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The Lawyer as Truth-Teller: Lessons From Enron

Thomas G. Bost*

I. THE "CODE"

The teaching and practice of law assume and are shaped by, in Joseph Allegretti's words, the "standard vision" of lawyer conduct and ethical responsibility.¹ Under the standard vision, which is reflected in the various codes of professional responsibility governing lawyers, the lawyer is a "neutral partisan" for his or her client: "neutral" in that he does not let his moral values affect his actions on behalf of his client; "partisan" in that she does whatever she can within the limits of the law to advance her client's stated interests. Because the standard vision is readily understood by most lawyers as imposing a code of conduct upon them in their practice of law, Allegretti calls the standard vision the "Code."² Although the Code is not codified *per se*, it is reflected in the Constitution, with its guarantees of trial by jury and assistance of legal counsel, in our judicial system, which is primarily adversarial rather than inquisitorial, and in the various codes of ethics governing lawyer behavior. Under the adversarial system, lawyers are champions of their clients and "leave questions of 'truth' and 'justice' to others."³ Lawyers conforming to the Code may see a trial as a sporting

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1. JOSEPH G. ALLEGRETTI, *THE LAWYER'S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE*, 8-10 (1996). The "standard vision" for lawyers is further discussed in Thomas G. Bost & L. Timothy Perrin, *Practicing Law as a Christian: Restoration Movement Perspectives*, 32 PEPP. L. REV. 419 (2004).

2. ALLEGRETTI, *supra* note 1, at 8.

3. *Id.* at 8. See also Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 STAN. J.L., BUS. & FIN. 9, 37 (2002) (finding similar attitudes among students in graduate business programs).

event with the judge as the umpire to insure that both sides, including their respective lawyers, play by the rules. In a transactional context, the lawyer guided by the Code determines the client's business objective and then does everything "legal" to accomplish it. The lawyer's own morals or scruples are not imposed on her client and do not impact her work for her client.

II. THE WATKINS INVESTIGATION AS A CASE STUDY OF THE CODE

Some perspective for an evaluation of the merits or limitations of the Code may be provided by the cataclysmic and precipitous decline and fall of Enron Corporation, which has occasioned a comprehensive and somewhat fevered reappraisal of American business and professional ethics and behavior.⁴ In particular, the performance of corporate and transactional lawyers has been subjected to the merciless gaze of 20/20 hindsight, often accompanied by scathing criticism.⁵ Particular attention has been paid to the role and conduct of Enron's attorneys, most significantly by an investigative committee of Enron's Board of Directors chaired by William C. Powers, Jr., an Enron director and Dean of the University of Texas School of Law, and by Neal Batson, the Bankruptcy Court-appointed Examiner in the Enron bankruptcy. The Enron Board's investigative committee issued its report (the "Powers Report") in February 2002⁶ and Examiner Batson issued his final report (the "Batson Report") in November 2003.⁷ The focus herein will be on Enron's primary outside law firm, Vinson & Elkins ("V&E"), with particular attention being given to V&E's role in the so-called "Watkins Investigation" which occurred in August through October 2001. Over the years V&E had represented Enron in a wide range of matters, with Enron paying the firm legal fees of over \$162 million in the five years ending with 2001.⁸ In 2001, Enron's fees of \$36.4 million represented almost 8% of V&E's revenues.⁹

Before reviewing V&E's role in the Watkins Investigation, a brief summary of the dreary Enron fiasco might be in order. In October 2001 Enron announced a charge against earnings of about \$1 billion and reduction in shareholders' equity of about \$1.2 billion.¹⁰ Following in rapid

4. See, e.g., ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS, (Nancy B. Rapoport & Bala G. Dharan eds., 2004) (presenting an extensive collection of articles and papers on Enron, business, law, ethics and society) [hereinafter Rapoport & Dharan].

5. See, e.g., Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J.L. & PUB. POL'Y 195 (2003). Compare Lawrence J. Fox, *The Academics Have It Wrong: Hysteria Is No Substitute for Sound Public Policy Analysis*, in Rapoport & Dharan, *supra* note 4, at 851 (expressing a skeptical response to critics).

6. WILLIAM C. POWERS, JR. ET AL., REPORT OF INVESTIGATION BY THE SPECIAL INVESTIGATIVE COMMITTEE OF THE BOARD OF DIRECTORS OF ENRON CORP. (2002) [hereinafter POWERS REPORT], available at 2002 WL 198018.

7. NEAL BATSON, FINAL REPORT OF NEAL BATSON, COURT-APPOINTED EXAMINER (2003) [hereinafter BATSON REPORT], available at 2003 WL 22853260.

8. *Id.* at *22.

9. *Id.* See also Ellen Joan Pollock, *Limited Partners: Lawyers for Enron Faulted Its Deals, Didn't Force Issue*, WALL ST. J., May 22, 2002, at A1.

10. BATSON REPORT, *supra* note 7, at *7; see also POWERS REPORT, *supra* note 6, at *2-3.

succession were announcements of mammoth restatements of more than \$500 million of the earnings of the four previous fiscal years and reductions of shareholders' equity of more than \$ 2 billion.¹¹ Enron's situation rapidly deteriorated, with a dizzying plunge in stock price, the drastic lowering of its debt ratings and the activation of credit triggers.¹² It filed for bankruptcy in December 2001.¹³

Conspicuous among the restatements was the unraveling of investments in and transactions with hundreds, if not thousands, of affiliated business entities, often called "special purpose entities" ("SPEs"), that, in retrospect, appear to have had little business purpose for Enron other than to artificially accelerate income, defer loss or expense or remove debt from its balance sheet.¹⁴ Although details varied considerably, these complex arrangements usually involved the formation of a partnership or limited liability company to serve as an SPE capitalized by an equity investment by third parties of at least 3% of the required capital, with the remaining capital being supplied by debt financing from institutional lenders.¹⁵ This structure was designed to comply with Financial Accounting Standards Board regulations, which accorded independent third party status to the SPE as long as Enron did not control it.¹⁶ As such, the SPE would not be viewed as an Enron subsidiary or affiliate and transactions between Enron and the SPE would be treated as transactions between unrelated parties.¹⁷ Thus, Enron's financial statements would reflect gains realized on assets sold to the SPEs but would not reflect losses or liabilities incurred or assumed by them.¹⁸ Some of the most significant transactions with SPEs were hedging transactions in which the Enron and the SPEs would enter into derivative contracts whereby the SPE would assume the risk of loss on a particular asset, thereby mitigating the loss of income or gain previously realized by Enron.¹⁹

Subsequent review of the transactions revealed that in all too many instances their substance bore little resemblance to their form. In a number of cases, Enron provided some or all of the equity capital injected by the apparent independent third party investors and, in effect, guaranteed the

11. POWERS REPORT, *supra* note 6, at *2-3; United States Securities & Exchange Commission Enron Corp. Form 8-K filed Nov. 8, 2001, *available at* <http://www.sec.gov/Archives/edgar/data/1024401/000095012901503835/0000950129-01-503835-index.htm> (last visited Nov. 6, 2004) (advising that audit reports for the previous four years "should not be relied upon").

12. POWERS REPORT, *supra* note 6, at *17.

13. *Id.*

14. *Id.* at *18-20. *See also* BATSON REPORT, *supra* note 7, at *2.

15. *Id.* *See also* John R. Emshwiller, *Accounting for Enron—Murky Waters: A Primer on Enron Partnerships*, WALL ST. J., Jan. 21, 2002, at C1.

16. POWERS REPORT, *supra* note 6, at *19.

17. *Id.*

18. Emshwiller, *supra* note 15, at C1.

19. *Id.*

debts incurred by the SPEs to the institutional lenders.²⁰ Moreover, Enron executives participated as principals in some of the entities and directed their activities and Enron employees performed essential services for them.²¹ Thus, in no real sense were the SPEs financially or operationally independent of Enron's control. Accordingly, the gains realized on assets sold to the SPEs should not have been reflected on Enron's income statement, while the losses and debt incurred or assumed by the SPEs should have been reflected on Enron's income statement and balance sheet.²²

The apparent scope of these transactions was staggering. Examiner Batson has estimated that Enron may have improperly transferred as much as \$5 billion in assets to the entities and that Enron Chief Financial Officer Andrew Fastow received over \$60 million in fees from the entities.²³ Despite the size and scope of these transactions, there was little, if any, disclosure of them in Enron's financial statements or its periodic filings with the SEC.²⁴ In those cases in which the arrangements were disclosed, "the company's descriptions of the partnership dealings were so complicated as to be practically indecipherable," according to the Wall Street Journal.²⁵

Enron's bankruptcy was a precursor to a host of indictments relating to the company's misuse of the SPEs and a number of resulting convictions or guilty pleas. Caught up in this legal maelstrom were Enron's auditor, Arthur Andersen, LLP, and several Enron officers, including Chairman and Chief Executive Officer Kenneth Lay, former Chief Executive Officer Jeffrey Skilling and Mr. Fastow.²⁶

In August 2001, Sherron Watkins, an Enron financial executive, sent to Kenneth Lay, Enron's CEO and Chairman of the Board, the first of several letters and other written communications expressing her deep concern about the *bona fides* and accounting treatment of several of the SPE transactions.²⁷

20. POWERS REPORT, *supra* note 6, at *19.

21. *Id.* at *43.

22. See generally Bala J. Dharan, *Enron's Accounting Issues: What Can We Learn to Prevent Future Enrons?* (Testimony, U. S. House of Representatives Energy and Commerce Committee, Feb. 6, 2002), in Rapaport & Dharan, *supra* note 4, at 113. For press coverage, see, for example, Emshwiller, *supra* note 15, at C1; Daniel Fisher, *Shell Game: How Enron Concealed Losses, Inflated Earnings—and Hid Secret Deals from the Authorities*, FORBES, Jan. 7, 2002, at 52.

23. John R. Emshwiller, *Enron May Have Improperly Moved Up To \$5 Billion*, WALL ST. J., Mar. 6, 2003, at C10.

24. See Emshwiller, *supra* note 15, at C1.

25. *Id.*

26. See Jeffrey D. Van Niel, *Enron—The Primer*, in Rapaport & Dharan, *supra* note 4, at 3; Amon Burton & John S. Dzienkowski, *Reexamining the Role of In-House Lawyers After the Conviction of Arthur Andersen*, in Rapaport & Dharan, *supra* note 4 at 689, 692-711 (discussing indictment and conviction for obstruction of justice of Arthur Andersen, LLP). For general press coverage, see John R. Emshwiller & Rebecca Smith, *Corporate Veil: Behind Enron's Fall, A Culture of Operating Outside Public's View*, WALL ST. J., Dec. 5, 2001, at A1 and John R. Emshwiller, et al., *Lay Is Indicted as Enron Inquiry Reaches the Top*, WALL ST. J., July 8, 2004, at A1.

27. The "Watkins Investigation" is described in NEAL BATSON, FINAL REPORT OF NEAL BATSON, COURT-APPOINTED EXAMINER, APPENDIX C (ROLE OF ENRON'S ATTORNEYS) [hereinafter BATSON REPORT APPENDIX C], available at 2003 WL 22853263, at *59-77, and MIMI SCHWARTZ WITH SHERRON WATKINS, POWER FAILURE: THE INSIDE STORY OF THE COLLAPSE OF ENRON, 273-315, 369-379 (2003).

Watkins stated that she was "incredibly nervous" that Enron would "implode in a wave of accounting scandals" and recommended that the company commission a review by independent counsel and accountants, specifically cautioning that V&E should not be retained for that purpose because of its previous involvement in the SPE transactions.²⁸ Within a week of sending her first letter, Watkins had discussed her concerns with Lay and other Enron personnel, as well as an accountant at Andersen.²⁹

Shortly after receiving Watkins' first communication, Enron's General Counsel James Derrick met with V&E attorneys, requesting their assistance in responding to Watkins' stated concerns.³⁰ Specifically, Derrick told the V&E attorneys that Enron's objective was to quickly determine "whether Watkins' concerns were shared among Enron's senior management" or by key Andersen personnel and whether her communications presented new facts not previously known by those individuals.³¹ Although the V&E attorneys knew that the firm had performed substantive legal work on the several of the transactions specifically questioned by Watkins, they accepted the assignment, not informing Derrick of the potential conflict of interest posed by the firm's previous involvement in the transactions in question.³² V&E understood its assignment as a "fact finding mission," with further independent legal and accounting review dependent upon the responses of the Enron and Andersen personnel to be interviewed.³³

In accepting the assignment, V&E agreed that the scope of its review would be subject to several significant limitations imposed by Enron. V&E would not "second guess" the accounting judgments of Andersen reflected in the Enron financial statements, "dig down" into the transactions in question, attempt to study the particular structure of the transactions or analyze the adequacy of disclosure of the transactions by "rebuilding" the disclosure process.³⁴

Over the next two weeks, V&E interviewed eight Enron executives, two Andersen partners and Watkins.³⁵ It appears that, other than a review of minutes of the Audit and Finance Committees of the Enron Board of Directors, V&E's investigation consisted solely of these interviews.³⁶ Based on the interviews, V&E concluded that none of the Enron interviewees believed that Enron had suffered from the SPE transactions or that the

28. BATSON REPORT APPENDIX C, *supra* note 27, at *59.

29. *Id.*

30. *Id.*

31. *Id.* at *60.

32. *Id.* at *61.

33. *Id.*

34. *Id.*

35. *Id.*

36. *See id.* at *61-64.

transactions were not in Enron's best interest, and that the Andersen interviewees were comfortable with the accounting treatment of the transactions.³⁷ The Batson Report notes that V&E did not determine *how* the Enron interviewees had reached their sanguine view, even though a V&E transactional attorney who had been substantively involved in a number of the SPE transactions in question had expressed significant reservations about the substance of the transactions in internal V&E conversations during the course of the investigation.³⁸ V&E did not communicate those reservations to Enron.³⁹

About a month after initiating its review, V&E orally reported its conclusions first to Lay and Derrick, then to the chair of the Audit Committee of the Enron Board and finally to the full Audit Committee.⁴⁰ On October 15, 2001, V&E submitted a nine page written report on its assignment, which it characterized as a "preliminary investigation," to Derrick.⁴¹ After describing the procedures followed in the investigation and specific responses of the interviewees to some of the concerns raised by Watkins and restating its conclusions as noted above, V&E closed the report by stating that "a further widespread investigation by independent counsel and auditors"⁴² was not warranted. Concern was expressed over the "bad cosmetics" of the SPE transactions and the consequent risk of negative publicity ("a Wall Street Journal exposé") or class action lawsuit.⁴³

Ironically, within two days after V&E's letter, the first of many Wall Street Journal articles on Enron's travails, with a specific reference to the SPE transactions, appeared.⁴⁴

In retrospect, V&E's performance in the Watkins Investigation is curious, to say the very least, raising questions about both its nature and scope. As to its nature, why would Enron commission its lawyers to determine and report on the opinions of corporate and accounting insiders, all of whom were immediately and directly available and, in fact, beholden, to corporate management? As to its scope, why would Enron impose limitations on V&E's involvement that would almost necessarily insure that only the views of those insiders would be reported, rather than fresh insights that might result from an independent investigation and review by counsel? It is not clear that V&E asked these questions of itself prior to accepting the engagement. What is clear is that V&E's acceptance of the nature and limited scope of the engagement determined its outcome. As the Powers

37. *Id.* at *63.

38. *Id.*

39. *Id.* at *64.

40. *Id.*

41. Opinion Letter from Max Hendrick III, Vinson & Elkins, L.L.P., to James V. Derrick, Jr., Executive Vice President and General Counsel, Enron Corp. (Oct. 15, 2001) [hereinafter Hendrick Opinion Letter], available at 2001 WL 1764266.

42. *Id.* at *7.

43. *Id.*

44. John Emshwiller & Rebecca Smith, *Enron Jolt: Investments, Assets Generate Big Loss*, WALL ST. J., Oct. 17, 2001, at C1.

Report states: "[t]he result of the V&E review was largely predetermined by the scope and nature of the investigation and the process employed."⁴⁵ In a very real sense, V&E foreclosed its ability *to tell the truth* about the substance of the SPE transactions by: (1) limiting the investigation to conversations with Enron and Andersen insiders, almost all of whom "had substantial professional and personal stakes in the matters under review";⁴⁶ (2) eschewing substantive legal and accounting (presumably with the assistance of accounting experts) review of the SPE transactions; and (3) failing to report its own institutional (in the person of its transactional partner who had first hand knowledge of the SPE transactions) reservations concerning the substance of the transactions. The Powers Report is a model of restraint when it concludes its discussion of the Watkins Investigation by noting that V&E's investigation was "structured with less skepticism than was needed to *see through*" — understand and be able to tell the truth about — "these particularly complex transactions."⁴⁷

Observers have not been shy in ascribing unsavory motives to Enron's framing an assignment of such narrow scope and nature. A very real possibility is that Enron management wanted its sophisticated and trusted legal counsel to issue a report on its prestigious letterhead that had the appearance (but not the reality, if closely and discerningly read) of blessing the SPE transactions. It may have desired a "protective document"⁴⁸ from a credible source that would "provide cover on the broader question: 'There is no problem that deserves a full investigation.'"⁴⁹ Its object may have been to use the V&E report "to paint a gloss of respectability (sprinkle holy water, as it were) on dubious transactions."⁵⁰ As Examiner Batson notes: "Many times Enron officers appear to have obtained opinions or advice from professionals merely as a necessary step to justify questionable decisions rather than as a tool to assist them in reaching a considered business decision based upon the risks."⁵¹ The Watkins Investigation is cited as a supporting example.⁵² Enron management may have been particularly interested in having a soothing message conveyed to the Audit Committee of the Board.

45. POWERS REPORT, *supra* note 6, at *81.

46. *Id.*

47. *Id.* (emphasis added).

48. Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 BUS. LAW. 143, 166 (2002).

49. *Id.* at 164.

50. Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1201 (2003).

51. BATSON REPORT, *supra* note 7, at *45.

52. *Id.* at *46.

The Powers Report notes the Board's heavy reliance on V&E's "perceived approval" of the "structure and disclosure of the [SPE] transactions."⁵³

If Enron management devised the assignment for the purpose of fundamentally obscuring or deceiving rather than enlightening, then V&E may have indeed been victimized, but it was a victimization that might have been avoided if V&E had decided that it would not speak on the subject unless the whole truth could be told.

Critics, primarily from within the academic community, have been expansive in their criticism of V&E for its role and performance in the Watkins Investigation. They contend that the firm engaged in unethical or illegal behavior, possibly subjecting itself to state bar discipline for ethics code violations, civil liability for malpractice, fraud or securities law violations and, possibly, even criminal liability for fraud.⁵⁴ Their criticisms have focused on: (1) V&E's accepting an assignment of such narrow scope even though it was apparent that a broader question, "Do we have a problem here?" should, in fact, have been posed; (2) the conflict of interest posed by V&E's assessing the propriety of transactions in which it had previously been involved as Enron's transactional counsel; (3) the perfunctory nature of the investigation and review carried out by V&E; and (4) V&E's assumption of the role of mere interviewer and scrivener, conveying a generally reassuring message even though it had institutional knowledge that at least some of the SPE transactions were problematic.⁵⁵

Interestingly, Examiner Batson has faulted V&E's work on the Watkins Investigation on significantly narrower grounds, concluding that V&E might be found to have committed professional malpractice based on negligence because of its failure to notify Enron that it shared many of Watkins's concerns on certain of the SPE transactions and that, therefore, its objectivity and independence might be impaired.⁵⁶

V&E, in vigorously defending its work in the Watkins Investigation as meeting the ethics standards and as fulfilling its responsibilities under the law, insists on the propriety of accepting an assignment of limited scope and notes the express characterization of its report as "preliminary."⁵⁷ V&E further responds to Examiner Batson's criticisms by contending that there was no conflict of interest arising from its previous representation of Enron in the SPE transactions, and, if any such conflict existed, Enron would have waived the conflict in order to achieve a speedy and efficient review.⁵⁸ V&E is not without its defenders and has obtained supporting opinions from prominent legal ethics experts.⁵⁹ V&E is adamantly insisting that it

53. POWERS REPORT, *supra* note 6, at *15.

54. See, e.g., Gordon, *supra* note 50, at 1188.

55. Cramton, *supra* note 48, at 163-69.

56. BATSON REPORT APPENDIX C, *supra* note 27, at *68.

57. Cramton, *supra* note 48, at 166.

58. *Id.*; BATSON REPORT APPENDIX C, *supra* note 27, at *68.

59. Cramton, *supra* note 48, at 166 (citing opinion letter from Charles W. Wolfram, Professor of Law Emeritus, Cornell Law School, to John K. Villa, Esq., Williams & Connolly L.L.P. (Mar. 13,

complied with all legal and ethical requirements or, in Allegratti's words, complied with the "Code."⁶⁰ It is quite possible that V&E is correct in that insistence and its critics are wrong. V&E is a firm with a longstanding reputation for excellence and it would be surprising indeed if its lawyers did not understand the Code very well.

However, even assuming that V&E fully complied with the Code by faithfully executing its assignment of narrow nature and scope in the Watkins Investigation, should we necessarily conclude that V&E served its client well? Was, for example, the Board of Directors, in its role as ultimate manager and director of the business and affairs of the company, well served by V&E's transmission to its delegated Audit Committee of the presumably self-serving assurances of interested insiders, without any expression of internal reservation, and its conclusion that no further investigation was warranted? In the last analysis, could anyone seriously maintain that V&E's communication to the Audit Committee furthered the Board's knowledge and understanding of the essential truth about the SPE transactions, the very transactions that brought the company down? In fact, V&E probably obscured the Board's understanding of the truth by delivering a communication that could be taken as clearing the SPE transactions of suspicion and reassuring the Board that no further inquiry was necessary.

What stands out in clear relief is the client's need for someone, in addition to Watkins, *to tell the truth, the whole truth*, about the SPE transactions. Albert Alshuler posits an obligation, moral if not legal, on the part of the lawyer to tell the truth *to* his or her client "even when doing so may be costly" in the terms of lost favor or billings.⁶¹ As Alshuler notes, "'No,' however, is rarely the advice clients want to hear."⁶² But the client needs the truth even if it does not necessarily want to hear it at the time.⁶³ Only by telling the truth to the Enron Board, for instance, could its attorneys have, in Examiner Batson's words, "provided a check against the officers' misconduct."⁶⁴ Batson's general depiction of Enron's attorneys mirrors Allegratti's "neutral partisan" hewing closely to the dictates of the Code:

2002); opinion letter from Geoffrey C. Hazard, Jr., Trustee Professor of Law, University of Pennsylvania, to John K. Villa, Esq., Williams & Connolly L.L.P. (Mar. 13, 2002)).

60. See generally ALLEGRETTI, *supra* note 1.

61. Albert W. Alshuler, *Lawyers and Truth-Telling*, 26 HARV. J.L. & PUB. POL'Y 189, 192 n.17 (2003) (citing as a negative example the V&E report in the Watkins Investigation). On the possible economic disincentives for business lawyers giving cautionary advice to clients, see William O. Fisher, *Where Were the Counselors? Reflections on Advice Not Given and the Role of Attorneys in the Accounting Crisis*, 39 GONZ. L. REV. 29, 71-74 (2004).

62. Alshuler, *supra* note 61, at 192.

63. Lawyer-statesman Elihu Root is quoted as saying, "About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop." MARY ANN GLENDON, *A NATION UNDER LAWYERS* 37 (1994).

64. BATSON REPORT, *supra* note 7, at *49.

[S]ome of these attorneys saw their role in very narrow terms, as an implementer, not a counselor. That is, rather than conscientiously raising known issues for further analysis by a more senior officer or the Enron Board or refusing to participate in transactions that raised such issues, these lawyers seemed to focus only on how to address a narrow question or simply to implement a decision (or document a transaction).⁶⁵

What was needed in the Watkins Investigation was more than the Code. What was needed was a determination to speak the whole truth or not speak at all.

III. TRANSFORMING THE CODE: THE LAWYER AS TRUTH-TELLER

By definition, the Code and the canons of ethics and rules of professional responsibility upon which it rests, set forth minimum standards of conduct. The lawyer conforming to the Code steers as close as possible to the Code's line of permissible conduct in his pursuit of his client's perceived interests.⁶⁶ However, as discussed above in connection with the Watkins Investigation, strict adherence to the letter of the Code may not serve either the lawyer or his client particularly well, particularly when the long-term implications of the matter are considered. Rather, the lawyer and his client may be better served if he can determine the "right" thing to do; that is, take the course of action that is not only "right" in the sense of that which is wise and prudent under the circumstances,⁶⁷ but "right" in the sense of that which is moral or virtuous. Further, the lawyer's principled determination to take the moral or virtuous course in all circumstances may give him the courage and strength to withstand client, professional or societal pressures to pursue a course of action that appears to be expedient at the moment but may be revealed over time not to have been wise or appropriate. For example, it is quite possible that if the lawyers involved in the Watkins Investigation had made a threshold determination that it would be morally wrong for them to speak anything other than the whole truth concerning the Investigation, they would not have communicated to the board in a manner that tended to obscure, rather than enlighten. With the benefit of hindsight, we can see that the *moral* course of action would also have been the *wise* course of action, both for the lawyers and the client.

In the last analysis, the Code is not a guide to moral action. The Code, with its emphasis on the rules, presents as the ultimate question to be answered, "How do I stay out of trouble?" rather than "How do I make the moral choice?" In fact, the Code makes fewer moral claims (or has fewer moral pretensions, depending on the point of view taken) today than in the

65. *Id.* at *52.

66. ALLEGRETTI, *supra* note 1, at 8.

67. According to Anthony Kronman, these are the values of the "lawyer-statesman" of an earlier, but sadly, no longer existing era. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 2 (1993).

past.⁶⁸ Mary Ann Glendon, in chronicling the "amazing shrinking concept of the lawyer as independent counselor,"⁶⁹ cites the first canons of ethics adopted by the American Bar Association, which stated that the lawyer advances the "best interests of his client when he renders service or gives advice tending to impress on the client and his undertaking exact compliance with the strictest principles of *moral law*."⁷⁰ In contrast, the current ABA Model Rules, no doubt reflecting the current diminished "consensus on what is right and wrong for lawyers,"⁷¹ contain no comparable moral imperative, relegating moral considerations as one of several extralegal factors to which the lawyer "may" refer in giving advice.⁷²

Of course, the basic responsibility for teaching morality does not rest with the law schools or the state bars, but, as Deborah Rhode and Paul Paton have noted, the failure of law teachers to initiate an explicit discussion of moral values is not value-neutral.⁷³ Rather, if morality and virtue are not part of the curriculum, the unmistakable message will be that "business as usual"—conformity to the Code—is the order of the day. Rhode and Paton view Enron as a "wake up call to broaden and deepen" professional responsibility education.⁷⁴ Noting that ethical challenges cut across subject-matter boundaries, they call for "collaboration among professionals from diverse backgrounds such as law, management, economics, organizational behavior, and public policy."⁷⁵ As admirable as this call to action to reshape ethics education may be, its ultimate effectiveness must be questioned in light of the likely failure of the participants in the contemplated collaboration to reach consensus on essential moral and ethical values. At one time in American educational history, a primary goal of teachers was to foster a belief in "commonly accepted moral values,"⁷⁶ but that goal has

68. See ALLEGRETTI, *supra* note 1, at 8-10.

69. GLENDON, *supra* note 63, at 79.

70. CANONS OF PROF'L ETHICS Canon 32 (1908) (emphasis added), *cited in* GLENDON, *supra* note 63, at 80.

71. GLENDON, *supra* note 63, at 79.

72. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2003) ("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."). Furthermore, Comment 2 to Rule 2.1 states that "although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied." *Id.* at cmt. 2.

73. Rhode & Paton, *supra* note 3, at 37.

74. *Id.*

75. *Id.*

76. DALLAS WILLARD, THE DIVINE CONSPIRACY: REDISCOVERING OUR HIDDEN LIFE IN GOD 2 (1998) (*quoting* DEREK BOK, THE PRESIDENT'S REPORT 1986-87 10 (1987) (President of Harvard University)).

been expressly abandoned.⁷⁷ Dallas Willard, noting the demise of the common sharing of basic moral values in American culture, comes to this conclusion: “*there now is no recognized moral knowledge upon which projects of fostering moral development could be based.*”⁷⁸ The “recognized moral knowledge” underlying the previous consensus on ethics was based on Christian teaching.⁷⁹ The irrelevancy of any sort of religious moral teaching in the sort of post-Enron ethics re-evaluation envisioned by Rhode and Paton is underscored by their failure to include “religion” or “theology” as among the enumerated disciplines to be consulted.

However, the Christian lawyer, accepting Biblical authority, suffers from no similar lack of “recognized moral knowledge” if she chooses to undertake the sort of ethical reappraisal contemplated above. In seriously considering the implications of the sovereignty of God and the lordship of Christ to her life in general and her legal practice in particular, she may come to the conclusion that she should endeavor to bring her Christian values into the practice of law. In other words, her goal would be for Christ to “transform” the Code and her relationship to it. As Allegretti notes, in discussing this “transformational” model:⁸⁰

For such a lawyer, the Code cannot be the sole guide to the moral life. The lawyer is not an amoral technician or a hired gun. He cannot avoid moral responsibility for his actions by appealing to the Code or to his professional role (“Gee, I was only doing my job”). He is a moral agent whose actions have consequences for which he is accountable, not just to himself and to others, but ultimately to God.⁸¹

As it has been for almost two millennia, the Sermon on the Mount is a clear starting point for those seriously contemplating the implications of the lordship of Christ and the nature of life and conduct coming “under the gracious rule of God.”⁸² Accordingly, the Sermon is a fundamental base for the transformational model. Dallas Willard styles the Sermon as a “concise statement of Jesus’ teachings on how to actually live in the reality of God’s

77. *Id.* (quoting President Bok as stating that “Today’s course in applied ethics does not seek to convey a set of moral truths but tries to encourage the student to think carefully about complex moral issues”).

78. WILLARD, *supra* note 77, at 3 (emphasis in original).

79. *See, e.g.*, GEORGE M. MARSDEN, *THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF* 3-5 (1994) (describing the dominance, pervasiveness and educational influence of Protestant Christianity in American higher education in the nineteenth and early-to-mid twentieth centuries).

80. ALLEGRETTI, *supra* note 1, at 20-23.

81. *Id.* at 21. For discussions of the transformational and three other models or types of the relationship of Christian lawyers to the practice of law, see *id.* at 10-23; Bost & Perrin, *supra* note 1, at 419.

82. JOHN R.W. STOTT, *THE MESSAGE OF THE SERMON ON THE MOUNT (MATTHEW 5-7)* 18 (1978). “The conduct . . . demanded in the Sermon becomes indicative of one’s relationship with the Father, the presence of God’s sovereign rule in one’s life.” ROBERT A. GUELICH, *THE SERMON ON THE MOUNT: A FOUNDATION FOR UNDERSTANDING* 28 (1982).

present kingdom."⁸³ Willard emphasizes that the goal of the Sermon is to state in clear, concrete, realistic and hopeful terms the nature of God's kingdom and life under God's rule.⁸⁴ Those who live in God's kingdom will develop a kingdom heart of goodness — "true inner goodness"⁸⁵ — reflecting the love and goodness of God in their daily lives.

In the Sermon, Jesus uses six common life situations to contrast those with hearts of "true inner goodness" with those whose conduct is formed by merely "doing the right thing," as defined by contemporary moral or spiritual culture.⁸⁶ The fourth of these situations involves oaths:

Again, you have heard that it was said to those of ancient times, "You shall not swear falsely, but carry out the vows you have made to the Lord." But I say to you, Do not swear at all, either by heaven, for it is the throne of God, or by the earth, for it is his footstool, or by Jerusalem, for it is the city of the great King. And do not swear by your head, for you cannot make one hair white or black. Let your word be "Yes, Yes" or "No, No"; anything more than this comes from the evil one.⁸⁷

Although an interpretation of this passage as forbidding all oaths in all circumstances has had a long history,⁸⁸ the church over the ages has generally understood the teaching of Jesus as primarily focusing on another point: those living under his lordship will be typified by transparent truth telling.⁸⁹ Those with hearts of true inner goodness will, in Willard's words, "only say how things are or are not" and will avoid "verbal manipulation."⁹⁰ According to Jesus, people swear oaths to impress others by the awesome nature and force of the declaration and to get their way by projecting an image of sincerity and reliability. Seen in this light, the oath can be a device of verbal manipulation designed to override the judgment and will of the listener. But, the manipulation goes even further: in the Sermon's

83. WILLARD, *supra* note 76, at 97. "It is the nearest thing to a manifesto that [Jesus] ever uttered, for it is his own description of what he wanted his followers to be and to do." STOTT, *supra* note 82, at 15.

84. WILLARD, *supra* note 76, at 97-98.

85. *Id.* at 145. "True inner goodness" is Willard's summary paraphrase of the Greek word *dikaiousune*. *Id.*

86. *Id.* at 129-85. Willard styles these life situations as: (1) irritation with one's associates; (2) sexual attraction; (3) unhappiness with marriage partner; (4) wanting someone to believe something; (5) being personally injured; and (6) having an enemy. *Id.* at 146.

87. *Matthew* 5:33-37 (New Revised Standard).

88. THE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH 987 (F.L. Cross & E.A. Livingstone, eds.) (2d ed. 1983) [hereinafter OXFORD DICTIONARY] (naming among groups forbidding oaths the Waldensians, Baptists, Mennonites and Quakers).

89. See GUELICH, *supra* note 82, at 249-250; OXFORD DICTIONARY, *supra* note 88, at 987.

90. WILLARD, *supra* note 76, at 146.

contemporary societal setting, certain oaths or vows, *e.g.*, those sworn by "heaven," "earth," "Jerusalem" or the "head," were not viewed as being binding because they avoided the direct use of the name of God and thus avoided the prohibition in *Leviticus* against false swearing.⁹¹ Because of the resulting emphasis on precise verbal formulas and artful wording, the making of oaths and vows had become means of obscuring, rather than illuminating, the truth.⁹²

Jesus rejected this casuistry, noting that each of the asserted non-binding oaths did in fact involve the identity and character of God.⁹³ Further, and more fundamentally, those who live under God's kingdom rule will be transparent in their honesty and straightforward in their declaration.⁹⁴ Their "yes" will mean "yes" and their "no" will mean "no." Deliberate obfuscation will be avoided. Skillful wording that obscures that the speaker is lying or, in fact, merely saying nothing meaningful, will be avoided.⁹⁵

IV. CONCLUSION

The thoughts expressed herein concerning the Watkins Investigation should be considered as a sort of cautionary tale for lawyers rather than an indictment of V&E in particular or corporate lawyers in general. They are written with full sympathy for the enormous pressures faced by practicing lawyers as they attempt to zealously and effectively represent their clients, often in hectic circumstances and under tight deadlines. The only admonition intended is that lawyers endeavor to move beyond being, in Examiner Batson's words, mere "implementers" to becoming wise "counselors" to their clients.⁹⁶ In order to effectively and fully counsel their clients, lawyers must be willing and able to tell their clients the truth, the whole truth and nothing but the truth. Anything short of that will fail.

If we are lawyers for whom Christ has transformed the Code, we will understand clearly that the Sermon on the Mount mandates that we be truth-tellers. What we will need is the discernment and courage to properly apply that understanding in our communications. In that regard, the Watkins Investigation gives us much food for thought.

91. "And you shall not swear falsely by my name, profaning the name of your God: I am the LORD." *Leviticus* 19:12. See GUELICH, *supra* note 82, at 215.

92. WILLARD, *supra* note 76, at 173-75.

93. GUELICH, *supra* note 82, at 215. See *Matthew* 23:16-22 for a parallel passage, stating that "whoever swears by heaven, swears by the throne of God and by the one who is seated upon it." *Matthew* 23:22.

94. See GUELICH, *supra* note 82, at 215.

95. "Whereas the [Mosaic] Law assumes dishonesty to be a given and forbids swearing a false oath, Jesus forbids the use of any false word at all. Such a demand presupposes the context of total honesty in human relationships." GUELICH, *supra* note 82, at 250.

96. BATSON REPORT, *supra* note 7, at *52.