. & SOC'Y. 323 (1983) (discussing the market, hierarchy, and collective as organizational forms for business transactions); Ralph Chami & Connel Fullenkamp, *Trust and Efficiency*, 26 J. BANKING & FIN. 1785 (2002) (arguing that trust within a firm increases efficiency); Roderick M. Kramer, *Trust and Distrust in Organizations: Emerging Perspectives, Enduring Questions*, 50 ANN. REV. PSYCHOL. 569 (1999) (surveying major themes and contemporary perspectives regarding trust in organizations); Ronald C. Nyhan & Herbert A. Marlowe Jr., *Development and Psychometric Properties of the Organizational Trust Inventory*, 21 EVALUATION REV. 614 (1997) (reviewing the relationship between trust and organizational theory); Giancarlo Spagnolo, *Social Relations and Cooperation in Organizations*, 38 J. ECON. BEHAV. & ORG. 1 (1999) (discussing the impact of social relations, including trust, on cooperation within organizations); Hwee Hoon Tan & Christy S.F. Tan, *Toward the Differentiation of Trust in Supervisor and Trust in Organization*, 126 GENETIC SOC. & GEN. PSYCHOL. MONOGRAPHS 241 (2000) (distinguishing trust in supervisor from trust in organization).

58. See Meir Dan-Cohen, *Law, Community, and Communication*, 1989 DUKE L.J. 1654 (implying that natural persons in their corporate roles can disassociate their corporate activity from themselves thereby acting in ways they would otherwise view as immoral).

59. See Timothy L. Fort, *Goldilocks and Business Ethics: A Paradigm That Fits "Just Right"*, 23 J. CORP. L. 245 (1998) (arguing that from a naturalist perspective large megacorporate structures undermine individual moral responsibility).

reporting financial health accurately.⁶⁰ Many employees must trust corporate management of their pensions because they are not capable of determining whether the company is managing their pensions well. Customers must trust corporate claims of quality because they are incapable of making that determination on technically complicated or goods and services that are difficult to compare.

Alternatively or consecutively, shareholders, employees, and customers can place their trust in external trust-generating institutions, such as laws enforcing contracts, regulating employment relations, protecting minority shareholders and consumers, and requiring financial disclosures. Trust in individuals or institutions is replaced or reinforced functionally by trust in such institutions.⁶¹ Corporate constituents may presume that the threat of legal sanctions and even legislative reaction will restrain corporations from abusing trust.⁶² They may place their trust in the trust-mediating institution of reputation and public opinion reflected in the marketplace, presuming that the fear of gaining a bad reputation and the benefits of a good one will promote trustworthy corporate behavior.

Indeed, as it is for a natural person, reputation is important for a corporation.⁶³ It is in a corporation's enlightened self-interest to be

60. Considering the disaggregate nature of modern corporate ownership, shareholders of stock in a large corporation are not owners in the traditional sense because such shareholders rarely have meaningful control over management decisionmaking. As investors rather than owners, shareholders conceivably exercise control through the market; however, even this route of control is ineffectual for individual investors in light of the prevalence and market effect of large institutional investors. See Jeffrey Nesteruk, *Corporations, Shareholders, and Moral Choice: A New Perspective on Corporate Social Responsibility*, 58 U. CIN. L. REV. 451, 457 n.27 (1989) (citing A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932) as the "first in-depth analysis of the manner in which corporations had altered the nature of property ownership."

61. See generally Zucker, *supra* note 23 (discussing institutions and trust production).

62. A breach of trust may result in legal sanctions, and a breach of trust on a large enough scale can prompt policymakers to create regulatory constraints on the discretion of the company thereby limiting its efficiency.

63. Reputation is one of several terms describing the relative standing of an organization in the eyes of various constituencies. Oded Shenkar & Ephraim Yuchtman-Yaar, *Reputation, Image, Prestige, and Goodwill: An Interdisciplinary Approach to Organizational Standing*, 50 HUM. REL. 1361, 1362 (1997). Economists prefer the term reputation, while accountants use the term "goodwill." *Id.* In marketing, the preferred term is "image." *Id.* Because reputation is a neutral term, sociologists, preferring the term "prestige," use "esteem" to refer to a good reputation. *Id.* For other definitions of corporate reputation, see Violina Rindova & Charles J. Fombrun, *Fanning the Flame: Corporate Reputations as Social Constructions of Performance* (Mar. 14, 2003) (unpublished manuscript, on file with author) (providing a collective representation of a firm's past actions and results that describe the firm's ability to deliver valued outcomes to multiple stakeholders), and Manto Gotsi & Alan M. Wilson, *Corporate Reputation: Seeking a Definition*, 6 CORP. COMM.: INT'L J. 24, 29 (2001) ("A corporate reputation is a stakeholder's overall evaluation of a company over time . . . based on direct experiences with

perceived as trustworthy not only by its transactional stakeholders but also by its contextual stakeholders such as government agencies, media, community groups, and the public at large, which is the ongoing source of future customers, employees, investors, lenders, and vendors. To the extent that a corporation develops a public reputation for trustworthiness, it can function more efficiently.⁶⁴

E. Social Legitimacy as a Component of Corporate Reputation

Although trustworthiness is an important component of a corporation's reputation,⁶⁵ a corporation, unlike a natural person, as an object of trust must also achieve social legitimacy.⁶⁶ As it must with its reputation of trustworthiness, a business corporation must manage the public perception of its social legitimacy—the external⁶⁷ accountability of the corporation to the broader society within which it functions. Legal scholars began debating the concept of corporate social legitimacy in the 1930s⁶⁸ and exhumed it in the 1970s under the rubric of “social responsibility.”⁶⁹ The concept might be summarized as

the company, any other form of communications and symbolism that provides information about the firm's actions and/or a comparison with the actions of other leading rivals.”)

64. See Peter W. Roberts & Grahame R. Dowling, *Corporate Reputation and Sustained Superior Financial Performance*, 23 STRATEGIC MGMT. J. 1077, 1077 (2002), available at <http://www3.interscience.wiley.com/cgi-bin/abstract/98517574/START> (last visited Mar. 24, 2003); see also Hausman *supra* note 39, at 1778 (“If a firm does not have a reputation for trustworthiness, implicit contracts will be tenuous and limited; and the costs of doing business—that is, of writing and monitoring contracts and supervising employees, suppliers, or neighbors—will be much higher.”) (citing R. Frank, *What Price the Moral High Ground?*, 63 S. ECON. J. 1, 1-17 (1996) (presenting a study showing that “firms with a moral reputation will be able to attract and retain better employees at lower wages”)).

65. See Simon A. Booth, *How Can Organisations Prepare for Reputational Crises?*, 8 J. CONTINGENCIES & CRISIS MGMT. 197, 198-99 (2000) (noting that reputation is based on five constituent elements: legitimacy (conformity to expectations, based on a legal/socially acceptable foundation), reliability (a mixture of competence and consistency), credibility (consistent truthfulness), confidence (credibility plus consistent message communication), and trust (based on a comparison of confidence between different organizations)).

66. Institutional legitimacy can be defined in “terms of the existence of a social consensus that supports the institution, gives it legal sanction, and perhaps even offers it special privileges.” JAMES J. BRUMMER, *CORPORATE RESPONSIBILITY AND LEGITIMACY: AN INTERDISCIPLINARY ANALYSIS* 74 (1991) (citations omitted).

67. There are internal issues of corporate legitimacy relating to corporate governance, such as selection and removal of executives, managerial authority, and the rights and identities of internal constituents. To some extent, internal legitimacy is related more to issues of trust because it involves transactional stakeholders who are most directly vulnerable to corporate abuse.

68. See, e.g., BERLE & MEANS, *supra* note 60 (analyzing how corporations changed property ownership); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

69. See, e.g., MORRELL HEALD, *THE SOCIAL RESPONSIBILITIES OF BUSINESS: COMPANY AND COMMUNITY, 1900-1960* (1970); JAMES W. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970* (1970); see also BRUMMER, *supra*

follows: Corporate existence is dependent on a social environment that condones it. Our society recognizes the efficiency of corporate action and promotes corporate existence through the granting of various powers, privileges, and limitations on liability. But conversely, in a society in which large-scale organizations dominate so many aspects of daily life, the broader public is particularly vulnerable to their misdeeds and incompetence. This vulnerable public is part of that broader set of contextual stakeholders affected by the corporation's actions.⁷⁰ The set of potential stakeholders in the general public can be quite large. All of us are potentially vulnerable to corporate market manipulation, abuse of the environment, or monopolistic practices. Trust involves vulnerability, and one relationship between trust and social legitimacy is as follows: The vulnerable public will extend its trust ("public trust") if it perceives the exercise of organizational authority and power as legitimate.⁷¹ Corporate social legitimacy is achieved if society perceives that the values of the corporation correspond to its own values and that the corporation meets the responsibilities assigned to it.⁷²

Much like developing a public reputation of trustworthiness, this process of legitimizing in a democracy takes place through discourse in the public sphere.⁷³ The corporation must convince the public that its exercise of the powers and privileges granted to it is justifiable;⁷⁴ therefore, it engages in a rhetorical "process of reason giving,"⁷⁵ asserting the congruence of its values with those of the broader society.

note 66, at 3 ("[L]egitimacy is based upon [social institutions] meeting the responsibilities assigned to them.").

70. See *supra* notes 51-57 and accompanying text for a discussion of stakeholders. Through "corporate constituency" statutes, many states have recognized managerial discretion to take into account such stakeholders, as opposed to shareholders. See, e.g., FLA. STAT. ANN. § 607.0830 (West 2001); MASS. GEN. LAWS ANN. ch. 156B, § 65 (West Supp. 2002); MINN. STAT. ANN. § 302A.251(5) (West Supp. 2003); N.J. STAT. ANN. § 14A:6.1 (West Supp. 2002); N.Y. BUS. CORP. LAW § 717(b) (McKinney Supp. 2003); OHIO REV. CODE ANN. § 1701.59(E) (West Supp. 2002); 15 PA. CONS. STAT. ANN. §§ 1715-1716 (West 1995).

71. See Edwin M. Epstein, *The Historical Enigma of Corporate Legitimacy*, 60 CAL. L. REV. 1701, 1703 (1972) ("The ascendancy of large-scale organizations that dominate virtually all aspects of life . . . has made it imperative that the power of these organizations be legitimate.").

72. See BRUMMER, *supra* note 66, at 3 ("[L]egitimacy is based upon their meeting the responsibilities assigned to them.").

73. See JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 359-87 (William Rehg trans., 1996); Hugh Baxter, *System and Lifeworld in Habermas's Theory of Law*, 23 CARDOZO L. REV. 473, 577-85 (2002).

74. See BRUMMER, *supra* note 66, at 73-74.

75. Robert A. Francesconi, *James Hunt, The Wilmington 10, and Institutional Legitimacy*, 68 Q. J. SPEECH 47, 50 (1982).

There are two competing standards for judging legitimacy—utility and responsibility.⁷⁶ A corporation's utility is established by its performance in relation to external standards of economic effectiveness.⁷⁷ Essentially, this metric concerns how well the corporation "does the job," ranging from demonstrating financial viability to producing goods or providing services of acceptable quality and desirability.⁷⁸ A corporation's responsibility refers to its adherence to legal and ethical norms—assurance that the corporation "plays by the rules."⁷⁹ This standard implies another relationship between trust and social legitimacy: fulfilling trusts or behaving in a trustworthy manner is one of the rules society imposes. The rules might also include a nebulous concept of acting in the broader public interest or at least not harming the public.⁸⁰

Establishing and maintaining corporate legitimacy involves a difficult balancing act between the two standards. Although utility directly benefits the shareholders (and management's primary legal responsibility is to the shareholders) and other transactional stakeholders, maximizing utility can occur at the expense of the public interest (e.g., by degrading the environment) and contextual stakeholders.⁸¹ In turn, maximizing social responsibility by satisfying public interest stakeholders can occur at the expense of the

76. There are many theories behind corporate legitimacy. See BRUMMER, *supra* note 66, at 73-97. This approach is closest to the "performance theory" which judges legitimacy by referencing the outcomes of a corporation's actions and policies. See *id.* at 87-89.

77. See Epstein, *supra* note 71, at 1704 ("Utility requires that an institution . . . must not be evaluated by criteria wholly in the control of or defined by the institution itself."); see also Keith M. Hearit, "Mistakes Were Made": *Organizations, Apologia, and Crises of Social Legitimacy*, 46 COMM. STUD. 1, 2 (1995) (referring to this standard as "competence").

78. Epstein, *supra* note 71, at 1704.

79. *Id.*

80. The dual nature of corporate legitimacy is reflected in section 2.01 of the American Law Institute's Principles of Corporate Governance. Section 2.01 is divided into two parts. Subsection (a) concerns the objective of the corporation and provides that, subject to the provisions of subsection (b), a corporation "should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain." PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATION § 2.01(a) (1994). Subsection (b) provides that

even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business:

- (1) Is obliged, to the same extent as a natural person, to act within the boundaries set by law;
- (2) May take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business; and
- (3) May devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.

Id. § 2.01(b).

81. Hearit, *supra* note 77, at 3.

shareholders.⁸² An additional difficulty in maintaining legitimacy comes from changes in society's expectations. Society needs to question and to redefine the prevailing norms occasionally; therefore, the discourse on legitimacy is ongoing and responsive to changing public perceptions of the corporation's actions and responsibilities.

As with a public reputation for trustworthiness, this rhetorically constructed and publicly recognized legitimacy is a vital resource with which a corporation is able to obtain needed resources such as capital, customers, favorable legal treatment, and labor from society. The public is able to place its trust in the corporation because it believes that the corporation will "do the right thing." The more public trust, the more discretion and leeway granted to corporate decisionmaking. If the corporation does not conform to legal and social expectations, however, the public will respond by questioning its legitimacy and trustworthiness. When a natural person's trustworthiness is questioned, it may limit that person's ability to enter into cooperative relationships. When a corporation's trustworthiness is questioned, it not only limits the corporation's ability to enter into cooperative relationships, it also may lead to a corporate social legitimacy crisis.⁸³ As a result of this crisis, society

82. The Article does not weigh in on the longstanding debate regarding the balance of corporate responsibilities between profit maximization and social responsibility. Compare Edwin M. Epstein, *The Corporate Social Policy Process and the Process of Corporate Governance*, 25 AM. BUS. L.J. 361 (1987) (praising the A.L.I.'s effort to move into the "external" sphere of corporate legitimacy, which involves obligations of the corporation to diverse segments of society impacted by its operations), with Melvin A. Eisenberg, *Corporate Conduct That Does Not Maximize Shareholder Gain: Legal Conduct, Ethical Conduct, the Penumbra Effect, Reciprocity, the Prisoner's Dilemma, Sheep's Clothing, Social Conduct, and Disclosure*, 28 STETSON L. REV. 1 (1998) (arguing that some corporate actions that are public interest-oriented and appear to be nonmaximizing are in fact maximizing), and Melvin A. Eisenberg, *Corporate Legitimacy, Conduct, and Governance—Two Models of the Corporation*, 17 CREIGHTON L. REV. 1 (1983) (arguing that profit maximization is most desirable). But see Nesteruk, *supra* note 60, at 460 (asserting that the distinction between shareholders and the broader public as a stakeholder is not as clear considering the way in which most stocks of large publicly held corporations are held by shareholders). Not only does shareholder ownership negate any actual control over the corporation by the individual investor, but ownership of shares through large mutual funds also makes the health of the economy and of businesses generally more important than the profitability of an individual corporation. See *id.*

83. See Hearit, *supra* note 77, at 3. The general concept of a business crisis is somewhat broader. See, e.g., STEVE ALBRECHT, CRISIS MANAGEMENT FOR CORPORATE SELF DEFENSE: HOW TO PROTECT YOUR ORGANIZATION IN A CRISIS . . . HOW TO STOP A CRISIS BEFORE IT STARTS 7 (1996) ("[A]n event-specific episode that can make or break you, depending upon the size of your company, the number of people you employ, the products and services you sell, and the resources of people, assets, and money you can aim at the problem."); W. TIMOTHY COOMBS, ONGOING CRISIS COMMUNICATION: PLANNING, MANAGING, AND RESPONDING 2 n.72 (1999) (discussing an unpredictable event that could have potentially negative results: "The event and its aftermath may significantly damage an organization and its employees, products, services, financial condition, and reputation.") (citation omitted). Other categories of business crises include

may punish the corporation and require more trust-generating regulation, thereby constraining corporate discretion.⁸⁴ Ultimately, the crisis may threaten the corporation's very existence.

III. INADEQUACY OF TRADITIONAL RESPONSES TO SOCIAL LEGITIMACY CRISES

A. *Social Legitimacy Crises, Generally*

A corporate social legitimacy crisis results from a public charge of corporate wrongdoing, an accusation that the corporation has violated the accepted norms of corporate behavior and, therefore, the public trust and is indicated by the emergence of public hostility toward the corporation.⁸⁵ Such charges may emanate from whistleblowers, disgruntled or public-conscious employees, political actors, watchdog groups, investigative reporters, or persons injured by corporate behavior.⁸⁶ Usually, the charges are made public through dissemination by various forms of mass news media. Upon entering the public discourse, the mere accusation is sufficient to cause the crisis, the truthfulness or accuracy of the charge being largely irrelevant.⁸⁷

These charges fall into roughly two categories—incompetence and public irresponsibility.⁸⁸ A charge of incompetence asserts that the corporation has failed to do its job properly, i.e., failed to meet the utility standard of corporate social legitimacy.⁸⁹ Examples include the wreck of the Exxon Valdez and the resulting disastrous oil spill and,

sudden market shifts, succession of top management, cash flow problems, industrial relations problems, hostile takeovers, adverse international events, and disruption from regulation or deregulation. See generally GERALD C. MEYERS, *WHEN IT HITS THE FAN: MANAGING THE NINE CRISES OF BUSINESS* (1986).

84. Such regulation is itself a replacement for public trust in the regulated entities. See generally Zucker, *supra* note 23.

85. Hearit, *supra* note 77, at 3.

86. See ALBRECHT, *supra* note 83, at 17-22 (arguing that crises arise as a result of people both in and out of the organization pressing their particular agendas).

87. One crisis management guru distinguishes between "character" crises, in which the organization's acts raise questions of trustworthiness, quality, or competence (e.g., breast implants, Exxon Valdez, and the 1996 Valuejet crash in the Everglades) and "sniper fire" crisis caused by external forces (e.g., Tylenol poisoning and syringes in Pepsi-Cola). ERIC DEZENHALL, *NAIL 'EM! CONFRONTING HIGH-PROFILE ATTACKS ON CELEBRITIES & BUSINESSES* 91 (1999).

88. See Hearit, *supra* note 77, at 4. Another authority distinguishes between four types of corporate social legitimacy crises—technological (Bhopal), confrontational (boycotts), malevolent (Tylenol poisoning and rumors about the Procter and Gamble logo), and management failure (E.F. Hutton). See OTTO LERBINGER, *MANAGING CORPORATE CRISES: STRATEGIES FOR EXECUTIVES* (1986).

89. Hearit, *supra* note 77, at 4.

more recently, the SUV rollover accidents allegedly resulting from design or production flaws in either the Ford Explorer or Firestone tires.⁹⁰ In the case of the Exxon Valdez, the underlying charge was that Exxon's incompetence violated public values of environmental protection.⁹¹ In the case of the Ford Explorer, the underlying charge was that design or manufacturing incompetence of either Ford or Firestone had violated public values of producing safe products.⁹²

A charge of public irresponsibility asserts a violation of the norms of public responsibility to the community in which the corporation operates, i.e., it failed to meet the responsibility standard of corporate social legitimacy.⁹³ Here, public trust is more deeply implicated because the actions are intentional. Examples include the accusation, prompted by a series of automobile accidents, that Domino's Pizza's policy of quick delivery endangered its drivers and placed the public at risk,⁹⁴ the accusation that Chrysler was rolling back the mileage on odometers of cars driven by its executives and sold to the public as new,⁹⁵ and the accusation that McDonald's was using beef flavoring in its French fries which it touted as suitable for vegetarians.⁹⁶ Although involving nonprofits, accusations that the Red Cross misused 9/11 funds and that the Roman Catholic Church quietly reassigned pedophilic priests to other parishes prompted crises for both organizations. The charges that Enron engaged in deceptive

90. See, e.g., James R. Healey, *Special Report: Firestone Leaves an Indelible Mark*, USA TODAY, Dec. 26, 2000, at 1B; Keith Naughton & Mark Hosenball, *Ford vs. Firestone*, NEWSWEEK, Sept. 18, 2000, at 26; Alex Taylor, III, *Jac Nasser's Biggest Test*, FORTUNE, Sept. 18, 2000, at 123; Daniel Eisenberg, *Anatomy of a Recall: How a Small-Town Lawsuit in Texas Cascaded into the Biggest Consumer Panic Since the Tylenol Scare, Plaguing Firestone and Ford with Allegations of Factory Flaws and Design Errors*, TIME, Sept. 11, 2000, at 11; John Greenwald, *Firestone's Tire Crisis: The Company Recalls 6.5 Million of Its Most Widely Used Tires. Did It Act Fast Enough?*, Time, Aug. 21, 2000, at 64.

91. Hearit, *supra* note 77, at 4.

92. See *supra* note 90.

93. Hearit, *supra* note 77, at 5.

94. The Domino's Pizza case is examined extensively in Hearit, *supra* note 77, at 5-12.

95. See, e.g., Keith M. Hearit, *Apologies and Public Relations Crises at Chrysler, Toshiba, and Volvo*, 20 PUB. REL. REV. 115 (1994); Christine Dugas, *Chrysler's Odometer Crisis: Managing the Public Response*, NEWSDAY, July 8, 1987, at 47, available at 1987 WL 2695482; *Iacocca Offers Apology: Chrysler to Extend Warranties, Replace Some Cars*, DALLAS MORNING NEWS, July 2, 1987, at 1A, available at 1987 WL 4724894; Jim Mateja & Michael Tackett, *Chrysler Odometer Fraud Charged*, CHI. TRIB., June 25, 1987, at 1, available at 1987 WL 2964748; Tom Peters, *The News Is That Iacocca's Response Made News*, CHI. TRIB., July 27, 1987, at 6, available at 1987 WL 2972922; James Risen, *Iacocca Admits Mileage Tampering Was "Dumb" Apologizes for Chrysler's New Car "Test-Drives" by Its Managers with Odometers Disconnected*, L.A. TIMES, July 2, 1987, at 1, available at 1987 WL 2162230.

96. See, e.g., Steve Lash, *McDonald's to List Natural-Flavor Ingredients*, FOOD CHEMICAL NEWS, Aug. 20, 2001, at 10; Ameet Sachdev, *McDonald's Apologizes for Fries 'Confusion'*, CHI. TRIB., May 25, 2001, at Business.

accounting tactics and that Arthur Andersen compromised its auditing function in favor of its consulting business are charges of public irresponsibility.

B. Traditional Responses and Corporate Apologia

Faced with an accusation of wrongdoing and a looming legitimacy crisis, what is a corporation to do? Management literature is replete with crisis management advice, most of which emphasizes prevention and preplanning; however, most agree that communication is the key.⁹⁷ If corporate legitimacy is established through public discourse and public discourse about corporate behavior causes corporate legitimacy crises, then the response must take the form of public communication. Noncommunicative responses, even if legitimate, are ineffectual by definition. Ignoring the problem is not likely to resolve it even if the charge is false. Although the attention of the public may shift elsewhere eventually, avoidance is usually poor damage control. A false charge may stick, and a true charge may reveal a real problem that will persist without corrective action. Even if the corporation responds privately and internally by ferreting out a real problem and fixing it so it will not recur, it can only solve its legitimacy crisis by engaging in public discourse to reassure the public that it deserves its trust. Public relations campaigns, which may become intensified during a social legitimacy crisis, simply reassert the corporation's adherence to public values and are not directly responsive to the accusation.

A corporate apologia is a public response to a social legitimacy crisis—a rhetorical reaction to public criticism in an attempt to reduce public animosity and to reestablish legitimacy.⁹⁸ Its dual purpose is to distance the corporation from the alleged wrongdoing and to reaffirm the corporation's commitment to public values and corrective action, if necessary.⁹⁹ Apologia is not the same as an apology. The latter involves an admission of wrongdoing and acceptance of

97. See, e.g., ALBRECHT, *supra* note 83, at 83; KATHLEEN FEARN-BANKS, *CRISIS COMMUNICATIONS: A CASEBOOK APPROACH 2* (2002) (defining crisis communication); HEATH, *supra* note 83, at 146-69 (stressing media management); LERBINGER, *supra* note 88, at 83-91; MARION K. PINSORF, *COMMUNICATING WHEN YOUR COMPANY IS UNDER SIEGE: SURVIVING PUBLIC CRISIS* (3d ed., 1999); WINTER & STEGER, *supra* note 51, at 244 (discussing communication and public relations management).

98. See generally B.L. Ware & W.A. Linkugel, *They Spoke in Defense of Themselves: On the Generic Criticism of Apologia*, 59 Q. J. SPEECH 273 (1973) (discussing apologia as use of public communication to defend one's self from public attack).

99. See Hearit, *supra* note 77, at 6.

responsibility,¹⁰⁰ neither of which is appropriate if the corporation believes that the accusation is unfounded. Corporate apologia may include an apology, particularly if the corporation acknowledges the wrongdoing, but is best defined as a public self-defense by which the organization responds to criticism by presenting a justification of its behavior through a “compelling, counter account of its actions.”¹⁰¹

An “account” is a statement used to explain behavior and to protect reputation from a threat.¹⁰² There are a number of account strategies ranging from defensive to accommodative.¹⁰³ Defensive strategies deny responsibility and attempt to protect reputation at the expense of victims of the behavior. They include obfuscation (“well, this is a very complex accounting issue”), deflection (“the real problem is the regulatory system”), attacking the accuser (“this accusation was made by a highly unstable, disgruntled ex-employee”), denial (“we didn’t do it”), excuse (“we had no control of the situation”), and justification (“the accident occurred while we were in pursuit of the greater good and no serious damage resulted”). Accommodative strategies, such as an apology, are those that accept responsibility, help victims, and correct the problem.¹⁰⁴ Different strategies may be appropriate for different crisis situations. If the corporation’s responsibility for the problem is weak, then defensive strategies may be appropriate and vice versa.¹⁰⁵

McDonald’s apologia related to animal products in its “vegetarian” French fries is a recent example of classic corporate apologia. It stated that

... mistakes were made in communicating to the public and customers about the ingredients in our French fries and hash browns. Those mistakes included instances in which French fries and hash browns sold at U.S. restaurants were improperly identified as “vegetarian.” We regret we did not provide these customers with complete information, and we sincerely apologize for any hardship that these miscommunications have caused among Hindus, vegetarians and others. We should have done a better job in these areas, and we’re committed to doing a better job in the future.

As a direct result of these events, McDonald’s has enhanced its disclosures concerning the source of ingredients in its food products... has created a Dietary Practice/Vegetarian Advisory Panel consisting of experts in consumer dietary

100. See Erin Ann O’Hara & Douglas H. Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1131-40 (discussing definition and nuances of apology). For apology in the context of corporations, see generally Taryn Fuchs-Burnett, *Mass Public Corporate Apology*, 57 DISP. RESOL. J., July 2002, at 27.

101. Hearit, *supra* note 77, at 3.

102. See BENOIT, *supra* note 41.

103. See W.L. Benoit, *Image Repair Discourse and Crisis Communication*, 23 PUB. REL. REV. 177 (1997) (listing fourteen strategies of apologia).

104. See COOMBS, *supra* note 83, at 122-23.

105. See *id.*

practices . . . [and] is donating \$10 million to Hindu, vegetarian and other groups whose charitable and educational activities are closely linked to the concerns of these consumers.¹⁰⁶

Consistent with the dual purpose of distancing the corporation from the alleged wrongdoing and reaffirming the corporation's commitment to public values, McDonald's apology has two parts, a negative rhetoric through which the corporation distances itself from the alleged wrongful act and a positive rhetoric through which it reaffirms its commitment to prevailing social values.¹⁰⁷ The company's apology strategy was largely accommodative in keeping with the level of responsibility it bore.

Exxon's defensive response to accusations of wrongdoing in the Valdez disaster is considered a textbook case of disastrous communications during a corporate social legitimacy crisis.¹⁰⁸ After failing to shift the blame to Captain Hazelwood, Exxon published an apology in the form of an advertisement entitled "An Open Letter to the Public," described by one commentator as "a formal, one-time public defense of its actions in which the company attempted to limit the editorial power of the media and take its case directly to the American public."¹⁰⁹ Unfortunately for Exxon, the apology backfired because the facts emerging about Exxon's culpability in the wreck (it had reduced crew sizes on the tankers) and incompetence in the cleanup (it acted sluggishly and engaged in scientifically criticized cleanup methods) belied the statements in its apology. In turn, this further undermined public trust and sustained Exxon's legitimacy crisis.¹¹⁰

In contrast, Johnson & Johnson was not responsible for tainted Tylenol, which killed several people, nor was Pepsi-Cola responsible for syringes found in its products; however, in both cases, the companies communicated the facts as known to the company to the public and took immediate action to protect the public by recalling the products in question.¹¹¹ Although lack of responsibility made these apologies easier to make, both cases are cited as successful examples of corporate response to legitimacy crises.

106. For the full text of the apology, see *Notices*, EDELMAN, COMBS & LATTURNER, L.L.C., at <http://www.edcombs.com/CM/Notices/Notices158.asp>.

107. Hearit, *supra* note 77, at 6.

108. See FEARN-BANKS, *supra* note 97, at 100-01; ROBERT HEATH, *CRISIS MANAGEMENT FOR MANAGERS AND EXECUTIVES* 148-49 (1998).

109. Hearit, *supra* note 77, at 5.

110. See *id.* at 11-12; see also Harvey L. Pitt & Karl A. Groskaufmanis, *When Bad Things Happen to Good Companies: A Crisis Management Primer*, 15 *CARDOZO L. REV.* 951, 952 (1994).

111. See FEARN-BANKS, *supra* note 97, at 86-96 (Johnson & Johnson), 236-45 (Pepsi-Cola); Pitt & Groskaufmanis *supra* note 110, at 951-52 (Johnson & Johnson).

C. Corporate Legitimacy Crises in a Post-Enron Environment

We believe that in the current social and economic environment, traditional responses to corporate social legitimacy crises are increasingly ineffective regardless of the corporation's level of responsibility. First, corporate legitimacy crises are increasingly common. Globalization and the impersonal nature of our society, combined with the vast reach of corporate activity in the lives of large numbers of people, cause corporate errors and abuses to have wide-ranging effects, increasing the likelihood of a crisis.¹¹² In fact, the situation has given rise to a moderately successful and widespread antiglobalization movement targeting international corporations.¹¹³ Second, revelations about Enron and other companies have exacerbated distrust of corporations and of trust-generating institutions more generally. Although there has been a general trend toward distrust of public institutions, businesses historically have been vilified, and intense periods of corporate scandal reporting are not uncommon,¹¹⁴ the current spate of corporate scandals seems to have tainted all business corporations to some degree and generated a particularly high level of public distrust. Corporate speech is viewed with increasing skepticism, despite the sincerity of many corporate executives and board members.¹¹⁵ Corporate speech generally, and self-generated apologia particularly, is likely to be viewed by the public as strategic or instrumentalist (oriented toward the success of the corporation's goals) rather than communicative (oriented toward reaching agreement, finding truth, or building community).¹¹⁶

112. See PETER SCHWARTZ & BLAIR GIBB, *WHEN GOOD COMPANIES DO BAD THINGS: RESPONSIBILITY AND RISK IN AN AGE OF GLOBALIZATION* 9-23 (1999).

113. Note the success of the Green Party in 2000 and Ralph Nader's 2000 presidential campaign based largely on anticorporate sentiment.

114. In the 1980s, the focus was on Michael Milken, Ivan Boesky, the savings-and-loan scandals, and defense contracting abuses as well as on Bhopal and the Exxon Valdez disasters. Casebooks discuss these crises. See, e.g., IAN I. MITROFF & THIERRY C. PAUCHANT, "WE'RE SO BIG AND POWERFUL NOTHING BAD CAN HAPPEN TO US": AN INVESTIGATION OF AMERICA'S CRISIS PRONE CORPORATIONS (1990).

115. The business press has quoted corporate crisis experts as subscribing to the notion of an increasingly cynical and skeptical public. See e.g., *Crisis? What Crisis?* BRAND STRATEGY, Aug. 21, 2002, at 20, available at 2002 WL 15824009; Aaron Bernstein, *Too Much Corporate Power?*, BUS. WK., Sept. 11, 2000, at 144 (quoting Ruy Teixeira, a pollster with the Century Foundation (Washington-based think tank): "There's a widespread sense of unfairness and distrust today, where people think companies are not quite playing by the rules.").

116. Habermas distinguishes between two types of discursive action—communicative action and strategic communication—and observes that the point of the organizational speech act is instrumental. See JURGEN HABERMAS, *COMMUNICATION AND THE EVOLUTION OF SOCIETY* ch. 1 (Thomas McCarthy trans., 1979); JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* ch. III (Thomas McCarthy trans., 1981). We note that there is increasing public cynicism and

Traditional defensive responses to corporate legitimacy crises are likely to backfire, particularly if the emerging facts contradict the corporation's communications. Public relations campaigns are viewed as cynical and self-serving by an increasingly sophisticated and skeptical public.¹¹⁷

Once distrustful, the public will remain wary in its response to the distrusted institutions' communications. It is no longer adequate to issue a press release that states: "We are looking into it, and if there is a problem, we will correct it," or "Mistakes were made, and we have fixed them." If the public is going to accept the apologia, reinstate the corporation's legitimacy, extend its trust, and resume beneficial collaboration and relationships, the assertions made in the apologia must be verified by some independent, trusted institution.

Unfortunately, the public has reasons to be wary of these institutions as well. Enron executives were closely connected with the highest levels of the government. The independent auditing system not only failed miserably in detecting the abuses, it even participated in them to some degree. It is now widely known that the accounting industry actively opposed reforms that may have prevented some of the abuses and that its primary lobbyist was Harvey Pitt,¹¹⁸ former chairman of the SEC, which itself could be criticized for its failure to prevent these abuses.¹¹⁹ Congressman Tauzin, chairing one of the House committees developing reforms, was a previous champion of the antireform lobby.¹²⁰ Burdened by conflicts of interest, financial analysts failed to provide objective assessments and in some cases gave glowing assessments of companies that they knew were unsound.¹²¹ In this sense, the trust-generating institutions that

skepticism concerning the recent widespread use of public apology. See O'Hara & Yarn, *supra* note 100, at 1156.

117. In the public relations industry, emergency crisis consultants "have become a staple of corporate life." *PR Industry Defends Work for Allina*, MINNEAPOLIS STAR TRIB., July 14, 2001, at 1D. Considering the many management books on how to handle the media and maintain corporate image, one might sense that corporate communications are purely strategic and lack sincerity.

118. Ironically, Pitt coauthored an article on corporate crisis management in the early 1990s which also forewarned of an "Age of Retribution" that would be particularly bad for corporations because of increasing litigation and liability exposure, overzealous public prosecutors and government regulators armed with enhanced civil and criminal sanctions, and a growing tendency to vilify business. Pitt & Groskaufmanis, *supra* note 110, at 956-59.

119. From another perspective, the failure of the regulatory system can be viewed as an example of law's limits in maintaining trustworthy behavior. See *supra* notes 30-34 and accompanying text.

120. See, e.g., Peter Beinart, *Accounting*, NEW REPUBLIC, Feb. 11, 2002, at 6 (describing Congressman Tauzin's success in stalling pre-Enron accounting regulation efforts).

121. "Salomon Smith Barney lead telecom analyst Jack Grubman, who was investigated by regulators for his role in the rise and fall of WorldCom Inc., resigned [in August, 2002]." *Salomon's Jack Grubman Resigns*, WASH. TIMES, Aug. 15, 2002, available at

provide people with enough confidence to extend their trust to these corporations have themselves failed and are now distrusted.

The nature of modern mass media complicates today's legitimacy crisis. It is through mass media that corporations assert their legitimacy and that reputations are formed; however, it is also through the mass media that allegations of corporate wrongdoing are reported. Such reports attract an audience, which in turn encourages the increasingly competitive news organizations to report more allegations of wrongdoing. In their efforts to do so, the news media provides a seemingly uncritical forum to any person or special interest group with a grudge or an accusation. Technology allows for the immediate and worldwide dissemination of this information. The public and market reaction can be immediate, which in the case of Enron virtually destroyed the company in a matter of days.

The immediate and pervasive nature of modern information dissemination is particularly problematic for corporations faced with untrue allegations of wrongdoing. Who will verify their denial? The courts may eventually verify the corporation's claim that an allegation of wrongdoing was false or unjustified. Unfortunately, the harm, loss of reputation and loss of public trust, has already occurred by the time the facts are established at trial. Although it is certainly unfair for innocent corporations to suffer from malicious or unsubstantiated allegations of wrongdoing, an otherwise good company can suffer disproportionately from the wrongful acts of a small internal constituency. Such a company might respond to an allegation of wrongdoing in good faith, fire the wrongdoers, act so as to prevent such abuses in the future, and issue an apologia, but without some form of independent verification, the public may continue to distrust the organization, causing its demise. Such a fate may be well deserved if the allegations are true and if the corporation is pervaded by a culture that promotes abuse of the public trust; however, it seems an overly extreme sanction to be borne by the innocent constituents of an otherwise good company. Not only will individuals suffer, but society will also bear the cost,¹²² including increased regulation that may not

<http://www.washtimes.com/upi-breaking/20020815-103345-3605r.htm> (last visited Mar. 31, 2003). In a settlement with the State of New York over allegations that its investment advice was tainted by conflicts of interest, Merrill Lynch paid a \$100 million fine and agreed to institute a number of significant reforms. See Press Release, Office of the New York Attorney General, Eliot Spitzer, Spitzer, Merrill Lynch Reach Unprecedented Agreement to Reform Investment Practices: Merrill Lynch to Pay \$100 Million Penalty, (May 21, 2002), at http://www.oag.state.ny.us/press/2002/may/may21a_02.html (last visited Mar. 31, 2003).

122. The social consequences include unemployment, pension collapses, displacement of persons, complete loss of shareholder value, and less competition in that company's industry.

be needed and could contribute to a more distrustful atmosphere.¹²³ It seems both inefficient and unnecessary to cause the destruction of a potentially legitimate and productive organization while society bears the attendant social costs. Moreover, nothing has been done to rebuild public trust—a condition which could have deeper economic consequences if left unaddressed.¹²⁴

The media companies, which could respond faster than the courts, have neither the resources to verify corporate apologies nor the inclination to do so. Media pandering to the public appetite for *schadenfreude* and its need to create villains and conduct witch hunts¹²⁵ is likely to be more sensitive to ratings than to the truth, and the speed of reporting can come at the expense of accuracy. By the time the truth emerges, the harm has been done, and while wrongdoing might get front-page headlines, corrections and retractions rarely do.

Indeed, the media, as arbiter of corporate reputation and protector of the public interest, is suffering from its own legitimacy crisis. While it should be praised for its role in uncovering corporate abuses of the public trust, the media appear to have been a complacent participant in helping to create the environment in which the abuses could take place. Many of the most abusive corporations and their executives maintained stellar reputations until the wrongdoing was exposed. In addition, the news media's

123. See *supra* notes 31-32 and accompanying text; see also Brian R. Cheffins, *Trust, Loyalty and Cooperation in the Business Community: Is Regulation Required?*, in *THE REALM OF COMPANY LAW* (Barry A.K. Rider ed., 1998):

While trust, loyalty and related norms may have a crucial economic role to play, it does not follow that regulation should be used to foster their development. Since it is sensible business practice to act in a cooperative manner, laws of this character will often be redundant and could in fact serve to reduce reliance on trust and loyalty. Also, using the legal system to try to ensure that trust and related concepts are crucial elements in a country's business culture will provide a platform for opportunistic litigation and might lead to the introduction of a bureaucratic enforcement regime. [.]

at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=156510.

124. Societies which suffer from a large degree of distrust fail to flourish economically. See generally Knack & Zak, *supra* note 25. Knack and Zak's work is also instructive to the extent it shows that an atmosphere of distrust is likely in a society that is less homogeneous and in which interpersonal trust is low. See generally *id.*

125. Although most books on corporate crisis management discuss how to handle the media during a crisis, only a few discuss the role of the media in creating such crises, thereby painting the media as either antagonistic toward business corporations or merely responsive to cultural trends. See, e.g., DEZENHALL, *supra* note 87, at 11-19 (arguing that we live in a "culture of attack" motivated by enjoyment of another's misfortune (*schadfreude*) and nebulous personal fears which create a witch-hunt mentality and that to compete, the media strives to pique the culture's rage through "attack programming" news shows such as 60 Minutes, Primetime, 48 Hours, and Dateline); see also ALBRECHT, *supra* note 83, at 17-19 (arguing that this is an "age of entitled disgruntlement"); Pitt & Groskaufmanis, *supra* note 110, at 956-59 (describing a current "age of retribution").

trustworthiness has been placed in doubt by its unchecked desire for sensationalism, which has led to its own abuses of the public trust, such as jumping to the conclusion that Richard Jewell was the Atlanta Olympics bomber, exaggeration and subterfuge in fabricating a scandal around Food Lion's handling of expired foods, and the manipulation of a crash test of a GM pickup truck to ensure an audience-grabbing gas tank explosion on film.¹²⁶

In the current environment of corporate illegitimacy and public distrust of other trust-generating institutions, combined with the media's inability to separate rumor from reality and the courts' inability to establish the facts in time, new trust-generating institutions may be necessary to verify corporate apologia and to create the public trust and confidence necessary to resume beneficial corporate relations.

IV. PUBLIC INDEPENDENT FACT-FINDING

Major organizations in severe legitimacy crises sometimes reinforce their apologia by engaging eminent persons as independent fact finders. We believe this development is a promising trust-generating process in the current environment of distrust. The concept is at the cottage industry stage, conducted ad hoc by a few able public figures; however, it is moving toward institutionalization. In this section, we examine the various forms of fact-finding, distinguish and give some examples of public independent fact-finding, and identify some of the fundamental characteristics of that process.

Generally, fact-finding is an extrajudicial,¹²⁷ problem-solving process in which a third party, or fact finder, investigates facts relevant to a controversy and issues a report establishing the relevant facts.¹²⁸ The fact finder is a person or group, often with technical expertise,¹²⁹ who is usually impartial, thereby lending more

126. See DEZENHALL, *supra* note 87, at 192-98, 204, 207, 258-59 (discussing Jewell, Food Lion, and GM).

127. Broadly defined, fact-finding is a "process of determining the facts relevant to the controversy and, as such, [is] a crucial aspect of most dispute resolution processes," including adjudication. *DICTIONARY OF CONFLICT RESOLUTION* 178 (Douglas Yarn ed., 1999). This Article is limited to the form of fact-finding that occurs outside the ambit of the courts and formal adjudication.

128. *Id.*

129. Fact-finding is distinguishable from "expert assessment" and "case evaluation," processes in which an independent third party with specific expertise is called upon to give an opinion concerning the relative strengths and weaknesses of parties' cases, the likely outcome of a litigated matter, or a reasonable settlement. *Id.* at 68-69, 173-74. Expert assessment is appropriate where the factual background to the dispute is relatively straightforward and the parties are relying on the particular expertise of the expert to

persuasive power to the findings. It can be used in two ways, as alternative dispute resolution (“ADR”) and as self-critical analysis (“SCA”). Both uses involve investigatory and reporting phases.

A. Fact-Finding as a Form of ADR

When conducted to resolve a dispute between two or more identifiable disputants, fact-finding is a form of ADR; however, fact-finding’s investigatory phase distinguishes it from better known ADR processes. Rather than passively hear the various disputants’ version of the facts, as do mediators and arbitrators,¹³⁰ the fact finder conducts an investigation, proactively exploring the facts and the nature of a dispute.¹³¹ Investigation may involve systematic observation, examination, and questioning. In addition to using an independent investigation and materials submitted by the parties, the fact finder may hold hearings, a practice more common in labor disputes. In this context, fact-finding is similar to typical mediation and nonbinding arbitration, both of which have hearing components.

The investigation phase is merely the gathering of information that, if reported at all, does not contain conclusions. The fact finder makes conclusions in the reporting phase of the process. The report may also contain a description of the investigatory process. In the reporting phase, conclusions are separate from recommendations. In its most basic form, fact-finding separates the functions of defining or clarifying the nature of the problem from developing a solution. The typical fact finder report simply states the fact finder’s conclusions as to the nature of the problem without offering recommendations. In the context of labor disputes, where the process is perhaps best known and institutionalized, there are variations of fact-finding in which the fact finder also makes recommendations concerning settlement.¹³²

settle their dispute. At times, this decision is treated as final. Similar or equivalent to an arbitration if the expert relies on the parties to present evidence and arguments.

Id. at 174 (citation omitted).

130. Arbitrators can be inquisitorial and active in the pursuit of the facts, visiting a construction site in which the dispute arose, for example; however, the more common practice is to allow the parties to present the evidence. *See, e.g.*, AM. ARBITRATION ASS’N, COMMERCIAL DISPUTE RESOLUTION PROCEDURES, R. 35 (2000) (providing for inspection and investigation by an arbitrator).

131. An investigation is an “[e]xploration of the facts and nature of a dispute or situation. [It m]ay involve systematic observation, examination, and questioning. Although used interchangeably with inquiry, . . . [an] investigation is merely the gathering of information that, if reported at all, does not contain conclusions.” DICTIONARY OF CONFLICT RESOLUTION, *supra* note 127, at 236.

132. Thus, the following legal definition: “An investigation of a dispute by a public or private body that examines the issues and facts in a case and may or may not recommend settlement procedures.” COLO. REV. STAT. ANN. § 13-22-302(2.1) (West 2002). This kind of fact-finding is

In international law, fact-finding is institutionalized as the process of "inquiry."¹³³ In this context, and unlike fact-finding in labor disputes, fact-finding is concerned only with ascertaining the facts and does not include the making of recommendations;¹³⁴ however, in an "enlarged inquiry," a finding of facts is accompanied by recommendations or conclusions of law.¹³⁵

When fact-finding is used as a form of ADR, the fact finder typically is appointed jointly by disputants. This is called "joint fact-finding,"¹³⁶ an ad hoc private and voluntary process, in which the nature and effect of the process and report are shaped by the parties' agreement. Although the parties can agree to make a fact-finding report public, the report is typically for the parties' use only. Disputants might agree before or after the report to be bound by the conclusions, to use it as a basis for settlement, or to move to another dispute resolution process.

particularly common in public sector employment disputes, in which the fact finder, often a board or panel, recommends a resolution for each outstanding issue. An additional benefit of fact-finding in this context is that it prohibits changes in the status quo until the fact finder has had an opportunity to investigate and report. *DICTIONARY OF CONFLICT RESOLUTION*, *supra* note 127, at 179. Some statutes require "interest" disputes to be submitted to a fact finder who issues recommendations either as a final stage in a series of processes or in advance of compulsory arbitration. *See, e.g.*, OHIO REV. CODE ANN. § 4117.14 (C)(3) (Banks-Baldwin 1990). *See generally* Marvin F. Hill, Jr. & Emily DeLacenserie, *Interest Criteria in Fact-Finding and Arbitration: Evidentiary and Substantive Considerations*, 74 MARQ. L. REV. 399 (1991) (focusing on selected evidentiary and substantive issues that may arise in fact-finding or arbitration of interest disputes in the public sector (e.g., client's ability to pay, ex parte consideration of evidence by neutrals, focus/function/scope of the interest neutral) and proposing policy recommendations for a successful fact-finding and arbitration process).

133. Fact-finding is not listed specifically with the different steps for pacific settlement in the U.N. CHARTER art. 33. In fact, only the word "enquiry" appears as a step between negotiation and mediation.

134. This process is consistent with the limits on inquiry defined in articles 9-36 of the Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779, 187 Consol. TS 410, as amended, Oct. 18, 1907, 36 Stat. 2199, 205 Consol. TS 233. Some treaties contemplate inquiry conducted jointly by officials of the disputing states rather than by an independent third party. U.N. OFFICE OF LEGAL AFFAIRS, HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES 29 (1992).

135. *DICTIONARY OF CONFLICT RESOLUTION*, *supra* note 127, at 221.

136. *Id.* at 180 (defining "fact-finding board" and "fact-finding panel" and asserting that in civil disputes, the parties may try to avoid impasse in negotiations by engaging a neutral, mutually selected expert to make determinations on contested facts). *See generally* Donald Lee Rome, *Resolving Business Disputes: Fact-Finding and Impasse*, 55 DISP. RESOL. J. 8 (2001) (examining the nature and goals of fact-oriented resolutions, compromise without fact-finding, fact-finding to break impasse, fact-finding as a flexible process, business considerations in a mediation impasse, and opportunities and pitfalls of fact-finding). The term is also used in public policy dispute resolution in which "facilitators often encourage the stakeholders to jointly gather and determine the salient facts. In some cases, the parties will designate representatives to work together to develop responses to factual questions relevant to a controversy." *DICTIONARY OF CONFLICT RESOLUTION*, *supra* note 127, at 180.

A court or governmental body may be empowered by statute, regulation, or court rule to impose fact-finding on disputants.¹³⁷ Although rare as a form of court-connected ADR, mandated fact-finding is not uncommon in public labor disputes.¹³⁸ The appointing body usually selects the fact finder and limits the scope of the investigation and determination to particular areas in which the facts are controverted, often in highly technical areas.¹³⁹ The report would not be binding; however, the unique feature of the imposed fact-finding process in labor disputes is that the recommendations of the fact finder are usually made public under the rationale that public opinion will make the recommendations more difficult to reject.¹⁴⁰

B. Fact-Finding as Self-Critical Analysis/Internal Investigation

In addition to its use as a form of ADR, fact-finding can occur in the absence of identifiable disputants. An organization can initiate fact-finding unilaterally simply to determine the facts of a situation and to respond to or correct it accordingly. In the private sector, a corporation might unilaterally engage a fact finder to investigate a complaint or problem internal to the organization. This type of fact-finding is a form of self-critical analysis ("SCA"), which is more often conducted as an "internal investigation"¹⁴¹ by selected board members

137. See, e.g., ARK. CODE ANN. § 16-7-201 (Michie 1999) (encouraging the use of fact-finding in civil disputes); CAL. GOV'T CODE §§ 3548.1, 3591 (West 1995) (discussing fact-finding as impasse procedure for disputes involving employees in public education and higher education respectively); COLO. REV. STAT. ANN. §§ 13-22-301 to 13-22-313 (West 2002) (addressing court-connected ADR processes); CONN. GEN. STAT. ANN. § 52-549n (West 1991) (empowering courts to appoint fact finders in certain contract actions).

138. See, e.g., CAL. GOV'T CODE §§ 3548.1, 3591 (West 2002); OHIO REV. CODE ANN. § 4117.14 (C)(3) (West 1990) (discussing fact-finding in collective bargaining).

139. DICTIONARY OF CONFLICT RESOLUTION, *supra* note 127, at 179 (mandating that the fact finder not resolve policy issues and citing 1 C.F.R. § 305.86-3 App. (1993) and WIS. STAT. ANN. § 111.70(4) (West 1996)).

140. See, e.g., 43 PA. CONS. STAT. §§ 1101.801, 1101.802(2) (2001); OR. REV. STAT. § 243.722(3) (1993).

141. See Michael P. Kenny & William R. Mitchelson, *Corporate Benefits of Properly Conducted Internal Investigations*, 11 GA. ST. U. L. REV. 657, 658 (1995) ("[M]ore and more corporations in one form or another are utilizing internal investigations to investigate potential wrongdoing by employees, including, in some instances, senior management."). This Article does not cover the detailed recommended practices for internal investigations, which, although useful for the PIFF process, do not help define it or the fundamental principles of that practice. See generally *id.* For more on internal investigations, see generally Gregory J. Wallance, *Internal Investigations and Document Destruction Policies After Enron*, in CORPORATE COMPLIANCE, at 639 (PLI Corp. Practice Course Handbook Series No. 1218, 2002) (providing a list of questions counsel should ask itself as they perform internal investigations or oversee document destruction); Raymond C. Marshall, *Conducting Internal Investigations—What to Do and Not to Do*, A.L.I.-A.B.A., Nov. 8, 2001, at 25 (suggesting efficient/effective method for conduction internal investigations); Joseph McLaughlin & J. Kevin McCarthy, *Corporate Internal Investigations—Legal Privileges and Ethical Issues in the Employment Law Context*, A.L.I.-

or committees, internal staff, ombudsmen, general counsel, outside counsel, or accountancies and which is implicitly encouraged by emerging legal trends.¹⁴² Much like ADR fact-finding, the value of SCA fact-finding depends on the thoroughness of the investigation, the accuracy of the report, and the perceived validity of the process by the affected corporate constituents.¹⁴³

Unlike the situation with ADR fact-finding, thoroughness, accuracy, and validity may be difficult to achieve without an "other side" monitoring the process to keep it "honest." In the absence of adversarial balance¹⁴⁴ or of an outside oversight body, this process is particularly open to abuse and manipulation. Ideally, a thorough investigation, conducted free from interference, would yield optimal self-critical analysis and best serve the interests of all those affected, including the hiring corporate constituency; however, revelation of the "true facts" might undermine or embarrass the corporation or the hiring constituency, causing it to interfere in the investigation or to squelch the report. Interference could take the form of limiting the fact finder's access to information, the resources made available to conduct a thorough investigation, or the scope of the investigation itself. In response to a potentially damaging report, the hiring constituency could bury the report or truncate and end the investigation simply by reassigning an employee engaged in the process or by terminating the engagement of an outside contractor. A public historical example of the latter is Richard Nixon's firing of

A.B.A., July 23, 1998, at 991 (examining work-product doctrine and attorney-client privilege when attorneys perform internal investigations); Joel W. Sternman & Emily Eiselman, *Advising the Directors: Minimizing the Risk of Litigation Through Internal Investigations by Special Counsel*, A.L.I.-A.B.A., May 28, 1992, reprinted in *THE PROSECUTION AND DEFENSE OF SHAREHOLDER LITIGATION AGAINST DIRECTORS AND OFFICERS* (1992).

142. See Kenny & Mitchelson, *supra* note 141, at 659-60 (describing the trend toward leniency in corporate criminal prosecutions if a corporation conducts an internal investigation and engages in whistle-blowing); see also Pitt & Groskaufmanis, *supra* note 110, at 961 n.55 (noting the effect on the sentencing guidelines multiplier); U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (1994); Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605, 607-08 (1995) (proposing that an effective compliance program be a defense to corporate criminal liability, not just a mitigating factor); Dan K. Webb et al., *Understanding and Avoiding Corporate and Executive Criminal Liability*, 49 BUS. LAW. 617, 657-59 (1994) (explaining that the implemented compliance program must be effective in preventing and detecting criminal conduct).

143. Despite the internal nature of this form of fact-finding, more likely than not the process is stimulated by some external or internal controversy over the underlying facts. There may be competing internal corporate constituents whose interests could be adversely affected by the outcome. In short, there are potential disputants; however, the process is controlled by the directors, CEO, or other corporate managers who initiated it.

144. In joint fact-finding, the disputing parties presumably create the checks necessary to keep the process honest. Otherwise, they are free to abandon it.

Archibald Cox, to which one of the political reactions was the creation of the Office of Independent Counsel.¹⁴⁵

C. Independent Fact-Finding

The thoroughness, accuracy, and validity of fact-finding can only be assured if the process and the fact finder are independent. Fact-finding is independent when the corporation and its internal constituencies relinquish control over the process to a fact finder who is impartial and impervious to manipulation. The principle of independence applies to both the process and the person. With respect to the independence of the process, there are issues of scope, access, and resources. Scope refers to the breadth of the problem to be investigated. Although an overbroad statement of the problem in the fact finder's engagement agreement could cause a problem, a too-narrowly defined scope may unduly hamper the fact finder's ability to get to the root of the problem. Access refers to the availability of information to the fact finder, including key people and documents. Resources refer to the time, money, and expert personnel available to the fact finder.

With respect to the independence of the person, there are issues of selection, conflicts of interest, and termination, all of which relate to how much influence the corporation or its various constituents may have over the fact finder. Independence in selection implies that the selection process is arm's length and that the fact finder did not directly solicit the engagement. The corporation should not be free to hire a fact finder it believes would be uncritical and biased in its favor. A fact finder should be free of any conflicts of interest which may influence the investigation or the conclusions in the report. Independence may result in a more thorough investigation because people who might otherwise fear retaliation from other corporate constituents will be more willing to talk to someone who does not answer to those corporate constituents and who can assure them some degree of confidentiality. Finally, a fact finder cannot be independent if the corporation or any of its constituents are capable of terminating the engagement at any time. By extension, an independent fact finder cannot be a member of the corporate

145. Independent Counsel Statute, 28 U.S.C.A. §§ 591-599 (1993) (lapsed in 1999). During the Watergate scandal, Cox was appointed as special prosecutor, and Nixon fired him in what became known as the "Saturday Night Massacre." Elliot Richardson, *The Saturday Night Massacre*, ATLANTIC MONTHLY, Mar. 1976, at 40, 43, 71 (discussing Cox's appointment and firing).

constituency or have a stake in any continuing relationship with the corporation.¹⁴⁶

D. Public Independent Fact-Finding

If the purpose of the independent fact-finding is limited to self-critical analysis, then it is an internal investigation, the sole purpose of which is to help those in charge better understand what has occurred or is occurring. As such, it may be an excellent diagnostic tool, but it does not address a legitimacy crisis or the public trust problem. The report is private or limited only to management or the directors of the corporation. In some cases, it may be in the corporation's interest to keep the report confidential, as when the content may be embarrassing or may reveal illegal acts or other behavior that exposes the corporation to liability. During a corporate social legitimacy crisis, however, public dissemination of the report can provide support for the assertions of the apology. At this point, independent fact-finding becomes *public* independent fact-finding ("PIFF") and is capable of addressing the public trust problem.

1. Examples of PIFF

PIFF is not new, particularly in the context of incidents that jeopardize public trust in government. A relatively contemporary example is the Warren Commission formed to investigate and report on the Kennedy assassination.¹⁴⁷ The trend of its use in response to corporate social legitimacy crises might be traced to former Attorney General Griffin Bell's investigation and report in the wake of the E.F. Hutton scandal.¹⁴⁸ In its eighty-three years of existence, E.F. Hutton had become one of Wall Street's most formidable giants, with annual

146. In the post-Enron era, there is increased pressure on state courts to demonstrate that they can oversee corporate governance without the need for federalization beyond the initial steps of Sarbanes-Oxley. Higher scrutiny of who is truly independent in the context of special investigations is already manifesting itself in recent decisions. *See, e.g., In re Oracle*, 2003 WL 21396449 (Del. Ch. 2003); *Biondi v. Scrushy*, 820 A.2d 1148 (Del. Ch. 2003); *HealthSouth Independent Probe Had Gaps*, WALL ST. J., June 9, 2003, at C1; *see also* Sternman & Eiselman, *supra* note 141, at 9 (recommending use of outside special counsel rather than any corporate employees or regular outside counsel).

147. *See generally* THE OFFICIAL WARREN COMMISSION REPORT ON THE ASSASSINATION OF PRESIDENT KENNEDY (Louis Nizer ed., 1964) (chaired by Chief Justice Earl Warren). Although such commissions are usually ad hoc, the role of "inspector general" within the government is an example of an institutionalized, fact-finding mechanism. *See* Michael R. Bromwich, *Running Special Investigations: The Inspector General Model*, 86 GEO. L.J. 2027, 2028 (1998)

148. *See Steps in the Hutton Scandal: A Chronology*, AM. BANKER, Sept. 6, 1985, at 8; *E.F. Hutton's Simmering Scandal: More and More Questions Are Raised About the Investment Firm*, TIME, July 22, 1985, at 53, available at 1985 WL 2367489.

revenues of nearly \$3 billion and 18,000 employees in 400 offices around the United States.¹⁴⁹ Its powerful television slogan¹⁵⁰—"When E.F. Hutton talks, people listen"—made the brokerage house a household name; however, it faced a social legitimacy crisis upon the discovery of a check-kiting scheme in the early 1980s. In May 1985, as a part of its settlement with the Department of Justice, Hutton agreed to pay \$2.75 million in fines and to set aside \$8 million for restitution to banks victimized in the overdraft scheme. In response to this settlement, Hutton officials asked former United States Attorney General Griffin Bell, then a partner in the Atlanta law firm of King and Spalding, to investigate and to determine the cause, to identify who in the company should be held accountable for the scheme, and to recommend control measures.¹⁵¹ This investigation led to the publication of a report in September, 1985, which called for the discipline of a number of Hutton employees.¹⁵²

In 1996, thirty female current and former employees and the U.S. Equal Employment Opportunity Commission ("EEOC") accused Mitsubishi Motors Manufacturing of America of allowing widespread sexual harassment.¹⁵³ Mitsubishi's initial reaction, protesting the claims, triggered a corporate social legitimacy crisis. In addition to intense media scrutiny, Mitsubishi faced boycotts by the Rainbow/PUSH Coalition and the National Organization for Women.¹⁵⁴ The Congressional Women's Caucus called for greater EEOC spending to investigate the case and warned the auto company to end its alleged "retaliation" against women employees.¹⁵⁵ Mitsubishi hired a crisis communications firm,¹⁵⁶ which contracted former Secretary of Labor Lynn Martin to investigate working conditions in the Normal, Illinois plant. Martin issued her public report in February 1997, making thirty-four wide-ranging

149. Irwin Ross, *Inside the Hutton Debacle*, FORTUNE, Aug. 28, 1989, at 127.

150. The commercials featured the face and voice of the late John Houseman who ironically played fictional Harvard Law Professor Kingsfield, a character of undoubted intelligence and integrity, in the movie and television series *The Paper Chase*.

151. The result of the investigation was the "Hutton Report." See *Pearce v. E.F. Hutton Group, Inc.*, 653 F. Supp. 810, 812 (D.D.C. 1987).

152. See *id.*

153. See *EEOC v. Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. 1059, 1068 (C.D. Ill. 1998).

154. David Southwell, *Jackson, NOW Push on with Mitsubishi Boycott*, CHI. SUN-TIMES, July 24, 1996, at 20, available at 1996 WL 6755993.

155. See Press Release, Congresswoman Eleanor Holmes Norton, Congressman Norton Condemns Retaliatory Actions by Mitsubishi, May 2, 1996, at <http://www.house.gov/norton/may2.htm>.

156. The role of the firm is described on its website. See Manning, Selvage & Lee, at http://www.mslprdc.com/cc/cc_mitsu.html (last visited Feb. 5, 2003).

recommendations for Mitsubishi to improve its workplace environment.¹⁵⁷

In 1997, Nike faced a barrage of accusations regarding its labor practices, or the labor practices of its suppliers, in Southeast Asia.¹⁵⁸ Although Nike had developed one of the first codes of conduct governing labor relations in its industry, reports of sweatshop conditions and substandard wages precipitated a corporate social legitimacy crisis.¹⁵⁹ Nike asked civil rights advocate and former U.N. Ambassador Andrew Young, a nonlawyer, to provide Nike management with an independent evaluation of its code of conduct and its application at the factory level and to make specific suggestions on how to apply it more effectively and possibly how to enhance it.¹⁶⁰ Young conducted an investigation, toured factories, and issued a report containing a number of findings and recommendations about Nike's code.¹⁶¹

In 1999, the entire Olympic organization was faced with a social legitimacy crisis arising from allegations of bribery. The Salt Lake Organizing Committee ("SLOC") was accused of providing \$400,000 in scholarships to families of IOC members along with skis, custom shotguns, free medical care, and other lavish gifts in its efforts to secure its bid as host city for the 2002 Winter Olympic Games.¹⁶² So as not to be tainted with the scandal, major sponsors were threatening to withdraw their support.¹⁶³ In response, the United States Olympic Committee ("USOC") engaged former Senator and Majority Leader George Mitchell, a lawyer with the Washington, D.C., law firm of Verner, Liipfert, Bernhard, McPherson & Hand, to head a special investigation commission.¹⁶⁴ His report led to the dismissal of a USOC

157. Thane Peterson, *Mitsubishi Gets Its Report Card*, BUS. WK., available at <http://www.businessweek.co.za/1997/08/b351572.htm> (last visited Mar. 31, 2003).

158. Brad Knickerbocker, *Nike Fights Full Court Press on Labor Issue*, CHRISTIAN SCI. MONITOR, Sept. 23, 1997.

159. For Code of Conduct, see Nike, *Nike's Commitment is to Provide Workers Making Our Products with the Best Possible*, at <http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=compliance>.

160. Matthew Quinn, *Young to Study Nike Policies on Sweatshops*, ATLANTA J. & CONST., Feb. 25, 1997, at C1.

161. The Young's Report is located on-line, Andrew Young, *Andrew Young's Report*, NIKEWORKERS.COM, at <http://www.rpi.edu/~huntk/nikeworkers/ay.html>.

162. See Carol Morello, *Some Sponsors Say They Feel 'Victimized'*, USA TODAY SPORTS, Dec. 17, 1998, available at 1998 WL 5745020.

163. *Games Corporate Sponsors Await Findings of Inquiries*, USA TODAY SPORTS, Dec. 21, 1998, 1998 WL 5745329.

164. The committee is titled "Special Olympic Bid Oversight Commission." See *USOC Panel Issues Report on Olympic Reforms*, CNN.COM, Mar. 1, 1999, at <http://www.cnn.com/US/9903/01/olympics.01> (last visited Mar. 31, 2003). Commission members also included former White House Chief of Staff Ken Duberstein and baseball union chief Donald Fehr, Roberta Cooper

employee and various reforms.¹⁶⁵ This example illustrates PIFF in not-for-profit organizations, which also can suffer from social legitimacy crises.

As noted earlier, government agencies also experience legitimacy crises. After its conduct in the standoff with the Branch Davidians at their compound in Waco, Texas, the FBI faced questions about its conduct—in particular accusations that it had caused the fire that killed many members of the sect and that it had engaged in a cover-up. By special order, Attorney General Janet Reno appointed former Senator John Danforth, a lawyer with the Saint Louis firm of Bryan Cave, as special counsel to investigate and report on whether any government employee was responsible for the deaths, withheld evidence, or made fraudulent statements about the events of April 19, 1993.¹⁶⁶ Danforth's final report was sharply critical of some members of the Justice Department's trial team and two FBI agents but otherwise absolved the government from the alleged acts.¹⁶⁷

In the wake of the Enron scandal, Enron's auditor, Arthur Andersen, faced accusations of destroying audit documents that would have revealed its complicity in Enron's misleading accounting tactics.¹⁶⁸ Andersen hired Danforth, along with former Federal Reserve Chairman Paul Volcker, to examine its document handling policies and potential conflicts between its auditing and counseling businesses.¹⁶⁹

Other than uncovering the facts and providing useful recommendations as any internal investigation should do, does PIFF work? We are unaware of any method of precisely gauging the effect of such an intervention on the public's perception of the organization's legitimacy. Although E.F. Hutton continued to struggle and was eventually subsumed in mergers with Shearson and Lehman Brothers, the efficacy of Judge Bell's PIFF cannot be judged by Hutton's demise when one considers all the other possible causal

Ramo, past president of the American Bar Association, and Jeff Benz, a lawyer and member of the USOC's athletes council. *See id.*

165. *See id.*

166. Attorney General Order 2256-99, pursuant to the Attorney General's authority under 28 U.S.C. §§ 509-510 (2000).

167. *See* JOHN C. DANFORTH, SPECIAL COUNSEL, FINAL REPORT TO THE DEPUTY ATTORNEY GENERAL: CONCERNING THE 1993 CONFRONTATION AT THE MOUNT CARMEL COMPLEX, WACO, TEXAS (Nov. 8, 2000) (pursuant to special order 2256-99).

168. David Hilzewrath, *Data Destruction Intensifies Andersen's Woes*, WASH. POST, Jan. 11, 2002, at E01, available at 2002 WL 2520305.

169. *Id.* (Danforth); David Hilzewrath & Jackie Spines, *Andersen Recasting Its Image; Volcker to Lead Reform Effort*, WASH. POST, Feb. 4, 2002, at A1, available at 2002 WL 10945793.

factors.¹⁷⁰ Hutton engaged Bell too late, after much of the damage had already been done. Perhaps its other efforts at managing the crisis were insufficient or perhaps public trust was so fundamental to Hutton's business that it may have sustained a self-inflicted mortal wound from the onset,¹⁷¹ as was the case with Arthur Andersen, whose narrowly defined engagement of Danforth and Volcker was too little, too late.¹⁷² Conversely, Young's PIFF cannot be credited directly for Nike's continued success—however, in spite of some criticism of Young's efforts,¹⁷³ accusations of exploitive labor practices have largely dissipated. Danforth's Waco report also received predictable criticism from groups that benefit from public mistrust of the government,¹⁷⁴ but, for the most part, the public's interest has moved on from the episode.¹⁷⁵ In the Mitsubishi example, the company's response to Martin's report helped end the boycotts and settle the suit with the EEOC.¹⁷⁶ In the case of the Salt Lake City Olympic bribery, the 2002 Winter Olympics took place, and the USOC, along with the Olympic organization in general, seem to have saved their sponsors. Although it is difficult to assess Mitchell's role in the overall recovery, his intervention did have a considerable effect on ending the legitimacy crisis. The media shifted its focus from questioning the

170. Numerous federal and state agencies pursued Hutton after the first settlement, arguably weakening it to the point that it was forced to merge. See COMM. ON FED. REGULATION OF SEC., AM. BAR ASS'N, REPORT OF THE TASK FORCE ON SEC SETTLEMENTS OF THE SUBCOMMITTEE ON CIVIL LITIGATION AND SEC ENFORCEMENT, MATTER OF THE FEDERAL SECURITIES LAW COMMITTEE OF THE AMERICAN BAR ASSOCIATION SECTION OF BUSINESS LAW (1991), reprinted in 47 BUS. LAWYER 1083 (1992) (submitted for discussion by Harvey L. Pitt).

171. JOE MARCONI, CRISIS MARKETING: WHEN BAD THINGS HAPPEN TO GOOD COMPANIES 203, 205-06 (2d ed. 1997) (observing that Hutton marketed poorly and failed to respond to the crisis with enough force).

172. See *Crisis, What Crisis?*, supra note 115, at 20 (noting the opinion of Clifford Nichols that "the problem with Andersen is that the Enron crisis hit its core competency, its essence of professional trust"). Andersen failed to give Danforth and Volcker a broad enough charge early enough to convince the public to give the process a chance. Meanwhile, the Department of Justice acted with uncharacteristic speed and force to prosecute the firm, thereby preempting the fact-finding process.

173. Global Exchange, a San Francisco-based human rights group, criticized Young's report as misleading. See Tina Cassidy, *Can't Just Do It Anymore; Nike's Recent Success Turns Spotlight on Firm—For Better or Worse*, BOSTON GLOBE, June 28, 1997, at F1 (quoting Global Exchange's president as saying that Nike "bought off Andrew Young"). For Nike's and Young's handling of anticipated criticisms, see *infra* note 187 and accompanying text.

174. The libertarian Cato Institute criticized Danforth's Waco Report. See Timothy Lynch, *No Confidence: An Unofficial Account of the Waco Incident*, in CATO POLICY ANALYSIS NO. 395 (2001).

175. The Justice Department and the FBI are now concerned with a legitimacy crisis arising from perceived intelligence failures and subsequent mishandling of 9/11-related activities.

176. Although self-serving, the crisis management consultants deemed the effort successful. See Manning, Selvage & Lee, supra note 156.

credibility of the USOC to tracking Mitchell's efforts. Ultimately, his report was accepted as dispositive.

At a minimum, these organizations benefited from the intercession of a publicly trusted person. This conclusion is purely speculative, but interpersonal trust of a natural person, even if based solely on reputation, seems easier to extend than institutional trust.¹⁷⁷ The process had the best chance of success when it was implemented as soon as the crisis became evident and before the public had taken a position.¹⁷⁸ The process was more efficient and, with the exception of Andersen, faster than the courts in uncovering the facts that were sought. Additionally, if the public was convinced to give the process a chance and perceived both that the organization was willing to engage in a public process of self-analysis¹⁷⁹ and that the process successfully revealed all to the public, the effort essentially inoculated the organization from further media attack. This reprieve gave the organization enough breathing room to address the problem. As one authority on corporate crises notes, after Bell's report for E.F. Hutton had made everything public the media quickly lost interest because the situation was "stripped of newsworthiness."¹⁸⁰

2. Publicness in PIFF

This characteristic of "publicness" distinguishes PIFF from other independent fact-finding. Unlike fact-finding as ADR, which is a dispute resolution mechanism, and fact-finding as self-critical analysis, which is primarily an internal truth-finding mechanism, PIFF also functions as a public trust-generating mechanism that validates the corporation's apology.¹⁸¹ For PIFF to function

177. Arguably, the effectiveness of Chrysler's apology was directly related to the public's trust in its chairman Lee Iacocca, who had developed a strong reputation and issued the apology personally.

178. See Pitt & Groskaufmanis, *supra* note 110, at 965-66:

"If you aren't geared up and ready to inform the public," one corporate spokesperson noted, "you will be judged guilty until proven innocent." . . . Companies that withdraw into a cocoon at this stage are making a grave mistake. Reporters facing tight deadlines will inevitably look to alternate sources for their information.

(citation omitted).

179. By merely engaging in PIFF, the organization reinforces the positive rhetoric of its apology by communicating to the public that the organization values the truth and is willing to bear the consequences and act to correct and prevent.

180. COOMBS, *supra* note 83, at 142.

181. Of course, PIFF may not validate the previous assertions of the corporation. The corporation must communicate a reaction to the report.

In addition to the general public, "public" includes any corporate constituency, internal or external, other than management, who might be the intended audience and whose trust is essential for the organization's continued well-being. Presumably, the PIFF also serves the same internal corporate purposes as an internal investigation.

successfully as a trust-generating mechanism, both the process and the person conducting it must obtain the public trust. For the process and the person to be perceived by the public as trustworthy, they must be independent for many of the same reasons discussed above, but that independence also must be transparent. For those relying upon the fact finder's report, the perception of independence is as important as actual independence.¹⁸² If the public is relying upon the report, all indices of independence must be public and must withstand public scrutiny.

As a process, however, PIFF has received little public scrutiny because its use has been ad hoc and relatively rare. Lacking an institutional framework of well-established procedures and standards to guarantee independence and thoroughness and enough of a track record to establish a reputation as a reliable trust-generating institution, PIFF's effectiveness rests almost solely on the public reputation of the fact finder. For this reason, PIFF has been conducted by public figures, some of whom are prominent lawyers, who enjoy a reputation for competence, objectivity, and integrity. Generally, independent fact-finding does not require public figures. Although many of these public figures are especially adept at handling the press and communicating with the public, fact-finding requires no special skills and characteristics other than good investigative and analytical abilities, competence, and independence. Because the public independent fact finder is operating in an atmosphere of distrust, the fact finder also must have the skill to conduct the process beyond reproach and without the slightest appearance of impropriety. Although lawyers are particularly suited by training and experience to conduct such a process, many nonlawyers are equally capable. Similarly, there are many capable people with the requisite level of integrity but who lack a public reputation for it. Because high-profile problems such as a giant multinational corporation's social legitimacy crisis may inevitably require the intervention of high-profile individuals, by hiring a reputable public figure to conduct the fact-finding, the beleaguered organization is probably hoping for some "halo" effect similar to celebrity endorsement of its products. Nevertheless, the PIFF process has the potential to be a trust-generating institution without relying solely on reputable public figures. Until better institutionalized, however, the public's response

182. Fair procedures promote trust in the decisionmaker and acceptance of the outcome, not because they achieve a more advantageous outcome, but instead because people evaluate the outcome through a "fairness heuristic" that judges the outcome based on perceived aspects of procedural fairness in how the decision was reached. *See generally* E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

to the fact finder's report is far more dependent on the reputation of the person than that of the process.

V. THE NEED FOR INSTITUTIONALIZATION

For the fact finder and the corporation in crisis, overdependence on personal reputation is a risky proposition. Although it is axiomatic that public institutions are dependent on public trust to function, public independent fact finders are equally dependent on the public trust to function effectively. Each time they conduct a PIFF, they put their own credibility on the line. Without established and publicly accepted structures, standards, practices, and procedures by which the public can gauge the credibility of the process, fact finders risk being accused of merely trading on their good name. Such an accusation could destroy a fact finder's reputation unless the process was transparent in its integrity. Moreover, the destruction of public figures' reputations undermines the value of reputation in society as a public good.¹⁸³

In turn, the corporation risks an even deeper crisis if it is perceived as merely trying to achieve a halo effect without a sincere interest in getting to the root of the problem. In an interview with the *New York Times*, Edwin H. Stier, a lawyer who specializes in independent investigations, noted that:

[A beleaguered corporation's] first inclination from a public relations standpoint is to hire somebody whose credibility will convince the public that in and of itself the conclusion they reach is the right conclusion. . . . However, the public has got to be reassured that the process you went through is one that is effective at getting the bottom-line information you need. If you take the position that "we'll let you know what the results are but we're not going to tell you how we got there," then you run into a serious risk that the whole effort will backfire.¹⁸⁴

This risk materialized when Mattel, Inc. hired Gary G. Lynch, the former director of enforcement for the Securities and Exchange Commission who had brought cases against prominent traders like Michael Milken and Ivan Boesky, to investigate accusations that Mattel had overstated its earnings. Mattel left itself open to continued criticism by stating that Lynch had uncovered no wrongdoing on the part of company executives but refusing to release his report.¹⁸⁵

More importantly, corporations that abuse the process and public figures who merely sell their reputation to "whitewash" socially irresponsible corporations undermine the integrity of a promising but poorly institutionalized fact-finding process. What little public

183. See *supra* notes 45-47 and accompanying text.

184. Dana Canedy, *Checking What's Under Nike's Heel*, N.Y. TIMES, Mar. 25, 1997, at D1.

185. *Id.*

scrutiny PIFF has received reflects cynicism and questions the integrity of the process.¹⁸⁶ This reaction places public independent fact finders on the defensive without the protective framework of an institutionalized process.¹⁸⁷ Arguably, this fatal flaw eroded support for the Office of Independent Counsel.¹⁸⁸ In addition to improving public trust in PIFF, thereby making its effectiveness less dependent on the public trust in the fact finder, better institutionalization will protect the fact finder's reputation and the long-term utility of the process.

A. Institutionalizing Public Independent Fact-Finding

In the previous sections, we have attempted to show that, when PIFF exhibits the requisite fundamental characteristics of independence and publicness, it has the potential to generate trust and may be particularly useful when other trust-generating institutions are being questioned or fail to address the problem. We have argued that the process, the fact finder, and the corporation in crisis are best served by establishing PIFF as a trust-generating institution with the structures necessary to guarantee independence and publicness.

186. *Id.*; see also Liza Kaufman, *Credibility for Hire? Griffin Bell, Tapped for Implant Probe, Draws Fire*, LEGAL TIMES, Feb. 24, 1992, at 1; *Blessed by Paul: Paul Volcker and Other Corporate Cleanup Men*, SLATE, Feb. 4, 2002 (noting that Arthur Andersen hired former Federal Reserve Board Chairman, Paul Volcker, Jr., to monitor the company's accounting practices, and quoting Volcker as saying, "The reason I got involved is that Andersen is in big trouble and they were looking for someone to sprinkle holy water on them."), at <http://slate.msn.com/?id=2061633> (last visited Apr. 1, 2003); David Plotz, *Former Sen. John Danforth: Why is "St. Jack" Helping Arthur Andersen?*, SLATE, Jan. 18, 2002 (describing the engagement as one in which "Andersen basks in the reflected glory of St. Jack" and asserting that "Andersen approached Danforth because they know he will give the company a nice scrubbing. Andersen wants Danforth to make dozens of recommendations for document handling, and then to walk away, leaving the world with the impression that St. Jack has given Andersen a gold stamp"), at <http://slate.msn.com/?id=2060848> (last visited Apr. 1, 2003).

187. For example, Andrew Young felt obliged to answer critics directly in a section of his report entitled, "The Credibility of This Report." See Young, *supra* note 161. Nike even created a website to respond to specific criticisms. See *Frequently Asked Questions: Working Conditions in Nike Subcontract Factories*, NIKEWORKERS.COM, at http://www.rpi.edu/~huntk/nikeworkers/faq_wc.html (last visited Apr. 1, 2003).

188. No institution had a duty or inclination to defend independent counsels when they were attacked in the public arena. See Abraham Dash, *The Office of Independent Counsel and the Fatal Flaw: "They are Left to Twist in the Wind,"* 60 MD. L. REV. 26, 27 (2001).

Assuming that institutionalizing¹⁸⁹ PIFF is a good idea, what are the best procedures and standards of practice that will ensure the requisite independence and publicness, which allow the public to gauge the credibility of the process? In short, how should these procedures and standards be institutionalized to earn and deserve the public trust?¹⁹⁰ The American Arbitration Association's ("AAA") effort to institutionalize fact-finding provides us with a model to examine possible responses to this question.

B. The AAA's Fact-Finding Model

The AAA launched its new Independent Fact-Finding Service ("IFFS") in 2002 on the heels of the recent rash of corporate crises.¹⁹¹ Emphasizing accuracy, speed, and credibility, the IFFS provides a range of ADR and SCA fact-finding services, including those for private internal investigations by business and not-for-profit corporations and in aid of judicial and administrative processes.¹⁹² However, the primary thrust seems to be to promote the use of PIFF.¹⁹³ According to the AAA's promotional materials, the IFFS is a

189. Institutionalization refers to "the extent to which there are well-known, regularized, readily available mechanisms, techniques or procedures for dealing with a problem." Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 L. & SOC'Y REV. 525, 563 (1980-81). It includes, but is not limited to, the following: policies, laws, procedures, and practices embedded in social and organizational systems and culture of society to integrate conflict prevention and resolution in an organization, the process by which conflict prevention and resolution become part of the organizational identity, and absorption, adoption, or melding of conflict prevention or resolution activities into an organization or policy.

190. The progress of mediation's institutionalization over the last twenty-five years may provide some insight. Although some efforts to institutionalize mediation started in the 1970s, mediation emerged out of its status as a cottage industry when businesses and courts recognized its potential to reduce the costs of disputing and to manage overloaded dockets. In the private sector, for-profit and not-for-profit organizations formed to provide mediation services. These organizations developed procedural rules that governed the conduct of the process. Mediators formed professional organizations and adopted codes of conduct. In the public sector, courts and legislatures established mediation programs and provided rules for the process and standards for mediators.

191. On June 4th 2002, the American Arbitration Association announced its new Independent Fact Finding Servicessm. Press Release, Am. Arbitration Ass'n, AAA Announces Launch of New Independent Fact-Finding Services and Panel; Independent Investigation for Organizations Facing Crisis (June 4, 2002) [hereinafter AAA Press Release], *reprinted in* BUS. WIRE, June 4, 2002, Westlaw, All New Plus Wires.

192. Am. Arbitration Ass'n, AAA Draft Promotional Brochure (on file with authors). For business corporations, the service is depicted as a method through which senior management, directors, trustees, and general counsel might better fulfill their fiduciary responsibilities by providing accurate, credible information to various interest groups. It is being marketed to courts and regulatory agencies to assist in the deliberative processes of those entities; however, to the extent fact-finding for a court or regulatory agency is not directly tied to the problem of restoring public trust, it is irrelevant to our analysis.

193. The AAA Press Release states:

credible response to an assault on public trust, institutional goodwill, brands, and corporate reputation and provides “an impartial, objective investigation in emerging crisis situations.”¹⁹⁴ As an institutional infrastructure for the process,¹⁹⁵ the AAA, a private, not-for-profit corporation, has administrative experience and capacity in delivering arbitration, mediation, election monitoring, and other dispute-handling services.¹⁹⁶

Although the IFFS is a nascent work-in-progress, the initial set of rudimentary procedures is designed to protect the independence of both the fact finder and the process.¹⁹⁷ In much the same way the AAA preserves the appearance of arbitrator and mediator impartiality by insulating them from *ex parte* contact with the parties, the rules require that the potential user approach the AAA first.¹⁹⁸ Then, the AAA prequalifies a list of fact finders for the particular engagement, checking for potential conflicts of interest, suitable expertise, and availability.¹⁹⁹ The “client” chooses a fact finder from the list of prequalified members of the panel.²⁰⁰ The engagement agreement between the client and the fact finder establishes the scope of the investigation and any additional procedures consistent with the IFFS

“It is an honor for me to be a part of such a unique and credible service offering, and to be involved with an organization grounded in integrity and impartiality,” said Judge William Webster. “AAA’s Fact-Finding Services gives business and service entities a socially responsible option for fulfilling the public’s deserved demand for accountability in the midst of controversial situations.” William K. Slate II, President and CEO, American Arbitration Association added “AAA’s oversight of the integrity and independence of the process, combined with the depth and breadth of the panelists’ professional accomplishments and experience, provide unmatched benefits to organizations and enterprises that seek to sustain public trust and institutional goodwill through the work of independent investigative teams.”

AAA Press Release, *supra* note 191.

194. AM. ARBITRATION ASS’N, AAA INDEPENDENT FACT-FINDING SERVICES (promotional brochure) [hereinafter AAA IFFS PROMOTIONAL BROCHURE], available at http://adr.org/upload/LIVESITE/focusArea/Fact-Finding/75-282_IFFSS_mech.pdf (last visited Apr. 1, 2003)

195. We recognize that PIFF can be provided through other private and public institutional structures, including for-profit corporations, self-regulatory organizations, courts, and government agencies. As with other forms of fact-finding, e.g., labor and international, institutionalization could be aided by regulation, statute, court rule, and treaty. Although these options are all part of the institutionalization question, our focus is on the establishment of fundamental rules and standards.

196. See AAA IFFS PROMOTIONAL BROCHURE, *supra* note 194.

197. AM. ARBITRATION ASS’N, AAA IFFS POLICIES AND PROCEDURES (May 30, 2002) [hereinafter IFFS PROCEDURES] (draft on file with authors).

198. *Id.* at 2.1, 2.3 (discussing contact with the AAA and requiring the AAA to determine suitability). If the AAA determines that the investigation is suitable for the IFFS, the client and the AAA will enter an engagement agreement incorporating the IFFS Procedures. *Id.* at 4.1.

199. *Id.* at 2.1 & 5.2.

200. *Id.* at 5. The client selects the fact finder from a list of three candidates provided by the AAA or gives the AAA sole discretion to select the fact finder. See *id.* at 5.1(a)-(b), 5.2.

Procedures governing the process.²⁰¹ It strictly limits the fact finder's function to the conduct of the independent investigation²⁰² and expressly proscribes the role of advocate.²⁰³ The fact finder controls all aspects of the investigation²⁰⁴ and has the authority to contract outside resources as needed.²⁰⁵ If the client attempts to end the process unilaterally, obstructs, or otherwise makes it difficult for the fact finder to complete the process, the fact finder can terminate the relationship and make public the reasons for doing so.²⁰⁶ As administrator of the program, the AAA provides a buffer and oversees

201. *See id.* at 6.1:

Upon the selection of the Fact-Finder, the Client and the Fact-Finder will negotiate and execute the Fact-Finder Engagement Agreement which will contain (in addition to standard terms incorporating IFFS policies and procedures) a detailed description of the scope of the investigation, the anticipated scope of the Report, the identity of the Report Recipients, and the manner in which the Fact-Finder will be compensated.

202. AM. ARBITRATION ASS'N, AAA IFFS CLIENT-FACT FINDER ENGAGEMENT AGREEMENT (2002) [hereinafter FACT FINDER ENGAGEMENT AGREEMENT] (unpublished manuscript on file with authors). The agreement provides:

Client acknowledges and agrees that Fact-Finder is engaged for the sole purpose of the Engagement and for no other reason. In this regard, Fact-Finder shall not be obligated or expected to bring to the Client's attention any matters of which Fact-Finder or its agents become aware which are not related to the Report to be rendered in connection with the Engagement.

Id.

203. *Id.*; *see also* IFFS PROCEDURES, *supra* note 197, at 7.3 ("The Fact-Finder shall not act as an advocate for the Client but shall instead conduct an independent investigation and shall control all aspects of the investigation.").

204. IFFS PROCEDURES, *supra* note 197, at 7.3 (control of process).

205. *See* FACT FINDER ENGAGEMENT AGREEMENT, *supra* note 202. Providing:

Fact-Finder shall be entitled to engage support personnel and other professionals, including without limitation law firms, accounting firms, and other experts (collectively, "Other Professionals") to assist Fact-Finder in connection with the Engagement subject to prior approval by Client, which approval shall not be unreasonably withheld. Client shall in all events be responsible for the compensation and expenses of Other Professionals. Client approves of the Other Professionals specified on *Schedule C* and agrees to the compensation arrangements for such Other Professionals as specified thereon.

Id.; IFFS PROCEDURES, *supra* note 197, at 6.4 ("The Fact-Finder and the Client shall be responsible for documenting agreements with Other Professionals. Unless agreed otherwise in writing between the Fact-Finder and the Client, the Client shall be solely responsible for compensating the Other Professionals."); *Id.* at 1.8 (" 'Other Professionals' shall mean support personnel and other professionals, independent of the Client, engaged by the Fact-Finder to assist in the investigation, such as law firms, accountants, investment bankers, or private investigators.").

206. *See* IFFS PROCEDURES, *supra* note 197, at 8.1-8.4. If the client terminates the fact finder's engagement, the AAA can appoint a new fact finder and the former fact finder "shall promptly disclose to the Report Recipients the reasons for such withdrawal by the Fact-Finder or termination by the Client and may disclose to the Report Recipients the results of the investigation to date," unless they mutually agree otherwise. *Id.* at 8.2. If the client terminates the investigation "the Fact-Finder or the AAA may disclose to the Report Recipients the results of the investigation to date and the circumstances giving rise to the termination of the investigation." *Id.* at 8.3.

compliance with the procedures. With respect to the publicness of the person and the process, the procedural framework to assure independence is publicly available as are all of the AAA's rules. Finally, the rules provide that the final report or its conclusions must be disclosed to an independent committee of the board of directors or trustees, the public, a court, or some other appropriate independent body approved by the AAA.²⁰⁷

VI. THE NEED FOR ETHICAL STANDARDS AND SOME QUANDARIES FOR LAWYER-FACT FINDERS

The IFFS promotional materials state that the fact finder will conduct an independent investigation "according to the highest ethical standards";²⁰⁸ however, these standards have not yet been articulated. Eventually, they will need to be. Although procedural controls on conduct play a part, the success of a trust-generating institution also rests on the public's perception of the integrity of the process and of the person conducting it. The IFFS is relying heavily on the reputations of the AAA and each member of the panel, initially composed of prominent attorneys,²⁰⁹ "recognized by their peers for

207. See IFFS PROCEDURES, *supra* note 197, at 7.5 ("The determination of what constitutes 'another appropriate independent body' shall be determined by the AAA in its sole and absolute discretion.")

208. AAA IFFS PROMOTIONAL BROCHURE, *supra* note 194, at 2.

209. The initial fifteen-person panel includes:

Arlin M. Adams, Counsel to Schnader Harrison Segal & Lewis and former U.S. Circuit Court of Appeals Judge; Dennis Archer, Chairman, Dickinson & Wright, and former Mayor of the City of Detroit; Griffin Bell, Managing Partner, King & Spalding, former Attorney General of the United States and former U.S. Circuit Court of Appeals Judge; W. J. Michael Cody, Partner, Burch, Porter & Johnson and former Attorney General of the State of Tennessee; Talbot ("Sandy") D'Alemberte, President, The Florida State University and former President, American Bar Association (ABA); John D. Feerick, Dean, Fordham University School of Law and former Partner, Skadden, Arps, Slate, Meagher & Flom; Conrad K. Harper, Partner, Simpson Thacher & Bartlett and former Legal Adviser for the U.S. State Department; R. William Ide III, former Senior Vice President, General Counsel and Secretary, Monsanto Corporation and former President of the ABA; Roberta Katz, Executive Officer and Director, Charles and Roberta Katz Family Foundation and former Senior Vice President, Secretary and General Counsel, Netscape Communications Corporation; Edward V. Lahey, General Counsel, Essex Boat Works and former Senior Vice President, General Counsel and Secretary, PepsiCo; Gabrielle McDonald, Iran/U.S. claims tribunal judge in the Hague and former U.S. District Court Judge; George G. Mitchell, Partner, Verner, Liipfert, Bernhard, McPherson and Hand and former U.S. Senate Majority Leader; Roberta Cooper Ramo, Partner, Modrall, Sperling, Roehl, Harris & Sisk and the first female president of the ABA; David B. Sandalow, Executive Vice President, World Wildlife Fund and former Assistant Secretary of State for Oceans, Environment and Science; William H. Webster, Senior Partner, Milbank, Tweed, Hadley & McCloy, former Director of Central Intelligence and former Director of the Federal Bureau of Investigation.

AAA Press Release, *supra* note 191.

their integrity, high ethical standards, character and good judgment” and embodying “the AAA’s fundamental commitment to objectivity and independence.”²¹⁰ As reasoned above, too heavy a reliance on the personal reputations of the fact finders is risky for the fact finders, the institutionalization effort, and the public good. The public may trust a fact finder based on a reputation for personal integrity and claims of expertise to a point, but trust in the institutional framework will better reinforce the interpersonal trust in the fact finder. Trust in the institution of fact-finding requires the establishment of carefully delineated expectations of practitioner behavior.²¹¹ Conformance to a code of ethics signals to the public that practitioners define their responsibilities based on something other than the nature of the assigned task or than simple self-interest.²¹²

Currently, fact-finding is not a recognized profession, and there is no model code of professional conduct for fact finders. What set of ethical or professional standards apply or can provide some guidance? Lacking anything specific, the nonlawyer–fact finder may look to the standards applicable to their primary profession²¹³ or to some of the standards applicable to neutrals.²¹⁴ For the lawyer–fact finder, this is a particularly vexing question, and the answer depends on whether the lawyer is representing the company or not. Lawyers are subject to

210. AAA IFFS PROMOTIONAL BROCHURE, *supra* note 194, at 3.

211. See Zucker, *supra* note 23, at 63-64 (explaining person or firm-specific trust).

212. By obtaining a license, earning credentials, and joining a professional association, individuals signal their commitment to abide by applicable rules of conduct. See Dean Neu, *New Stock Issues and the Institutional Production of Trust*, 16 ACCT. ORGS. & SOC’Y 185, 188 (1991).

213. Nonlawyer–fact finders may be members of professions which have ethics codes that may apply if the fact finder provides the fact-finding service ancillary to their normal professional services. For example, accountants might offer the service as part of the panoply of accounting services.

214. Arguably, standards applicable to neutrals would not apply because disputing parties do not select the fact finder in SCA fact-finding to serve as their neutral, as contrasted with ADR fact-finding. See SOC’Y FOR PROF’LS IN DISPUTE RESOLUTION, ETHICS COMM., ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY (1986) (addressing impartiality and confidentiality, among other issues), available at <http://www.acresolution.org/research.nsf/key/Eth-Sta> (last visited Apr. 2, 2003). The parties, however, may provide some guidance. See *id.* Codes for arbitrators and mediators are specific to those disciplines but also may offer some guidance. See, e.g., CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (Am. Arbitration Ass’n & Am. Bar Ass’n, 1977), available at http://www.adr.org/index2.1.jsp?JSPssid=15718&JSPsrc=upload%5CLIVESITE%5CRules_Procedures%5CEthics_Standards%5Ccode.html (last visited Apr. 2, 2003); MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Am. Arbitration Ass’n et al., 1994), available at <http://www.adr.org/index2.1.jsp?JSPssid=15734&JSPsrc=upload%5CLIVESITE%5CfocusArea%5Clabor%5C.%5C.%5CResources%5CRoster%5CMediators%5Cstandard.html> (last visited Apr. 2, 2003). For a discussion of the relationship of these codes to the ethics codes applicable to lawyers, see Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 213-17 (2001).

the prevailing legal ethics regime, usually a version of the *ABA Model Rules of Professional Conduct*,²¹⁵ which now recognizes both representational and nonrepresentational roles of lawyers;²¹⁶ however, different rules apply to different roles. With respect to the representational role, Model Rules 1.1 through 1.17 apply to a lawyer-client relationship, and Model Rules 3.1 through 3.9 apply when the lawyer is serving as advocate. With respect to the nonrepresentational role, Model Rule 2.4 applies when lawyers are serving as neutrals. Most of the other Model Rules are applicable without regard to the lawyer's relational status vis-à-vis the client.

At first glance, the lawyer-fact finders on the AAA IFFS panel occupy a particularly nebulous status. The corporation in crisis hires the fact finder, but only through the AAA, an organization known for its neutral services, and from a list provided by the AAA. Once engaged, the fact finders are expected to act impartially and independently,²¹⁷ much like a neutral mediator or arbitrator, but this type of fact-finding is not strictly speaking an ADR process. Under the engagement agreement, the fact finder is "legal counsel" to the "client"; however, the description of the lawyer's role in providing the service is expressly "not one of advocacy" but is rather one of independent investigation. Although this role is somewhat atypical for an organization that otherwise provides only neutral ADR services, the role of the lawyer-fact finder under the IFFS model is representational, forming an attorney-client relationship.²¹⁸

The AAA's choice of the representational role would seem counterproductive because the public could easily perceive the fact finder to be merely a hired gun of a corporation already under public suspicion, but this is no ordinary attorney-client relationship. To provide the independence necessary for public trust in the process, the role is severely restricted through procedures and conditions for

215. MODEL RULES OF PROF'L CONDUCT (as amended 2002) [hereinafter MODEL RULES]. Most states have adopted a version of the ABA's Model Rules of Professional Conduct, although some still impose a version of the older ABA Model Code of Professional Responsibility. California has developed its own set of professional standards. See UCLA SCH. OF LAW, RESEARCH GUIDE SERIES, CALIFORNIA LEGAL ETHICS 1, at <http://www1.law.ucla.edu/~library/researchtools/guides/guidec5.pdf> (last visited Apr. 2, 2003).

216. See MODEL RULES, *supra* note 215, at 1.

217. IFFS PROCEDURES, *supra* note 197, at 7.1 ("By engaging the Fact-Finder and participating in IFFS, the Client has agreed that a totally independent and impartial investigation is in its best interests."). We note that lawyers are supposed to exercise independent professional judgment, but the concept is different.

218. The lawyer-fact finder can attempt to avoid the formation of an attorney-client relationship. See *id.* at 7.2 ("At the sole discretion of the Fact-Finder, the Client and the Fact-Finder may agree to establish an attorney-client relationship."). This relationship, however, may be implied as discussed *infra* notes 234-40 and accompanying text.

engagement that turn the typical attorney-client relationship on its head while staying within the legal ethics rules. The client²¹⁹ does not have the freedom of choice of counsel. It can only select a lawyer prequalified by the AAA and cannot terminate the relationship at will without consequence.²²⁰ The client's objective, through the scope of the engagement, is strictly limited,²²¹ and the client has no control over the way in which the fact finder pursues the objective.²²² The lawyer-fact finder controls most aspects of the engagement,²²³ has no obligation to bring matters to the client's attention,²²⁴ has limited duties of confidentiality,²²⁵ and expressly reserves the right make a noisy withdrawal even if it damages the client.²²⁶

In general, the representational role has distinct advantages for the process. If an attorney-client relationship is formed, the fact finder's notes, certain communications between client and fact finder, and other information gained in the course of the representation are protected by the work-product doctrine, the attorney-client privilege,

219. IFFS PROCEDURES, *supra* note 197, at 1.4 (“[C]lient’ shall mean the party or parties engaging the fact-finder”). In the context of a corporation composed of various constituencies, it is important to understand the nature of the “client.” See MODEL RULES R. 1.13.

220. *Contra* MODEL RULES R. 1.16, R. 1.2 cmt. 5 (terminating representation and discussing the client surrendering the right to terminate services).

221. *See id.* at R. 1.2(c) (providing that the lawyer may limit scope only if reasonable and if the client gives informed consent); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19 (2000) (limiting the scope of representation).

222. *Contra* MODEL RULES R. 1.2(a) (requiring that the lawyer must consult with client pursuant to Rule 1.4(a)(2) to carry out objectives).

223. *Id.*

224. *Compare* MODEL RULES R. 1.4 (promoting communication with the client to keep client reasonably informed), *with* FACT FINDER ENGAGEMENT AGREEMENT, *supra* note 202 (providing, in the context of the limited scope of the service: “Fact-Finder shall not be obligated or expected to bring to the Client’s attention any matters of which Fact-Finder or its agents become aware which are not related to the Report to be rendered in connection with the Engagement.”).

225. *Compare* IFFS PROCEDURES, *supra* note 197, at 10.3 (requiring confidentiality to be governed by an agreement between the client and the fact finder), *with* MODEL RULES R. 1.6 (making information acquired in the course of the representation confidential with few exceptions).

226. *See* MODEL RULES R. 1.16(d) (protecting the client’s interests upon withdrawal); *id.* at R. 1.16 cmt. 8 (terminating representation if client refuses to abide by the agreement); *id.* at R. 1.6 (addressing disclosure of confidential information necessary to carry out representation). Corporate lawyers are not permitted to disclose corporate wrongdoing either to the public or to shareholders when the lawyer’s purpose is protecting the corporation itself. *See id.* at R. 1.13(b), (c) (providing that if the board of directors refuses to act, the lawyer may resign and that disclosure outside the corporation is warranted only when permitted by Rule 1.6, which provides exceptions to confidentiality regardless of the client’s consent). Rather, the corporate lawyer is permitted to refer the matter only to a “higher authority in the organization,” including “referral to the highest authority that can act on behalf of the organization as determined by applicable law.” *Id.* at R. 1.13(b)(3).

and the lawyer's duty of confidentiality.²²⁷ From our experience, corporate decisionmakers are increasingly concerned with the costs and liability of litigation and would be reluctant to engage in the fact-finding process, much less to share information, without some guarantees of confidentiality.²²⁸ Also, employees need to feel that they can speak in confidence. To the extent confidentiality improves the thoroughness of the investigation by helping the fact finder gain access to information that otherwise would not be shared, it improves

227. The attorney-client privilege is a common law privilege designed to encourage full and frank discussion between attorneys and clients for the purpose of enabling better legal advice by protecting such communications from public disclosure. 8 JOHN HENRY WIGMORE, *EVIDENCE, in TRIALS AT COMMON LAW* § 2290 (John T. McNaughton ed., rev. ed. 1961); see, e.g., *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 376 (1991) ("The attorney client privilege . . . fosters the open dialogue between lawyer and client that is deemed essential to effective representation.") (citations omitted). The work-product doctrine protects certain documents prepared in anticipation of trial. FED. R. CIV. P. 26(b)(3); see *Hickman v. Taylor*, 329 U.S. 495 (1947) (formulating the privilege). With certain limited exceptions, attorneys are required under their applicable standards of professional conduct to keep information obtained in the course of representation confidential. See MODEL RULES R. 1.6. The seminal decision on privilege in the context of internal investigations is *Upjohn Co. v. United States*, 449 U.S. 383 (1981). In that case, Upjohn's management had sent confidential questionnaires to its employees regarding potential wrongdoing by corporate personnel, while in-house counsel prepared memoranda and notes of interviews. *Id.* at 386-88. The Court held that both the attorney-client privilege and the work-product doctrine apply to internal investigative activities. *Id.* at 347, 400. The Court articulated several factors reinforcing a claim of privilege in connection with employee interviews, including that communications were made by employees to counsel and that the communications were made at the direction of management so that the company could obtain legal advice from counsel. *Id.* at 391-92. This ruling implies that lawyer-fact finders hired with the expectation of providing legal advice are necessary for these privileges to apply in the SCA fact-finding context; however, it may be that lawyer- and nonlawyer-fact finders could ensure confidentiality by working with corporate counsel. A complete discussion of the attorney-client privilege and the work-product doctrine and their application in the context of internal investigations is beyond the scope of this Article. For a more comprehensive discussion, see Joseph T. McLaughlin & J. Kevin McCarthy, *Corporate Internal Investigations—Legal Privileges and Ethical Issues in the Employment Law Context*, SF42 ALI/ABA 927 (2001). Regarding privileges in internal investigations generally, see also DAN K. WEBB ET AL., *CORPORATE INTERNAL INVESTIGATIONS* §§ 6-7 (2000); JEROME G. SNIDER & HOWARD A. ELLINS, *CORPORATE PRIVILEGES AND CONFIDENTIAL INFORMATION* (2002). See *infra* note 223 and accompanying text for discussion of self-critical evaluation privilege.

228. There are limits to the protections afforded the attorney-client privilege, work-product doctrine, and ethical duty of confidentiality. In the course of an internal investigation, certain communications and work product may not be protected. See, e.g., *Upjohn*, 449 U.S. at 396-97, 401. Because it is an evidentiary privilege, the attorney-client privilege can only be asserted in the context of a judicial proceeding. Communications during an investigation may not be covered by the attorney-client privilege because they were not made for the purpose of obtaining legal advice. See *Spectrum Sys.*, 78 N.Y.3d at 371. Notes and other materials generated during the process may not be covered by the work-product doctrine because there was no pending litigation. See FED. R. CIV. P. 26 (b)(3); see also *U.S. v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998) (covers documents generated because of prospect of litigation).

Although nonlawyer-fact finders voluntarily can adhere to a promise of confidentiality, they are not bound to do so under an enforceable disciplinary regime like lawyers, and there is not a legally recognized privilege or protection of their client's communications with them.

the process and the accuracy of the report.²²⁹ Additionally, other confidential matters such as trade secrets may be involved. The attorney-client relationship is a double-edged sword, however. While it provides some important advantages, it imposes duties of loyalty and confidentiality that can be perceived by a suspicious public and depicted by adversarial interest groups as a convenient pretext for hiding important facts from the public and insulating the company from liability exposure. Despite claims that the attorney-client relationship actually should give the process more credibility, its existence has the potential to undermine the public trust in the process. The AAA's procedural/contractual restraints on the representational role do not address this concern directly. Instead, the belief is that if someone with integrity conducts a high-quality, independent process under the AAA's procedures and supervision, it will engender public trust in the process.

Consistent with its experience and reputation in providing neutral services, the AAA could have selected a nonrepresentational role, under which the company engages the lawyer as a neutral rather than as legal counsel, thereby avoiding the formation of an attorney-client relationship.²³⁰ The Model Rules now recognize the neutral role, when the lawyer is acting as a third party to resolve a dispute or other matter between two or more parties, as an aspect of practicing law.²³¹ A lawyer-neutral does not have an attorney-client relationship with the parties,²³² and the source of payment is irrelevant.²³³ Unfortunately, the Model Rules did not anticipate SCA-fact-finding in corporate crises in which there are no clearly designated additional parties involved as disputants in the process—thereby making the lawyer-neutral a third party.

229. The fact finder (whether a lawyer or not) may employ a law firm on behalf of the corporation to assist in the process, in which case the firm could have an attorney-client relationship with the corporation.

230. The AAA is not wedded to an attorney-client relationship. See IFFS Procedures, *supra* note 197, at 7.2 (stating the attorney-client relationship is at the discretion of the fact finder). The organization has appointed a nonlawyer to its IFFS panel. See *infra* note 237. Presumably, the nonlawyer-fact finder would have an principal-agent relationship with the corporation and its attendant duties (competence, diligence, and confidentiality, perhaps).

231. See MODEL RULES, preamble.

232. See *id.* (describing a lawyer-neutral as having a "non-representational role"); *id.* at R. 2.4(a) (describing a lawyer-neutral as responsible for assisting "persons who are not clients").

233. Although the ideal is that all disputants bear equal responsibility for the neutral's fees in order to avoid any appearance of bias, it is common practice for one party to pay all the neutral's fees when the dispute resolution agreement so provides. See, e.g., AM. ARBITRATION ASS'N COMMERCIAL DISPUTE RESOLUTION PROCEDURES, R. 45(c). See generally, DOUGLAS H. YARN, ALTERNATIVE DISPUTE RESOLUTION: PROCEDURE AND PRACTICE IN GEORGIA §§ 6-12, 6-14, 8-48 (2d ed. 1997) (describing payment arrangements for mediators and arbitrators).

Without clearly falling within the definition of the neutral role as recognized by the Model Rules, lawyer–fact finders may find it difficult to avoid forming an attorney-client relationship when engaged to conduct the process. The crucial question is one of contract since the law of contract governs when an attorney-client relationship is formed.²³⁴ Is the client voluntarily requesting and the lawyer consenting to providing a legal service ordinarily provided by a lawyer to a client? On its face, the service is nonlegal in nature. An investigation and report does not necessarily constitute the “practice of law,”²³⁵ and it can be conducted by nonlawyers.²³⁶ In fact, the AAA intends to add nonlawyers to the IFFS panel.²³⁷ But if a lawyer–fact finder was contracted to determine the lawfulness of any wrongful act or of any recommended course of conduct or if the use of such legal expertise was anticipated in the engagement, the engagement would seem to anticipate that the lawyer–fact finder was engaged for his legal expertise and that at least that portion of the fact-finding process constituted the practice of law.²³⁸ Even if the advice is nonlegal in

234. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 22, § 14 cmt. a (“Agency and contract law are also applicable [to determining the scope of the attorney-client relationship], except when inconsistent with special rules applicable to lawyers.”).

235. There is no agreement on a comprehensive definition of what constitutes the practice of law. Most states have statutes on the unauthorized practice of law that list certain activities. Generally, it is agreed that such practice includes the representation of another person in litigation. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. c (2000) (noting that certain activities, such as the representation of another person in litigation, are generally proscribed). The drafting of legal instruments is also generally considered to constitute the practice of law, except perhaps where incidental to another specialized occupation, particularly when the preparation involves the filling in of blanks in a standard form. *Cf. id.* (noting that activities like completing standard forms are controversial, which means that scholars and courts debate whether this action should be considered the practice of law). There are various tests used to determine what constitutes the practice of law, including the professional judgment test, the traditional areas of law practice test, and the incidental legal services test. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 15.1.3 (1986).

236. Examples of nonlawyer–fact finders include Andrew Young, Lynn Martin, and Paul Volcker. See *supra* notes 160-80 and accompanying text.

237. As we write this article, the AAA added the first nonlawyer to the IFFS panel, Edward T. Reilly, President and CEO, American Management Association. Nonlawyers would not have an attorney-client relationship but rather a principal-agent relationship and its attendant duties as determined by the contractual relationship.

238. Such advice involves an activity “in which a lawyer’s presumed special training and skills are relevant,” an activity that is something lawyers commonly do, and an activity that is not “simply an adjunct to a routine in the business or commercial world that is not itself law practice.” WOLFRAM, *supra* note 235.

The same debate rages over when and whether lawyer-mediators are engaged in the practice of law. See ASS’N FOR CONFLICT RESOLUTION, REPORT OF THE COMM. TO STUDY THE UNAUTHORIZED PRACTICE OF LAW 9-31 (2002) (defining mediation and discussing the activities conducted by mediators that (1) should not be considered the practice of law; (2) should be considered the practices of law; and (3) may be considered the practice of law).

nature, the lawyer–fact finder may still be engaged in the practice of law considering the broad definition of advice allowed in Model Rule 2.1.²³⁹

From a functional perspective, a characterization of the lawyer–fact finder’s role may rest upon the extent to which the lawyer–fact finder participated in the formulation and execution of legal strategies. For example, if the lawyer–fact finder advises the company on how best to use the investigation and report in the context of anticipated litigation or regulatory action, he would seem to be engaged not only in the practice of law but also in partisan advocacy.²⁴⁰ The determinate questions might be framed as whether the fact finder is acting more as a lawyer than as an investigator and whether acting even just a smidge as a lawyer is enough to trigger a complete characterization of the role. Finally, even if the lawyer–fact finder limited himself solely to an objective investigation and report, an attorney–client relationship still might be inferred if the client believed it existed.²⁴¹

Just as the law of contract determines the existence of the attorney–client relationship, it would seem possible to avoid the relationship by a contract in which the lawyer dispels any expectation of such relationship giving the client no reasonable expectation of the protections of that relationship. Ostensibly, the AAA’s IFFS engagement agreement attempts to do that to some degree. Despite any such agreement, any actions or statements by the lawyer–fact

239. See MODEL RULES R. 2.1 (“In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”).

240. An analogy can be drawn between the lawyer–fact finder and the lawyer hired as a nontestifying expert consultant who is subject to the Model Rules of Professional Conduct. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 97-407 (1997) (distinguishing between the testifying expert, one who is not subject to the Model Rules of Professional Conduct and a nontestifying expert consultant, one who is subject to the Model Rules of Professional Conduct). The roles of testifying and nontestifying experts are not exclusive—for example, a lawyer expert might be hired to testify but might also participate substantially in trial strategy. *Id.* (“The distinction between the role of the testifying expert and the role of the expert consultant can, of course, become blurred in actual practice.”). Conversely, a nontestifying expert may be drawn into testifying (raising a number of problems of confidentiality and attorney client privilege). See *id.* Similarly, the lawyer–fact finder may be hired with the expectation that she might also testify in some subsequent forum. Cf. Nancy J. Moore, *The Ethical Role and Responsibilities of a Lawyer-Ethicist: The Case of the Independent Counsel’s Independent Counsel*, 68 FORDHAM L. REV. 771, 776-93 (1999) (using the dichotomy between the testifying lawyer-expert and the nontestifying expert consultant to examine Sam Dash’s role as an ethics expert for Ken Starr); Samuel Dash, *The Ethical Role and Responsibilities of a Lawyer-Ethicist Revisited: The Case of the Independent Counsel’s Neutral Expert Consultant*, 68 FORDHAM L. REV. 1065, 1069-71 (2000) (responding to Professor Moore’s article and arguing that the dichotomy between a testifying lawyer-expert and a nontestifying expert consultant should not be used to determine whether the lawyer at issue owes duties to the consulted entity).

241. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 221, § 26.

finder might give rise to the relationship if they blur the distinction and give the client an impression that the relationship exists.²⁴² There is also the question as to whether such an agreement would be viewed as an attempt at exculpation. In short, the attorney-client relationship may be difficult to avoid, making the AAA's limited engagement agreement the best possible alternative to a pure representative model.²⁴³

Under the AAA's IFFS, the lawyer-fact finder's role is most closely analogous to that of the lawyer as evaluator addressed by Model Rule 2.3²⁴⁴ and the corresponding *Restatement* section.²⁴⁵ It is similar to the extent that the client is hiring the lawyer to "evaluate a matter affecting a client for the use of someone other than the client,"²⁴⁶ and that "[i]n furtherance of the objectives of a client in the representation, a lawyer may provide to a non-client the results of the lawyer's investigation . . ."²⁴⁷ In PIFF, the public is ultimately the third party for whom the report is created and who will rely on the report in determining the corporation's social legitimacy and whether to extend the public trust. In this sense, the fact finder has a duty to the public to exercise care and not make false statements.²⁴⁸

242. See *id.* § 26 (2000); see also *Kurtenbach v. TeKippe*, 260 N.W.2d 53, 56 (Iowa 1977) ("The relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.").

243. "Pure" means that all duties and responsibilities of representation apply without modification.

244. See MODEL RULES R. 2.3. Rule 2.3, entitled "Evaluation for Use by Third Persons," provides:

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Id.

245. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 221, § 95.

246. MODEL RULES R. 2.3(a).

247. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 221, § 95(1).

248. See *id.* §§ 95(3), 51; MODEL RULES R. 4.1 ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.").

Model Rule 2.3 implies that the evaluating lawyer already represents the client and is thus responsible for determining that making the evaluation is compatible with other aspects of the lawyer's relationship with the client and obtaining the client's informed consent before revealing

Although the AAA's restricted representational model and the responsibilities imposed on the lawyer-fact finder/evaluator should assuage the public's initial natural wariness of the representational approach, such details are arcane and likely to be ignored in the heat of a media feeding frenzy. No matter what the conditions of the engagement, critics can always question the process by raising the fact that the public independent fact finder was hired to *represent* the beleaguered corporation. It is easy to overlook the AAA's role as a buffer between the fact finder and the corporation during the selection and contracting phases.²⁴⁹ The only way to avoid this vulnerability completely is to adopt a nonrepresentational role model at the expense of the process advantages from the confidentiality of an attorney-client relationship.

Assuming that the corporation pays for the fact finder's services,²⁵⁰ there are a couple of possible nonrepresentational role models from which to choose. One such model is that of the independent public accountant as auditor of a publicly traded company. Although this trust-generating institution is under some fire because of accountants' involvement in the current accounting scandals,²⁵¹ it is similar in its need for independence and its orientation toward the public's interest.²⁵² Investors must be able to rely upon the financial statements of publicly traded companies, and the auditor's opinion provides crucial assurance that the financial statements have been subjected to a rigorous examination by an objective, impartial, and skilled professional. Investors rely upon independent auditors, and if investors do not believe the auditor is

potentially damaging information. See MODEL RULES R. 2.3(A) ("A lawyer may provide an evaluation of a matter affecting a client . . . if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client."). Under the AAA's IFFS, the lawyer-fact finder does not provide these legal services contemplated by the Model Rule. Because the client has already agreed that the independent fact-finding process is in its best interest, the fact finder is not responsible for deciding whether it is in the corporation's best interest neither to issue the report nor to obtain the client's informed consent before disclosing potentially damaging information.

249. The AAA's role here should not be interpreted as soliciting for lawyers or engaging in fee splitting.

250. The process could be institutionalized so that the fact finder is paid by someone other than the corporation. For example, the government, a self-regulatory organization, or a trade association could provide the fact-finding service.

251. Even prior to the Enron scandal, regulators were reconsidering what it means to be a "independent" auditor. See Qualifications of Accountants, 17 C.F.R. § 210.2-01 (2002) (establishing a "nonexclusive" list of circumstances in which accountants cannot be considered independent).

252. The accounting profession's principles of professional conduct state that "[m]embers should accept the obligation to act in the way that will serve the public interest, honor the public trust, and demonstrate commitment to the profession." AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, PROFESSIONAL STANDARDS: CODE OF PROFESSIONAL CONDUCT, ET § 53.

independent of the company, they will be far less likely to invest in a company's securities. The parallels are plain; however, unlike an independent auditor, the public independent fact finder should have no interest in repeat business.

Another nonrepresentational role model is that of the trustee. Instead of principal-agent and attorney-client, the relationship could be framed as a settlor-trustee-beneficiary relationship. In many ways, the relationship created by the AAA's model is consistent with a trustee model and inconsistent with the legal paradigm of agency. In agency, the principal hires the agent to act for him, can direct the agent's activities, and can fire the agent at any time, or if the contract forbids firing at any time, the principal can simply terminate the agent's status by removing the authority delegated to the agent.²⁵³ Under the AAA's model, the independent fact finder is acting on behalf of the corporation, but not under its orders.²⁵⁴ The corporation cannot freely hire or fire the fact finder, who is still obligated to report even if the corporation attempts to end the engagement.²⁵⁵

Agency law may be contrasted with a trust arrangement, in which the trustee is not the agent of the settlor but rather an independent party who is committed to act for the best interest of the beneficiaries.²⁵⁶ Once the trust is created, the settlor relinquishes control over the trust property and the management of it.²⁵⁷ The beneficiaries do not have control over the property while it is in the trust, and they therefore cannot direct the trustee's actions.²⁵⁸ The

253. See, e.g., Eric B. Rasmusen, *A Theory of Trustees, and Other Thoughts* (social science abstracts, Nov. 17, 1997) (noting that the hiring party, the principle, "can fire the agency at any time unless they have a contract that forbids it, and even if the contract requires him to keep paying the agent, he [the principal] can end the status . . . by removing all the authority delegated to the agent."), at pacioli.bus.indiana.edu/erasmuse/published/89.book.trustees.new.pdf (last visited, Apr. 6, 2003).

254. IFFS PROCEDURES, *supra* note 197, at 7.3.

255. *Id.* at 8.2 & 8.3.

256. RESTATEMENT (THIRD) OF TRUSTS, § 170; GEORGE T. BOGERT, TRUSTS 341 (6th student ed. 1987) ("The trustee owes a duty to the beneficiaries to administer the affairs of the trust solely in the interests of the beneficiaries.")

257. The settlor relinquishes control over the trust property if the trust is irrevocable—that is, if the trust cannot be modified or terminated. BOGERT, *supra* note 256, at 528. Suppose a settlor transfers a sum of money to an irrevocable trust (that is, one that cannot be modified or revoked). The settlor can give directions in the initial trust agreement (e.g., invest the money conservatively and distribute to the beneficiaries in five years), but, once the property is transferred to the trustee, the settlor has relinquished control of both the property and the process. That is, the settlor cannot come back the next year and try to retrieve the property, nor can the settlor change the beneficiaries or the investment instructions.

258. Using the example described *supra* note 257, the beneficiaries may not demand a change in investments or an early distribution. On the other hand, they do have a cause of action if the trustee breaches the trustee's fiduciary duty. RESTATEMENT (THIRD) TRUSTS §§ 199, 205, 206.

trustee is bound to effectuate the terms of the trust and to act with undivided loyalty to the beneficiaries at all times.²⁵⁹ Similarly, a company in crisis (the settlor) is committed to the fact-finding process once the fact finder (trustee) has been engaged. The company no longer has control over the product of the process, and the fact finder, as an independent actor, is bound to complete the assignment regardless of the company's wishes. The general public (the beneficiaries) also has no direct control over the process, but the fact finder is duty-bound to act only for the public's benefit. Just as politicians, government institutions, and independent bankers are public trustees,²⁶⁰ the public independent fact finder under this model is a public trustee.

The nonrepresentational role model is attractive primarily because it is immune to the suspicion and innuendo that surround the representational model. By avoiding representation, the fact finder avoids public suspicion of the process, promotes acceptance of the report, and reinforces the company's apologia. The AAA has sought to achieve these advantages of nonrepresentational role models by making the IFFS model functionally approximate the public trustee model. The procedural and contractual restraints on the duties an attorney would normally owe a client create a situation in which the client has given complete control over to the lawyer-fact finder in much the same way as a settlor gives control to a trustee. In addition, the rules of engagement under the IFFS substantially reduce the distinction between representational and nonrepresentational models. By committing to finding the truth by giving free rein to the fact finder and by releasing the fact finder from most other duties, the client is essentially saying that the fact finder's only job is to find and expose the truth and that in doing so the fact finder is representing our interests.

VII. RECONCILING COMPETING CONSIDERATIONS THROUGH A FACT-FINDING PRIVILEGE

Even though the distinction between representational and nonrepresentational models is blurred somewhat in the IFFS, it is a representational model nonetheless and risks public suspicion. Ultimately, the AAA determined that in spite of such a risk a

259. The trustee cannot use trust assets for personal benefit nor can the trustee use the trust assets imprudently. RESTATEMENT (THIRD) OF TRUSTS, §§ 170, 227.

260. See Rasmusen, *supra* note 253, at 5-6. "All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people and are at all times amenable to them." See GA. CONST. Art. I, § 2, ¶ 1.

representational model was the only way to provide corporate decisionmakers with the confidentiality necessary to encourage them to use the process. When considering the use of PIFF in an overall strategy of responding to a social legitimacy crisis, corporate decisionmakers are attempting to reconcile competing considerations—public perception and legal exposure.²⁶¹ Typically, the corporation's public relations staff advocates an open strategy in which the corporation discloses all information to promote its image as being forthcoming about its faults and, therefore, trustworthy and deserving of social legitimacy.²⁶² In contrast, corporate counsel advocates a closed strategy, admitting nothing and revealing as little as possible.²⁶³ Lawyers instinctively fear that the corporation or its employees may say or do something that will disadvantage it in current or future litigation.²⁶⁴

Although some legally recognized confidentiality arrangement that assuages litigation fears may be necessary to induce an organization in crisis to use PIFF, most crisis management experts would agree that the loss of a few million dollars from lawsuits pales in comparison to the loss of shareholder value when that corporation loses the public trust.²⁶⁵ When the organization's very existence is on the line, attempts to hide anything seem misdirected. In an article prior to the Enron revelations and his service as SEC Chairman, Harvey Pitt observed: "If a crisis actually arises, full disclosure and total candor (rather than a stonewalling or 'limited hang-out' approach) should be the order of the day."²⁶⁶ Nevertheless, the same experts recognize a balance between enough disclosure to reassure the public and a reasonable modicum of confidentiality to minimize legal exposure.²⁶⁷

261. See Carol Basri & Irving Kagan, *Crisis Management*, in PRACTICING LAW INST., ADVANCED CORPORATE COMPLIANCE WORKSHOP 599-600 (2002) ("The corporation's disclosure strategy is a function of balancing these two considerations. First, the corporation has a strong interest in maintaining its image; . . . the other input is legal liability.").

262. *Id.* at 600.

263. See *id.*

264. See Pitt & Groskaufmanis, *supra* note 110, at 967 (noting that many articles on crisis management warn companies to "rein in your lawyers" to save the company) (citation omitted).

265. See Basri & Kagan, *supra* note 261, at 599 ("The avoidance of \$1 million in a civil suit is not worth the loss of \$20 million in profits from lost sales.").

266. See Pitt & Groskaufmanis, *supra* note 110, at 965 ("The key to public confidence and acceptance, however, is candor and complete disclosure.").

267. See Basri & Kagan, *supra* note 261, at 600 (considering "the best strategy" to be one between "complete non-disclosure" and "full disclosure"); Pitt & Groskaufmanis, *supra* note 110, at 967 (recognizing that the future survival of the company depends on revealing some information to retain corporate credibility while keeping some information confidential to avoid additional legal liability).

Currently, PIFF's ability to strike this balance and provide some assurance of confidentiality relies upon the fact finder and the corporation having an attorney-client relationship through which the corporation can assert the protections of the attorney-client privilege and the work-product doctrine. In contrast, a nonrepresentational approach cannot achieve this balance unless an evidentiary privilege for fact-finding exists independently of the attorney-client relationship. Already, some jurisdictions have recognized a self-critical analysis or a self-evaluative privilege, under which an organization's internal reports and critical assessments remain confidential if all parties involved expected that the information would remain confidential.²⁶⁸

In general, evidentiary privileges are created when public policy favors confidential relationships that are not effectively absent protected communications.²⁶⁹ The rationale underlying a self-evaluative privilege is that it encourages full and frank discussions that allow organizations to assess their operations critically and to improve and to correct their conduct and practices.²⁷⁰ Corporations and their employees will be resistant to a nonrepresentational approach and nonlawyer-fact finders (and possibly lawyer-fact finders) because they fear that without confidentiality protections the information uncovered may be used against them. This resistance makes it difficult for the fact finder to gather critical information

268. The privilege was first recognized in *Bredice v. Doctor's Hospital, Inc.*, 50 F.R.D. 249 (D.C. Cir. 1970). Where courts have accepted the self-evaluative privilege, they prescribe four elements in order for it to apply in a particular situation:

[T]he information must result from a critical self analysis by the party asserting the privilege; second, the public must have a strong interest in preserving the free flow of the type of information sought; . . . [third,] the information must be of the type whose flow would be curtailed if discovery were allowed; . . . [and fourth,] no document will be accorded a privilege unless it was prepared with the expectation that it would be kept confidential, and has in fact been kept confidential.

Dowling v. Am. Haw. Cruises, Inc., 971 F.2d 423, 425-26 (9th Cir. 1992) (citing Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1086 (1983)). A complete discussion of the privilege is beyond the scope of this Article. See generally Note, *The Privilege of Self-Critical Analysis*, *supra* (discussing the extent to which self-evaluations conducted by either institutions or individuals are privileged).

269. See WIGMORE, *supra* note 227, § 2285. According to Wigmore,

(1) the communications must originate in a confidence so that they will not be disclosed to others; (2) the element of confidentiality must be essential to the . . . maintenance between the parties; (3) the relation must be one which the opinion of the community ought to be fostered and protected; (4) the injury [from disclosure] . . . must be greater than the benefit thereby gained by the public for the correct disposal of litigation.

Id.

270. See *In re Crazy Eddie Sec. Litig.*, 792 F. Supp. 197, 205 (E.D.N.Y. 1992) (noting that the privilege is intended to serve the "[p]ublic interest by encouraging self-improvement through uninhibited self-analysis and evaluation").

when the threat of disclosure may discourage individuals from coming forward with that information. In forms of fact-finding in which the final report is not meant for public disclosure, the fact finder may actually be discouraged from investigating thoroughly, fearing that if the report were disclosed, he would be subject to criticism or liability. Although the report in PIFF is meant to be public, the corporation may still have a strong interest in protecting some of the information uncovered by the fact finder but not revealed in the report. In jurisdictions recognizing the self-critical analysis privilege, some protections could apply to the communications and work products underlying the final public report and generated as part of the fact-finding process.²⁷¹

Moreover, a self-evaluation privilege may be a significant improvement over the attorney-client privilege and the work-product doctrine. In the corporate context, the attorney-client privilege extends to communications between employees and the corporate attorney only if the elements articulated by the Supreme Court in *Upjohn* are present.²⁷² It is easy to find the elements wanting in the context of a fact-finding process. For example, protected communications are those made for the purpose of obtaining legal advice; however, the investigation and therefore the related communications in a fact-finding process, particularly in a PIFF, are not made for the purpose of receiving legal advice but rather for the purpose of responding to a corporate legitimacy crisis and regaining the public trust. The communication must be made to the organization's attorney; however, the fact finder, even if a lawyer, might not be considered an attorney for the purposes of the attorney-client privilege because she is not giving legal advice. Because only confidential communications are covered, facts learned that are not part of the communications and of the fact finder's evaluation made in the course of the process are not protected. Finally, it is easy for the organization's employees who fail to understand how strictly the privilege is applied to waive it unintentionally.

271. See, e.g., *Laws v. Georgetown Univ. Hosp.*, 656 F. Supp. 824, 825-26 (D.D.C. 1987) (holding that the privilege covered a private memorandum prepared by a doctor, who was accused of malpractice and who delivered the memorandum to the chairman of his department in order to prompt a review that ultimately occurred at a staff meeting).

272. See *Upjohn v. United States*, 449 U.S. 383, 394-95 (1981). The elements include: (a) the communication is made under instructions of corporate superiors to secure legal advice; (b) the issues communicated must be those within the scope of the employee's duties; (c) the employee must be cognizant that the communications are for the purpose of obtaining legal advice for the corporation; and (d) corporate superiors must direct that the communications remain confidential, and (e) the communications must not actually be disclosed to anyone outside the attorney client relationship. See *id.*

Likewise, the work-product doctrine is limited in its protection to the product of an attorney's trial preparation.²⁷³ Although the doctrine holds some promise for protecting the records of interviews, employee statements, and other materials prepared or gathered in connection with the fact-finding process, it is also easily waived, and the materials are discoverable if the opposing party can show a "substantial need" for the information.²⁷⁴ Moreover, the materials must be prepared in anticipation of litigation.²⁷⁵ Although most organizations suffering from a corporate social legitimacy crisis anticipate related litigation, the work-product doctrine may not apply if preparation for that litigation was not the dominant purpose of the fact-finding.

Considering the possible gaps in confidentiality under the attorney-client privilege and the work-product doctrine, a self-evaluation privilege would not only provide some protection in a nonrepresentational model of IFF but arguably also would provide more protection in the representational model. Unfortunately, the self-evaluation privilege is poorly established²⁷⁶ and has been the subject of criticism.²⁷⁷ Legislation that uniformly recognizes and clarifies the application of a self-critical analysis privilege would encourage the use of PIFF and other forms of SCA fact-finding and give organizations more confidence in nonrepresentational as well as representational institutionalization approaches.²⁷⁸

Although not as directly applicable as the self-evaluation privilege, the confidentiality accorded to mediation proceedings bears some consideration as analogous. Confidentiality has long been recognized as necessary to the success of mediation,²⁷⁹ and mediation

273. See *supra* note 227 (discussing the recognition of the doctrine).

274. FED. R. CIV. P. 26(b)(3).

275. See *id.*; see also *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998) (holding that the work-product doctrine covers documents generated because of the prospect of litigation).

276. The Supreme Court has not recognized the privilege, and those courts which have given it limited acceptance have applied it inconsistently and narrowly. See Jason M. Healy et al., *Confidentiality of Health Care Provider Quality of Care Information*, 40 BRANDEIS L.J. 595, 630 nn.165-68 (2002).

277. See James F. Flanagan, *Rejecting a General Privilege for Self-Critical Analyses*, 51 GEO. WASH. L. REV. 551, 569-70 (1983) (asserting that the absence or presence of such a privilege "would not have a significant impact on the investigation or on the behavior of those involved").

278. See Healy et al., *supra* note 276, at 647-57 (proposing a comprehensive federal statute creating a privilege for health care records generated to improve the quality of care); David P. Leonard, *Codifying a Privilege for Self-Critical Analysis*, 25 HARV. J. LEGIS. 113, 116-22 (1988) (describing generally the need for a privilege protecting self-critical analysis).

279. See, e.g., Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 37-39 (1986) (noting the importance of confidentiality to effective mediation); Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 ADMIN. L. REV. 315, 323-27 (1989) (discussing the need for confidentiality in mediation); Alan Kirtley, *The*

privileges have been established by statutes and court rules.²⁸⁰ As stated in the recently approved Uniform Mediation Act, the purpose of the privilege is to “promote candor of parties through confidentiality of the mediation process, subject only to the need for disclosure to accommodate specific and compelling societal interests.”²⁸¹ Similar to mediation, the candor possible only under the protection of confidentiality is necessary for the success of the IFF process. Just as confidence in the impartiality of the process and the mediator is enhanced by the mediation privilege, so too would confidence be enhanced in IFF and in the fact finder.²⁸² While mediation serves an important public purpose by facilitating the resolution of disputants’ problems, IFF serves the important public purpose of helping organizations to determine what, if any, problems they have, resolve those problems, and prevent their recurrence. In addition, to the extent that PIFF achieves the important public purpose of reestablishing social legitimacy, public trust, and the benefits of cooperative relationships, the process seems as deserving of confidentiality protections as mediation.

Mediation Privilege’s Transformation from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest, 1995 J. DISP. RESOL. 1, 8-10 (discussing the function of confidentiality in mediation); Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 80-84 (2001) (discussing the need for confidentiality in mediation). *But see, e.g.*, Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1, 31-35 (1986) (concluding that a mediation privilege cannot “be justified under traditional privilege analysis”); Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARQ. L. REV. 9, 72-77 (2001) (noting that confidentiality will at some level conflict with the primary purpose of mediation, self-determination).

280. *See* SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY, PRACTICE* app. B (2d ed. Supp. 2001) (listing relevant state statutes). To the extent that fact-finding becomes a court-connected process like some mediation, confidentiality can be conferred by court rule. *See, e.g.*, Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 652 (d) (2000) (empowering federal courts to develop confidentiality rules for mediation); GA. ALTERNATIVE DISP. RES. R. VII (providing an evidentiary exception for statements made and documents created in the context of a mediation and for the protection of mediators from subpoena).

281. NAT’L CONFERENCE OF COMM’RS ON UNIF. LAWS, *Prefatory Note to UNIF. MEDIATION ACT* (2001).

282. Because the privilege is independent of an attorney-client relationship, it would promote the less assailable nonrepresentational model. *See id.*:

[P]ublic confidence in and the voluntary use of mediation can be expected to expand if people have confidence that the mediator will not take sides or disclose their statements, particularly in the context of other investigations or judicial processes. The public confidence rationale has been extended to permit the mediator to object to testifying, so that the mediator will not be viewed as biased in future mediation sessions that involve comparable parties.

Id. (citing *NLRB v. Macaluso*, 618 F.2d 51 (9th Cir. 1980), and concluding that the public interest in maintaining the perceived and actual impartiality of mediators outweighs the benefits derivable from a given mediator’s testimony).

In the absence of a well-established fact-finding privilege based either on the self-evaluation privilege or on the mediation privilege, the AAA's representational approach with its attendant limitations seems to be in that important "middle ground," ostensibly satisfying the organization's concerns with confidentiality of information while also putting in motion a process that commits the corporation to publicly tell the truth, admit fault where necessary, and make amends. If the attorney-client relationship in the AAA's program creates some tension between confidentiality and publicness, it should not be fatal to the institutionalization of the process. As individuals, Griffin Bell and George Mitchell have successfully used the representational model and overcome criticism because they have insisted on full access without interference.²⁸³ Ultimately, the thoroughness and fairness of their reports won the day. Drawing from their experience, the AAA is pursuing the most functional institutionalization model. Any lingering public doubts hopefully will be erased as the process gains additional credibility over time.

VIII. CONCLUSION

Until PIFF is better institutionalized, a small group of elite lawyers and public figures are crucial to the success of the process. They are doubtless well aware that their public reputations are on the line each time they undertake the process. Whatever relational model is selected, these public independent fact finders owe a special duty to the public which trusts them. Ultimately, the public's trust in individuals and entities such as these and the process in which they engage is a precious commodity for institutions in crises. In turn, their reputations are a public good. Consequently, such fact finders are essentially "trustees" of the public trust with corresponding fiduciary duties, and it is essential for them to conduct these processes so as to best preserve the public's confidence in their integrity.

We have not explored some of the potentially useful variations on the fact-finding theme. For example, independent fact-finding can be used proactively for crisis prevention rather than simply reactively for crisis response. If an organization senses an emerging problem, it can use independent fact-finding to determine the facts and fix the problem before it triggers a legitimacy crisis. If there is no problem, it has an independent report that documents that finding. Under either scenario, it can preempt criticism by showing that it was acting

283. It also helps that Bell and Mitchell were unflinchingly critical in their reports when they discovered problems. Query whether the institutionalization effort would be hampered if only companies without problems used it or if fact finders were not finding problems.

responsibly by engaging in self-critical analysis and by having the facts immediately on hand for public discussion if necessary. It can manage its apologia based on independently determined facts, preempt the controversy, and effectively inoculate itself from ongoing media interest and innuendo. Along these same lines, internal investigations are often helpful in resolving conflicts within an organization and, if conducted by an independent committee of a corporation's board of directors, may reduce criminal penalties²⁸⁴ and serve as a defense to a shareholder suit or breach of fiduciary duty claim.

Although business corporations were the focus of this Article, fact-finding can be effective in other organizational settings as well. The courts have yet to harness the potential of such a process as an adjunct to the judicial system. By encouraging joint fact-finding early in litigation, particularly in complex, fact-intensive cases, the courts could reduce their dockets and the parties' costs of litigation. When faced with the time constraints of a temporary restraining order, the court could encourage joint fact-finding to obtain the necessary facts in a timely manner. Courts could provide the service on request of an organization or individual seeking SCA fact-finding and serve as another institutional delivery system by maintaining a fact finder panel. In this sense, fact-finding could be another yet another door in the "multi-door courthouse."²⁸⁵

PIFF is not a panacea for this age of corporate illegitimacy and public mistrust and by no means is it a replacement for other trust-generating institutions, many of which are undergoing restructuring in the face of the current crisis; however, PIFF holds some interesting promise. To the extent that PIFF can help falsely accused organizations clear their names, can help otherwise good companies restore their names after the wrongdoing of a few of their constituents, and can aid in the reformation of good companies gone bad, it should be used and supported. However, some degree of institutionalization, with an emphasis on procedures and standards that preserve the integrity of the process, will best serve its continued use and development. The AAA's institutionalization effort reflects some of the tensions in doing so and presents an intriguing compromise between representational and nonrepresentational fact finder role models.

284. See *supra* note 142.

285. The courthouse of many doors was a concept put forth by Frank Sander, whose article on the idea is credited with the modern alternative dispute resolution movement among legal institutions. See Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

When the process is better institutionalized, more individuals can fill the fact finder role. This presents lawyers with a unique opportunity to serve their immediate communities by participating in the resolution of the legitimacy crises of local businesses, charities, governments, and congregations. If it is the dream of justice that the guilty shall be so found and the innocent vindicated, the great inefficiencies of the rough justice of poorly informed public opinion must be addressed. The fact-finding concept has the potential to work at many societal levels to provide a quick, fair, and objective intervention to resolve controversy based on rumor and innuendo. In a global society in which public opinion can change so quickly, fact-finding can fill a void in dispute-handling processes between the formal application of law through litigation and the informal shaping of public opinion.