

“THE CLIENT(S) OF A CORPORATE LAWYER”*

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I. INTRODUCTION

It is hard to imagine, even in retrospect, that over less than seven weeks, one of the nation’s largest companies self-destructed. On October 15, 2001, Enron Corporation was the darling of Wall Street—the country’s seventh largest firm in terms of market value.¹ On October 16, Enron announced it was restating its prior earnings.²

That date was five weeks to the day after the terrorist attacks on the World Trade Center and the Pentagon.³ No one died based on revision of Enron’s financial statements, but the effect on American business was almost as profound. Up to \$60 billion in investor wealth tied up in Enron shares disappeared forever.⁴ Over 4,000 employees lost their jobs, and many also lost their life savings.⁵

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¹ See *Five Hundred Largest U.S. Corporations*, FORTUNE, Apr. 16, 2001, at F-1 (based on financial data from the year 2000).

² See April Witt & Peter Behr, *The Fall of Enron: Losses, Conflicts Threaten Survival: CFO Fastow Ousted in Probe of Profits*, WASH. POST, July 31, 2002, at A1 [hereinafter Witt & Behr, *Losses, Conflicts Threaten Survival*].

³ See *U.S. Attacked: Hijacked Jets Destroy Twin Towers and Hit Pentagon in Day of Terror*, N.Y. TIMES, Sept. 12, 2001, at A1.

⁴ Peter Behr & April Witt, *The Fall of Enron: Hidden Debts, Deals Scuttle Last Chance*, WASH. POST, Aug. 1, 2002, at A1 [hereinafter Behr & Witt, *Hidden Debts*].

⁵ Reuters, *Pact Would Let Enron Triple Worker Payout*, L.A. TIMES, June 12, 2002, at C4. Some books describing the events, albeit often with less than scholarly detachment, include the following: ROBERT BRYCE, *PIPE DREAMS: GREED, EGO, AND THE DEATH OF ENRON* (2002) (tracing the history of Enron from a gas company to a corporate giant then to complete
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On December 2, 2001, after more earning restatements appeared in the following days, Enron filed for Chapter 11 reorganization⁶ and suffered at least the practical equivalent of corporate death.⁷ Even more significant, the Enron collapse destroyed both the confidence of many Americans in their business leaders and the expectations of those Americans who thought that their financial future was secure. That loss of confidence has been reinforced by similar problems at WorldCom, Tyco, Global Crossing, Qwest, and other United States corporations.⁸

financial failure); LOREN FOX, ENRON: THE RISE AND FALL (2003) (describing how a \$100 billion company collapsed in a matter of weeks); BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON (2003) (exposing the top executives); MIMI SWARTZ & SHERRON WATKINS, POWER FAILURE: THE INSIDE STORY OF THE COLLAPSE OF ENRON (2003) (offering an inside look at the executives of Enron, before and after the financial collapse). See also WILLIAM C. POWERS, JR., ET AL., REPORT OF INVESTIGATION BY THE SPECIAL INVESTIGATIVE COMMITTEE OF THE BOARD OF DIRECTORS OF ENRON CORP. (2002), available at <http://news.findlaw.com/wp/docs/enron/specinv020102rpt1.pdf>. For an excellent five-part series of newspaper articles on the story that ran in the Washington Post from July 28, 2002 to August 1, 2002, see Peter Behr & April Witt, *The Fall of Enron: Coming Storms: Visionary's Dream Lead to Risky Business: Opaque Deals, Accounting Sleight of Hand Built an Energy Giant and Ensure Its Demise*, WASH. POST, July 28, 2002, at A1; April Witt & Peter Behr, *The Fall of Enron: Warnings: Dream Job Turns Into a Nightmare: Skillings Success Came at High Price*, WASH. POST, July 29, 2002, at A1; Peter Behr & April Witt, *The Fall of Enron: Concerns Grow Amid Conflicts: Officials Seek to Limit Probe, Fallout of Deal*, WASH. POST, July 30, 2002, at A1; Witt & Behr, *Losses, Conflicts Threaten Survival*, supra note 2; Behr & Witt, *Hidden Debts*, supra note 4 [hereinafter collectively referred to as Behr & Witt, *Five Part Series*].

⁶ Eric Berger, *Enron Reaches the Home Stretch on Bankruptcy Plan*, HOUS. CHRON., June 4, 2004, available at <http://www.chron.com/cs/CDA/printstory.mpl/business/2608778>.

⁷ See *id.* Enron's bankruptcy case has essentially become a liquidation. See Larry Schlesinger, *Enron Looks to Emerge From the Ashes*, ACCOUNTANCY AGE, June 4, 2004, at <http://www.accountancyage.com/News/1137297> (Mar. 6, 2004). The losses have been extreme. See *id.* The company "hopes to be reborn under a new name . . . with Prisma Energy a possibility. Following months of complex financial reorganisation [sic], [Enron] has sold off dozens of businesses and unwound many of its trading partnerships." *Id.*

⁸ Behr & Witt, *Hidden Debts*, supra note 4. See also LYNNE W. JETER, DISCONNECTED: DECEIT AND BETRAYAL AT WORLD COM (2003). For extensive listings of articles, see *The WorldCom Scandal*, ACCOUNTANCY AGE, at <http://www.accountancyage.com/WorldCom> (last visited Oct. 9, 2004). For SEC documents, see *Spotlight on SEC v. Worldcom: Litigation Release*, available at <http://www.sec.gov/spotlight/worldcom.htm> (last visited Nov. 7, 2004). See also, e.g., James Arnold, *Echoes of Enron in Telecoms [sic] Collapse*, BBC NEWS, Feb. 11, 2002, at <http://news.bbc.co.uk/1/hi/business/1813847.stm>; *FBI Launches Global Crossing Probe*, BBC NEWS, Feb. 8, 2002, at <http://news.bbc.co.uk/1/hi/business/1809602.stm>; *Problems Mount for Tyco*, BBC NEWS, June 6, 2002, at <http://news.bbc.co.uk/1/> (continued)

The dominant mood in the country has been that whoever contributed to the corporate meltdowns should suffer for what happened. Thus, we have seen criminal indictments of some top Enron officials and the threatened prosecutions of others.⁹ We have seen the collapse of Arthur Andersen, the venerable firm that did Enron’s accounting.¹⁰ We have seen a private Securities Act class action filed against Enron’s lawyers,¹¹ and claims against lawyers may still be yet to come in the bankruptcy proceeding.¹² We have seen congressional reaction in the form of the Sarbanes-Oxley Act,¹³ and a Securities and Exchange Commission (SEC) response that imposes significant federal regulation on corporate lawyers.¹⁴

Unfortunately, we live in a sound-bite culture that too often likes to offer simple answers to complex questions. We want to find the villains, and we often are not very careful about the accuracy of our characterizations as to who the villains are. However, I submit that it is important that we think about how we should want corporate lawyers to behave in a world of tough choices—and a world of major adverse consequences if the rule makers make bad choices.

The title of this Article, “The Client(s) of a Corporate Lawyer,” is meant to be provocative, but as a statement of the law, it is wrong. As we have long

hi/business/2030213.stm.; *SEC Takes Tough Qwest Stance*, CNN MONEY, June 26, 2002, at <http://money.cnn.com/2002/06/26/news/companies/qwest/index.htm>; *Watchdog Probes Qwest Accounts*, BBC NEWS, Mar. 11, 2002, at <http://news.bbc.co.uk/1/hi/business/1867238.stm>; *Prosecutors Accuse Adelphia’s Rigases of Stealing*, USA TODAY, Mar. 1, 2004, available at http://www.usatoday.com/money/media/2004-03-01-adelphia-trial-mon_x.htm; Barbara Ross et al., *The Great Tyco Robbery*, N.Y. DAILY NEWS, Sept. 12, 2002, available at <http://www.nydailynews.com/news/story/18669p-17595c.html>.

⁹ *Enron Prosecutions*, MULTINATIONAL MONITOR, Nov. 2003, available at <http://multinationalmonitor.org/mm2003/03november/nov03names.html>. To access the indictment of Kenneth Lay, former Enron Chairman and Chief Executive Officer, see news.findlaw.com/hdocs/docs/enron/usvlay70704ind.pdf (last visited Nov. 17, 2004).

¹⁰ See, e.g., SUSAN E. SQUIRES ET AL., *INSIDE ARTHUR ANDERSEN: SHIFTING VALUES, UNEXPECTED CONSEQUENCES* (2003); BARBARA LEY TOFFLER & JENNIFER REINGOLD, *FINAL ACCOUNTING: AMBITION, GREED, AND THE FALL OF ARTHUR ANDERSEN* (2003).

¹¹ See, e.g., *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 235 F. Supp. 2d 549 (S.D. Tex. 2002).

¹² See Final Report of Neal Batson, Court Appointed Examiner, www.enron.com/corp/por/examinerfinal.html (last visited Nov. 7, 2004). Appendix C of this report discusses the possibility of suits against the Enron lawyers. *Id.* For the Enron Chapter 11 bankruptcy proceeding, see *In re Enron Corp.*, No. 01-16034 (AJG) (Bankr. S.D. N.Y.), available at <http://www.enron.com/corp/por/pdfs/examinerfinal/NBFinalAppendixC1.pdf> (last visited Nov. 7, 2004).

¹³ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

¹⁴ 17 C.F.R. § 205 (2004).

tried to make lawyers understand, ultimately, a corporate lawyer has only one client—the corporation.¹⁵

The intent of the title is to focus our attention on the many interests that make up a corporate client, but I find that even focusing on clients in a discussion about lawyer ethics is disconcerting to many. We lawyers have traditionally seen ourselves as members of a self-regulating profession whose standards of conduct are largely independent of the wishes or needs of clients. Many decry any loss of that independence.¹⁶ I am less sympathetic to that concern. As I try to understand what is happening in the legal profession today, I will offer six propositions with which I believe any future regulation must deal.

II. SIX REALITIES FACING CORPORATE LAWYERS TODAY

1. *Lawyers' problems and challenges are not understandable apart from understanding the world experienced by the lawyers' clients.*

Artists and musicians can write in relative obscurity for most of their lives, only to be declared geniuses much later. Bach, for example, was an obscure country organist for most of his career.¹⁷ Some of his greatest music was lost for over a century, only then to be treasured.¹⁸

Lawyers tend to act in a different time frame. Our old briefs are rarely rediscovered and savored by later generations. Most of lawyers' professional activity is tied to the concrete problems of today's clients. If we are irrelevant to those clients, we are ineffective. Once in a while, we might file a case that sets important precedent and improves the lives of non-clients as well.¹⁹ A few

¹⁵ MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2002); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96(1)(a) (2002).

¹⁶ See, e.g., SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 9-20 (1994); Madeleine C. Petrara, *Dangerous Identification: Confusing Lawyers with Their Clients*, 19 J. LEGAL PROF. 179, 180-81 (1995). Cf. David Barnhizer, *Profession Deleted: Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit*, 17 GEO. J. LEGAL ETHICS 203, 203-05 (2004) (arguing that today's lawyers' increased profit goals have caused a decline in ethical practice).

¹⁷ OTTO L. BETTMAN, *JOHAN N. SEBASTIAN BACH: AS HIS WORLD KNEW HIM* 6-7, 147-51 (1995).

¹⁸ *Id.* at 6-7. See also ALBERT SCHWEITZER, *J. S. BACH* 227-65 (Ernest Newman trans., 1911).

¹⁹ See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that the Texas statute, which made it a crime for two persons of the same gender to engage in certain intimate sexual activity, was unconstitutional); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (allowing the exercise of free speech rights on a privately owned shopping mall that was open to the public); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (striking down as unconstitutional a

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such cases even change the course of history.²⁰ With few exceptions, however, what we do is bound up in serving current clients’ needs today.

I do not make that point to excuse shoddy lawyers’ conduct or to say of misconduct: “The client made me do it.” Clearly, there are fundamental lines we may not cross. The duty of zealous representation ends, for example, where assisting a client’s crime or fraud begins.²¹ On the other hand, what I am saying is that one cannot understand the issues that corporate lawyers face without understanding the issues through the eyes of their business clients.

That latter understanding, in turn, requires us to ask very basic questions about what a business does and what it means to do business in the corporate form. We know that a lawyer represents the corporate “entity,” but the term “entity” requires us to think about what interests are affected by a corporate client, which of those interests “count” for the corporate lawyer, and from whom a corporate lawyer is to take direction.

What a business does is simple and, ultimately, almost magical. A business transforms resources of capital and labor into products and services worth more to consumers than the resources that comprise them.²² Thus, a furniture maker takes wood, fabric, machinery, and labor and sells tables and chairs that customers value more than the sum of their components. A restaurant transforms simple groceries and ambience into an experience that customers value more than the elements that, in principle, they could use to create or to purchase a meal for themselves.

If a business person does not add value to the component resources, he or she will soon be out of business.²³ Conversely, the value the business owner does add will be returned to that owner as profit.²⁴ The more value that is added, the more profitable the business will be.²⁵ The more profitable one’s

restrictive covenant against occupancy or ownership of property by an African-American); *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. Ct. App. 1916) (holding an automobile manufacturer liable for injury to a third person due to a defect in the car’s manufacturing).

²⁰ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the Texas statute prohibiting the abortion of pregnancy in any stage except to save the life of the mother was unconstitutional); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (declaring as unconstitutional the segregation of schools based upon race).

²¹ MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2003).

²² See EDWARD W. YOUNKINS, *CAPITALISM AND COMMERCE: CONCEPTUAL FOUNDATIONS OF FREE ENTERPRISE* 101 (2002) (“The core of business is wealth creation. Its essential nature involves the production of value for trade.”). See, e.g., JOHN BROOME, *THE MICROECONOMICS OF CAPITALISM* 6-10 (1983); WERNER SICHEL & PETER ECKSTEIN, *BASIC ECONOMIC CONCEPTS* 3-4 (1974).

²³ See YOUNKINS, *supra* note 22, at 100-02.

²⁴ See *id.* at 100.

²⁵ See *id.* at 101 (“A firm’s economic power is derived from its ability to produce material values and offer them for sale. . . . A company is powerless when it fails to provide

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business is, the more others will seek to open a similar business, which is yet more effective in adding value.²⁶ Or, others may start complementary businesses that improve the value added by the first. Either way, the process ultimately redounds to the benefit of both consumers and business owners.

In the midst of scandals such as Enron, Worldcom, and the like, this kind of back to basics thinking is important. Ordinarily, corporate lawyers should have no reason to feel ashamed of what they do. Helping business owners in creative and transformative activity is a noble calling that can provide significant social benefit. It is work of which a corporate lawyer can be proud.

As I have described business activity so far, nothing has turned on acting in a corporate form. As our furniture maker or restaurateur becomes larger, however, more people will become involved in the activity, and the relationships among those people will almost certainly have to become more structured. That leads to my second proposition.

2. *Many interests are enmeshed in the activities of any substantial corporate entity and are affected by its decisions and its success or failure.*

First, for example, use of the corporate form permits investors to provide capital and share the benefits and risks associated with company growth.²⁷ It also allows investors to limit their potential liability to the amount that they invest.²⁸ A corporation's investors include not only the original entrepreneur and current managers, but often hundreds or even tens of thousands of others.²⁹ We loosely call the investors the company's "owners," but realistically, most of them have neither the ability nor the interest to affect the company's activities.³⁰ Instead, they are residual beneficiaries of the company's success and among the first to experience its failure. To the SEC and many members

things that people want to purchase.”).

²⁶ *See id.*

²⁷ JAMES D. COX ET AL., CORPORATIONS 1-2 (1997).

²⁸ *Id.* at 3.

²⁹ *See id.* at 24.

³⁰ *Id.* at 38. This is, of course, a simplification and undervalues important changes in the amount of observed shareholder activism. Professional shareholder advocates, most often seeking “socially responsible” corporate behavior, have been growing in number and importance. *See, e.g.*, Social Investment Forum: The Advocacy and Public Policy Program, <http://www.shareholderaction.org> (last visited Oct. 28, 2004); Business for Social Responsibility, <http://www.bsr.org> (last visited Oct. 28, 2004). For quite a different approach to shareholder participation in corporate affairs, see George Ponds Kobler, Comment, *Shareholder Voting Over the Internet: A Proposal for Increasing Shareholder Participation in Corporate Governance*, 49 ALA. L. REV. 673, 673-74 (1998) (discussing shareholder participation in corporate governance and the possibility of the Internet increasing participation and control).

of Congress, they are said to be the persons who are principally affected by a company’s activities. I disagree with making the interest of investors the only relevant interest, but I do not doubt that it is appropriate to give prominence to that interest.

A second major corporate interest is that of the company’s employees. Indeed, if the company is not successful, the employees will lose their jobs. Some employees work for only a short time and may almost be seen as interchangeable units of production. But for many of a corporation’s most valuable employees, the work they do is not only a source of their own financial support, it is part of their personal sense of themselves. The loyalty and effort of such employees is transferred to the corporation and can often be the difference between company success and failure when times get tough. Such employees and their interests should be seen as an integral part of the corporate fabric, not simply as inputs used by the company to produce products and services.³¹

Third, a corporation has a specialized group of employees who make up corporate management. I place them third in this list, not to disparage their role in a company’s success or failure, but to avoid the current media focus on them as would-be rock stars who are somehow the most significant part of corporate life.³² The managers do tend to make key corporate choices about

³¹ Cf., BROOME, *supra* note 22, at 6-7 (describing labor as an input to the production process). This may be a good point at which to recognize that there is significant parallel literature to this Article, often focusing on “constituency statutes” that give corporate boards the authority to consider interests of employees and other groups beyond the corporate shareholders. See, e.g., Brett H. McDonnell, *Corporate Constituency Statutes and Employee Governance*, 30 WM. MITCHELL L. REV. 1227, 1228-30 (2004); Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14 (1992); Mark E. Van Der Weide, *Against Fiduciary Duties to Corporate Stakeholders*, 21 DEL. J. CORP. L. 27 (1996). I only acknowledge that literature here as I try to focus on lawyers, but there are many analogous issues. Indeed, these issues go back to at least the 1930s. See, e.g., A. A. Berle, Jr., *Corporate Powers as Power in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) (arguing that all powers granted to a corporation or management are exercisable only for the benefit of all shareholders and thus may be subject to limitation); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1163 (1932) (concluding that the assumption that managers must conduct a company with devotion only to stockholder profit may change as the idea of the corporation changes over time).

³² Skillful and media-friendly business leaders like Jack Welch and Donald Trump have inflated the image of corporate leadership in the eyes of the general public. See generally ROBERT HELLER, JACK WELCH (2001); JACK WELCH & JOHN A. BYRNE, JACK: STRAIGHT FROM THE GUT (2001); DONALD J. TRUMP, TRUMP: THE WAY TO THE TOP: THE BEST BUSINESS ADVICE I EVER RECEIVED (2004); DONALD J. TRUMP & MEREDITH MCIVER, TRUMP: HOW TO GET RICH (2004).

what projects to undertake and the mix of capital and labor to use in each.³³ In acting in conformity with that role, they also tend to be the ones who hire corporate lawyers. Lawyers thus may be tempted to exaggerate their importance, but ultimately, most corporate managers are nothing more than relatively highly-paid employees.

Beyond its investors, employees, and managers, a corporation has suppliers. As is true of employees and many managers, some supplier relationships are utterly impersonal. However, seeing them as always so misses an important reality.³⁴ A significant part of any company's success depends on secure relationships with providers of its principal components.³⁵ A company that ignores the importance of such relationships may find that what it takes for granted can be lost.³⁶

Similarly, the success and satisfaction of a corporation's customers are critical elements in the business' performance.³⁷ Dissatisfied customers are a lost opportunity, and if the former customers tell potential customers about their dissatisfaction, future sales to these potential customers will never be obtained.³⁸ Corporate lawyers too often miss the fact that the customers of a corporate client are not the enemy—even if the only customers a corporate lawyer tends to see are those blaming the lawyer's client for something or otherwise, arguably, trying to take advantage of the client.³⁹

Finally, a corporation exists in a city, state, and nation that can be affected by everything the company does. I grew up in Peoria, Illinois, for example, and I do not know whether Peoria would survive if Caterpillar, Inc., were to leave. Indeed, in many cases corporations have received support from states and local communities, whether in the form of tax breaks, zoning variances, or construction of roads and other infrastructure.⁴⁰ My point is simply that the

³³ See COX, *supra* note 27, at 38.

³⁴ Michael P. Avramovich, *The Protection of International Investment at the Start of the Twenty-First Century: Will Anachronistic Notions of Business Render Irrelevant the OECD's Multilateral Agreement on Investment?*, 31 J. MARSHALL L. REV. 1201, 1274 (1998) (describing "relational capital" as one of a company's most important assets, yet one that is not reflected in its balance sheet).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *See id.*

³⁹ Professor Ian R. Macneil, writing about "relational contracts,"—obligations that should be understood to arise out of a relationship although never put into a formal agreement—also emphasizes the importance of such relationships. See, e.g., Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 Nw. U. L. REV. 805, 812-13 (2000).

⁴⁰ See *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981). In *Poletown*, only recently overruled in *County of Wayne v. Hathcock*, 684 N.W.2d

relationships between a corporation and the community with which it is interdependent cannot reasonably be ignored in the assessment of a corporation's conduct.

It will be clear, I think, to anyone following my argument that it would be a logical leap to call the groups I have identified "clients" of the corporate lawyer, as the title of this Article might suggest. They are not "clients" in any usual sense of that term, and I will not try to persuade you that they are. My point can be summarized as follows: the fact that so many interests are affected by a business client is what makes it inevitable that a lawyer take refuge in the fiction that the client is an impersonal entity that captures and accommodates all these interests.⁴¹

I also hope that this outline of some of the affected interests clarifies the futility of trying to define an entity client narrowly by calling it the corporate management, the board of directors, or even the investors.⁴² The lawyer's client, properly understood, is a web of interests that ultimately must be acknowledged as such if a lawyer's representation is to serve the interest of the client we call the "entity."

Another implication of my argument is that what is sometimes called "corporate responsibility"—the historic obligation of a corporation to act as a responsible or even benevolent citizen—is, at bottom, not necessarily a duty to others at all.⁴³ It is partly a business' legitimately selfish concern that it help

765 (Mich. 2004), the Supreme Court of Michigan allowed a large tract of land to be conveyed to General Motors for the construction of an assembly plant over the objection of a neighborhood association and individual residents. *Poletown*, 304 N.W.2d at 457. This suggests another whole set of issues that I am largely glossing over, if not ignoring—*Poletown's* approach to public acts affecting private rights in an alleged effort to serve the public good. *See id.* at 457-60. *See also* Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75, 77 (2004) (discussing a case in which a polluter purchased a town to avoid paying damages for the pollution).

⁴¹ *See, e.g.*, Ralph Jonas, *Who Is the Client?: The Corporate Lawyer's Dilemma*, 39 HASTINGS L.J. 617, 619 (1988) (asserting that "[i]n the corporate arena, the lawyer lives in an 'Alice in Wonderland' world. . . . His client is itself an illusion—a fictional 'person' that exists or expires at the whim of its shareholders, whom the lawyer does not represent").

⁴² The SEC's focus on protecting "investors" is further complicated by the fact that the class of investors includes people who own the company's stock today but plan to sell it tomorrow—investors who have no long-term interest in their stock ownership, and people who plan never to own the stock, but who want to use its price as a basis for assessing the level of the price of other stocks in which they are interested.

⁴³ *See, e.g.*, Lyman Johnson, *Reclaiming an Ethic of Corporate Responsibility*, 70 GEO. WASH. L. REV. 957, 962-67 (2002) (discussing the reconciliation of corporate interests with the obligation of being a responsible citizen in society); James M. McCauley, *Corporate Responsibility and the Regulation of Corporate Lawyers*, 3 RICH. J. GLOBAL L. & BUS. 15

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preserve the kind of labor relations and vital communities that will underlie and ultimately support its corporate activities.

Some may find the foregoing description a hopelessly romantic account of the modern corporation. Acknowledging that brings me to my third proposition.

3. *Today's corporate clients operate in a world much different than that of even a quarter-century ago.*

In an earlier time—but one that many of us still remember—we could talk seriously about local markets, relationships with loyal suppliers and customers, and investors who would buy and hold stock for the long term. Now, each of those concepts has been significantly eroded.

Today, the movement of goods and capital is nationwide and often transnational: The “magic” that is involved in transforming diverse inputs into new products is being performed in Columbia as well as Columbus—Pakistan as well as Peoria. When the transformation can be achieved by literally thousands of firms in thousands of places, consumers benefit, but officers of our corporate clients sleep less soundly at night.⁴⁴

This movement of goods and capital has not only telescoped the space in which production is done, it has telescoped a business' sense of time as well. One of the distinguishing features of a corporation is perpetual life.⁴⁵ In the past, one of the bases for thinking that the interest of a corporate entity is not limited by the interests of any one of its parts was the thought or belief that the entity's interests would outlive them all.

Today, however, the world does not look nearly that clear to corporate managers. If a client gives a contract to a supplier based on loyalty, even though the supplier is not the low bidder, the client will hurt its bottom line for that quarter. Further, the supplier's manager may leave—or the supplier may be acquired—tomorrow, and no one will care about our client's loyalty. Likewise, customers today rarely even ask: “What have you done for me

(2003) (discussing whether a lawyer can ethically remain silent when a corporate client acts in a way that may cause substantial economic harm to a third party or corporate clients); Jeanne L. Schroeder, *Economic Rationality, Empathy, and Corporate Responsibility*, 70 GEO. WASH. L. REV. 875, 885 (2002) (arguing that the state should use regulation to control corporate egotism, and that managers should not allow emotions to control decision-making).

⁴⁴ See, e.g., THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* (1999) (positing that globalization is the true central organizing principle of the world after the Cold War and advocating balancing globalization with things of traditional importance to individuals and nations); Delissa A. Ridgway & Mariya A. Talib, *Globalization and Development—Free Trade, Foreign Aid, Investment and the Rule of Law*, 33 CAL. W. INT'L L.J. 325, 327-29 (2003) (discussing the rise of the multinational corporation).

⁴⁵ MODEL BUS. CORP. ACT § 3.02 (2002) (stating that “every corporation has perpetual duration”).

lately?” or “Will you be here for me tomorrow?” Their only concern tends to be: “What will you do for me this instant?”

It does not help to decry such an attitude. The business world does not quickly forgive sentimentality or naiveté. If a company’s generosity towards its employees, suppliers, community, or others causes it to fail, even those who had seemed to benefit will come out losers. Usually, of course, this is not an either-or matter. Rarely does a single act of relationship-building cause a client’s premature bankruptcy, but business clients and their realistic lawyers nevertheless must deal with the reality that common decency in corporate transactions might not procure the desired results.

The problem is made even worse for the lawyer and client due to their need to act on incomplete information. With the benefit of hindsight, we can often look at a client’s decisions or a lawyer’s work and ask how anyone could have failed to see the crisis that followed. In many cases, however, if we look at the world from the lawyer’s or client’s perspective, we all could have missed the signs. Information can often be interpreted several ways, and some world-altering events—such as the attacks of September 11, 2001—are largely unpredictable. Any lawyer must have the humility to realize that, most of the time, he or she does not have the clarity of vision to second-guess most client decisions.⁴⁶

At least two other realities of the current business environment also complicate the simple picture with which I have begun. First, today’s market preoccupation with short-term stock price profoundly affects decisions of corporate managers.⁴⁷ The reasons for preoccupation with a stock’s price often have little to do with the long-term welfare of the underlying business.⁴⁸ Even people of modest means have a stake in a rising price, for example, if the stock is part of their personal savings. At the managerial level, compensation in the form of stock options has only reinforced this development. It has made ensuring that the stock price is well above the option’s trigger price a central element in leveraging manager compensation.⁴⁹

⁴⁶ See, e.g., Mitu Gulati et al., *Fraud by Hindsight*, 98 NW. U. L. REV. 773, 774 (2004); Thomas D. Morgan, *Sarbanes-Oxley: A Complication, Not a Contribution, in the Effort to Improve Corporate Lawyers’ Professional Conduct*, 17 GEO. J. LEGAL ETHICS 1, 25 (2003) [hereinafter Morgan, *A Complication, Not a Contribution*].

⁴⁷ See Lawrence E. Mitchell, CORPORATE IRRESPONSIBILITY: AMERICA’S NEWEST EXPORT 3 (2001); Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968, 968, 972-73 (2002).

⁴⁸ See Langevoort, *supra* note 47, at 972-73.

⁴⁹ The reaction to this issue has been fascinating to watch. The Financial Accounting Standards Board initially pushed to require firms to account for stock options as expenses, an approach sought by many critics of Enron and other financial scandals. See, e.g., Jackie Spinner, *A Hard Line on Options as Expenses: FASB Chief Herz Says He’ll Fight for Change*, (continued)

Ideally, the stock market appropriately factors a company's long-term investment in its future success into the current stock price. Realistically, however, developing the body of information necessary to accomplish that goal would be almost impossibly costly. The figure for quarterly earnings has thus become a less-than-perfect surrogate measure of corporate success.

The quarterly earnings number is almost certainly incomplete and even misleading, but it does not take a manager long to realize that action producing long-term benefits can easily have a negative effect on short-term earnings. That, in turn, is likely to make the stock price lower in the short run, and if sales of the stock are triggered by the apparent message of the price decline, the decline will tend to be even greater. Moreover, the perception of corporate weakness thus created can attract takeover interest, and the result can be personally fatal to the careers of some corporate managers.

Second, when reported earnings become the measure of corporate success that they are today, the pressure to have those reports meet or exceed market expectations can be almost overwhelming. Phantom earnings are as valuable as the real thing so long as the market does not know the difference! Indeed, they are even better in the eyes of managers because the company does not have to do the hard work necessary to earn real dollars. Furthermore, the perception of corporate strength, however misleading, can turn a firm into a takeover suitor rather than a takeover victim.

I hope it is clear that I am not making this point to countenance fraud or to condemn all corporate managements. What I am saying, however, is that the deception that has surfaced in recent corporate scandals is probably not simply the aberrant behavior of a few "bad apples."⁵⁰ When millions of dollars in market valuation turn on differences of just a few cents per share in reported earnings, the pressure to make the numbers come out "right" is enormous. Thus, it too is a part of the reality in which corporate clients—and their lawyers—inevitably work. That brings me to my fourth proposition.

WASH. POST, Mar. 5, 2003, at E1; Jackie Spinner, *New Option Rule Has Key Backers as Panel Meets*, WASH. POST, Mar. 12, 2003, at E1. By 2004, however, Congress was on its way to forbidding the SEC and other regulators to take such an approach in many cases. The House passed House Resolution 3574 to this effect in 2004, but that bill died in committee. Stock Option Accounting Reform Act, H.R. 3574, 108th Cong. (2004), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR03574:@@L&summ-2=m&>.

⁵⁰ The quoted phrase is said to have come from a speech by President Bush on July 9, 2002, but the published text of the speech does not contain it. See President Announces Tough New Enforcement Initiatives for Reform, <http://www.whitehouse.gov/news/releases/2002/07/20020709-4.html>; Dick Mayer, *A Few Bad Apples or a Rotten Tree?*, CBSNEWS.COM, June 26, 2002 (saying that financial writer Joseph Nocera used the term "bad apples" and claimed that the recent corporate scandals were actually a "systemic breakdown"), available at <http://www.cbsnews.com/stories/2002/06/26/opinion/meyer-/main513512.shtml>.

4. *Lawyers too often hide behind the idea that they need only consult the person who has authority to speak for the corporate client.*

I expect that the points I have been making are realities, but not practical concerns, for many corporate clients. As many lawyers think about representing corporations, the problematic questions often involve not the substance of corporate decisions, but, rather, who can make those decisions. For example, if the company president can speak for the entity in directing a lawyer to act in a given way, it is difficult for some lawyers to see that there is any more the lawyer needs to know. Indeed, the American Law Institute Restatement of the Law Governing Lawyers says in section 96:

(1) When a lawyer is employed by or retained to represent an organization:

(a) the lawyer represents the interest of the organization as defined by its responsible agents acting pursuant to the organization’s decision-making procedures; and

(b) [unless told to violate the law], the lawyer must follow instructions in the representation . . . given by persons authorized so to act on behalf of the organization.⁵¹

That articulation of a lawyer’s role is clean and simple. It says that, as is true with respect to representation of an individual, the lawyer exists to implement that which the client wants to do and could do itself if the client had the lawyer’s training and experience. The lawyer’s duty is not to think; it is to accept the directions given by those people who are authorized to direct.

I subscribed to that Restatement proposition when I helped draft it,⁵² and I believe that it is still probably a realistic account of the world that many lawyers experience. However, the passage largely ignores the fact that corporate officials—even the company’s president and board of directors—act within a web of obligations to the entity.⁵³ It also largely ignores a lawyer’s ability to counsel conduct other than that which the lawyer was directed to follow and the lawyer’s ability to use the client’s own procedures to air a decision more broadly.⁵⁴

Lawyers are understandably more comfortable taking orders than taking responsibility. At least in the short run, the lawyer is not likely to be fired for

⁵¹ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96(1) (2000).

⁵² From 1986 through 2000, the author served as an Associate Reporter in writing the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS.

⁵³ On possible conflict of interest issues inherent in the various obligations possessed by corporate actors with whom the lawyer may deal, see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 131 (2003).

⁵⁴ MODEL RULES OF PROF’L CONDUCT R. 2.1 (2003). *See infra* text accompanying notes 63-64 (offering further development on this point).

declining to make waves. However, some issues might be better considered by the board of directors than lower-level managers, not because the board is infallible, but because it might take a longer-term view of the corporation's interest. Furthermore, the mere threat of board involvement may be enough to cause management to take a second look at a proposed course of action.

There is not time here to try to spell out the variety of circumstances in which that might be true or the steps that creative lawyers might take. However, I think the situations are many. The recent proposal of the American Bar Association Task Force on Corporate Responsibility, that a corporate general counsel meet regularly with the independent directors,⁵⁵ seems to me to be an important move in the right direction. This leads me to my fifth proposition.

5. *The ideas I have asserted up to this point have been implicit in the ABA Model Rules since 1983, and in some cases, in the Model Code even before 1983.*

One of the greatest frustrations to those of us who are trying to think about the role of modern corporate lawyers is the idea that, until Enron and the Sarbanes-Oxley Act, no one had been thinking about these issues. The fact is that the problems are not new,⁵⁶ and the proper course of action can be stated in both negative and positive terms.

We start with the rules stated as limitations on the lawyer's conduct because those are the ones that the lawyer can most readily be charged with violating. ABA Model Rule 1.2(d) says, for example: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent"⁵⁷ That Rule and its predecessor have long made the outer limit of lawyer conduct unmistakable. The stop sign is clear, and the federal Sarbanes-Oxley Act imposes no higher substantive limitation.⁵⁸

Model Rule 1.16(a)(1), in turn, requires a corporate lawyer to withdraw from any matter in which the "representation will result in [the lawyer's] violation of the rules of professional conduct or other law."⁵⁹ The lawyer is not required to withdraw if the lawyer's own work would not aid criminal or fraudulent conduct—for example, when the fraud involves the work of some

⁵⁵ See REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON CORPORATE RESPONSIBILITY 32 (2003), available at http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf.

⁵⁶ See, e.g., Jonas, *supra* note 41, at 617 (discussing the problems confronting a lawyer representing a publicly held corporation); Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 511-12 (1994) (arguing that the moral independence theory is problematic in the context of corporate representation).

⁵⁷ MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2003).

⁵⁸ See 15 U.S.C.A. § 7245 (West Supp. 2004).

⁵⁹ MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1) (2003).

other lawyer or law firm.⁶⁰ Conversely, if the lawyer’s own services have been used, even inadvertently, to aid criminal or fraudulent conduct, withdrawal is mandatory and has long been so.⁶¹

On the other hand, these limitations, or negative conditions, on lawyer conduct are, in my view, less important than the Model Rules that tend to reinforce the affirmative ideas about the role of corporate counsel that I outlined earlier. For example, Model Rule 1.4(b) imposes a duty on the lawyer to take information concerning the matter on which the lawyer is working to duly authorized constituents of the client “to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”⁶² That is not a precise standard, but it also is not, as lawyers sometimes think, simply a requirement that lawyers return client phone calls. Model Rule 1.4(b) calls for a dialogue between lawyer and client rather than an assumption that the client just wants the lawyer to improve the client’s short term bottom line, no matter who gets hurt in the process.

Lest there be any doubt that such a candid and independent discussion is appropriate, Model Rule 2.1 provides: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. 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.”⁶³ Some lawyers tend to interpret this language as merely permissive and, thus, without teeth. However, a look at comment 2 to Model Rule 2.1 states otherwise:

Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. . . . 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.⁶⁴

In short, a lawyer who knows of planned client behavior and who fails to give advice about its significant non-legal consequences may fall short of what the law demands the lawyer to do. I know many lawyers will find that disturbing. Merely providing legal information is much easier than providing candid professional judgment, but the law demands the latter.⁶⁵

⁶⁰ See *id.* & cmt. 2.

⁶¹ *Id.*

⁶² *Id.* R. 1.4(b).

⁶³ *Id.* R. 2.1.

⁶⁴ *Id.* R. 2.1 cmt. 2.

⁶⁵ See *id.*

In addition, and most directly, Model Rule 1.13(b) makes clear that a lawyer sometimes has a duty to take affirmative steps to try to protect the corporate client from a serious risk of harm.⁶⁶ Rule 1.13(b) provides:

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.⁶⁷

This language leaves no question that a lawyer is required to take action—it says the lawyer “shall proceed”—if the lawyer knows of serious crime or fraud committed by—or against—the corporate client.⁶⁸ The action to be taken is whatever is necessary given the nature and seriousness of the offense,⁶⁹ but the action may include referring the matter to the client’s board of directors for action.⁷⁰ Indeed, the duty to act must include going to the board if the conduct is serious enough or if lower-level corporate management refuses to deal with the problem that the lawyer has identified.⁷¹

To be sure, Model Rule 1.13(b) does not make the lawyer a “Lone Ranger” with authority to accuse corporate management of misconduct every time the lawyer disagrees with a decision, but neither does it allow the lawyer to take a “hear no evil, see no evil” attitude. Comment 3 to Model Rule 1.13 makes this point clear:

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk,

⁶⁶ See *id.* R. 1.13(b).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See *id.* cmt. 4.

⁷⁰ See *id.* cmt. 5.

⁷¹ See generally *FDIC v. O’Melveny & Meyers*, 969 F.2d 744 (9th Cir. 1992); *FDIC v. Mmahat*, 907 F.2d 546 (5th Cir. 1990).

are not as such in the lawyer’s province. [But] . . . when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. . . . [K]nowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.⁷²

ABA Model Rule 1.6(a), of course, has long seemed to impose a limit on lawyers’ efforts in their clients’ interest because of its requirement that “[a] lawyer shall not reveal information relating to the representation of a client” to persons other than the client.⁷³ Thus, a lawyer can raise issues within the corporation in an effort to help the client avoid criminal or fraudulent behavior, but if the client’s management ignores the information, Model Rule 1.6(b) seems to expressly prohibit the lawyer from revealing the information to anyone outside the client corporation, even in an effort to keep the client out of trouble and preserve its long-term reputation for acting with integrity.⁷⁴

Model Rule 1.6(b), of course, has, and has had, an exception to the confidentiality requirement permitting disclosure to prevent “death or substantial bodily harm” that the client or someone else was “reasonably certain” to cause.⁷⁵ However, there is, and was, no corresponding provision permitting disclosure of criminal financial fraud or other kinds of shady corporate conduct.

On the other hand, state laws governing the conduct of corporate attorneys have tended not to follow the ABA approach on this issue.⁷⁶ The ABA Model Code of Professional Responsibility, which preceded the Model Rules, and which Ohio and all states except California had incorporated into state law,⁷⁷ permitted disclosure of otherwise confidential information about “[t]he intention of [the lawyer’s] client to commit a crime and the information necessary to prevent the crime.”⁷⁸ When the time came to consider Model Rule 1.6, over forty states retained the Model Code exception, or something

⁷² MODEL RULES OF PROF’L CONDUCT R. 1.13 cmt. 3 (2003).

⁷³ *Id.* R. 1.6(a).

⁷⁴ *Id.* R. 1.6(b).

⁷⁵ *Id.* R. 1.6(b)(1).

⁷⁶ *See generally* ATTORNEYS’ LIABILITY ASSURANCE SOCIETY, INC., ETHICS RULES ON CLIENT CONFIDENCES (2002), *reprinted in* THOMAS D. MORGAN & RONALD D. ROTUNDA, 2003 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 161 app. A, at 163-72 (2003) [hereinafter ETHICS RULES ON CLIENT CONFIDENCES].

⁷⁷ *See id.* at 168-72.

⁷⁸ MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(C)(3) (1981).

close to it, instead of adopting the narrower version in the Model Rules.⁷⁹

Thus, while one would not know it from reading only the ABA Model Rules, in the vast majority of American jurisdictions, attorneys have long been authorized to disclose the information necessary to prevent their corporate client from committing at least a criminal financial fraud. Indeed, in summarizing the current state of United States law on the issue, section 67 of the Restatement of the Law Governing Lawyers says:

- (1) A lawyer may use or disclose confidential client information when the lawyer reasonably believes that its use or disclosure is necessary to prevent a crime or fraud, and:
 - (a) the crime or fraud threatens substantial financial loss;
 - (b) the loss has not yet occurred;
 - (c) the lawyer's client intends to commit the crime or fraud either personally or through a third person; and
 - (d) the client has employed or is employing the lawyer's services in the matter in which the crime or fraud is committed.
- (2) If a crime or fraud described in Subsection (1) has already occurred, a lawyer may use or disclose confidential client information when the lawyer reasonably believes its use or disclosure is necessary to prevent, rectify, or mitigate the loss.⁸⁰

The ABA on Evaluation of the Rules of Professional Conduct Commission proposed amending Model Rule 1.6(b) to say much the same thing,⁸¹ and in August, 2003—after Enron and the consequent reconsideration of its failure to do so earlier—the ABA caught up with the states and adopted largely the same rule as that described in section 67.⁸²

⁷⁹ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 67 cmt. b; ETHICS RULES ON CLIENT CONFIDENCES, *supra* note 76, at 161-72. The Attorneys' Liability Assurance Society, Inc. has kept abreast of these state rules for many years and reports them in a table reprinted in annual editions of THOMAS D. MORGAN & RONALD D. ROTUNDA, *SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY* app. A (2003).

⁸⁰ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 67(1) (2000).

⁸¹ See REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON CORPORATE RESPONSIBILITY (2003), available at http://www.abanet.org/buslaw/corporateresponsibility-final_report.pdf.

⁸² The current 2004 version of Rule 1.6(b) reads as follows:

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

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is

(continued)

In addition, the 2003 amendments to the Model Rules also altered Model Rule 1.13(c) to make unmistakable the lawyer’s right to report serious client misconduct to persons other than corporate management.⁸³ Rule 1.13(c) now states that unless the lawyer is expressly retained to defend against the charge of misconduct, if:

(c) . . .

(1) despite the lawyer’s efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure . . . if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.⁸⁴

Thus, the set of rules giving lawyers the authority to make the public impact of a client’s conduct part of the lawyer’s portfolio is clear. Less well-known, Model Rule 4.1(b) sometimes makes it the lawyer’s *duty* to do so.⁸⁵ Rule 4.1(b) forbids an attorney to knowingly “fail to disclose a material fact

reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;

(4) to secure legal advice about the lawyer’s compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or

(6) to comply with other law or a court order.

MODEL RULES OF PROF’L CONDUCT R. 1.16(b) (2003).

⁸³ See *id.* R. 1.13(c).

⁸⁴ *Id.*

⁸⁵ *Id.* R. 4.1.

when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”⁸⁶

Looking only at the four corners of the Model Rules themselves, the reference to Rule 1.6 seemed to swallow the rest of Model Rule 4.1(b), so this long-standing provision has been underappreciated. However, through the examination of state law versions of Rule 1.6, it appears that the limitation on the reach of Rule 4.1(b) should not have been decisive in a majority of United States jurisdictions.

Now, because of the ABA’s new Rule 1.6(b)(2) and Rule 1.6(b)(3), the limitation is clearly not significant.⁸⁷ Corporate attorneys will now be *required* by Model Rule 4.1(b) to disclose to affected persons or agencies any “material fact . . . necessary to avoid assisting a criminal or fraudulent act by a client.”⁸⁸ It would be hard to make the point much more clearly. That brings me to my sixth and final proposition.

6. *The recent federal Sarbanes-Oxley legislation and its accompanying regulations have complicated lawyers’ duties but added little additional public protection.*

When the Enron and other corporate scandals became known, Congress was appropriately incensed. It responded the only way it knew how—it wrote a law locking the proverbial barn door after the horse had gone. That law—the Sarbanes-Oxley Act—required the SEC, no later than 180 days after passage of the Act, to:

[i]ssue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

(2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of

⁸⁶ *Id.* R. 4.1(b).

⁸⁷ *See id.* R. 1.6.

⁸⁸ *Id.* R. 4.1(b).

directors not employed directly or indirectly by the issuer, or to the board of directors.⁸⁹

I will not stop here to go through each of the elements of this statute and the SEC regulations that implement it.⁹⁰ Suffice it to say that the principal effect of the federal standards is to require internal reporting of more low-probability risks of harm and then require handling of those reports according to a rigid protocol that seems likely to establish traps for the unwary.

At their best, the Sarbanes-Oxley regulations reinforce what lawyers should have known already, and for many years, to be the applicable standards. In addition, the regulations require lawyers to engage in self-protective reporting of conduct that the lawyers do not believe to be wrongful—indeed, that they believe is not wrongful—but about which they fear others could disagree. Further, as contained in the so-called “noisy withdrawal” proposal now pending before the SEC,⁹¹ lawyers could be required to resign and send a signal to the stock markets that something is wrong with the client without telling the markets *what* is wrong.⁹²

I have previously criticized the “noisy withdrawal” proposal, calling it a game of “charades” that is at least as likely to confuse investors as to clarify a company’s condition.⁹³ I mention it simply to illustrate that, although the

⁸⁹ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 307, 116 Stat. 745, 84 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

⁹⁰ I have done that in Thomas D. Morgan, *Sarbanes-Oxley: A Complication, Not a Contribution, in the Effort to Improve Corporate Lawyers’ Professional Conduct*, 17 GEO. J. LEGAL ETHICS 1 (2003). I have also discussed elements of the Act and regulations in my comments to the SEC on the proposed regulations. Thomas D. Morgan, Comments on Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys, File No. 33-8150.wp (Dec. 17, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/tmorgan1.htm> [hereinafter Morgan, Comments (Dec. 17, 2002)]; Thomas D. Morgan, Comments on Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys, File No. S7-45-02 (Apr. 7, 2003), *available at* <http://www.sec.gov/rules/proposed/s74502/tmorgan040703.htm> [hereinafter Morgan, Comments (Apr. 7, 2003)].

⁹¹ Securities and Exchange Commission, Final Rule: Implementation of Standards of Professional Conduct for Attorneys, 17 C.F.R. pt. 205 (2003), *available at* <http://www.sec.gov/rules/final/33-8185.htm> [hereinafter Implementation of Standards of Professional Conduct for Attorneys]. One of the principal advocates for a reporting out requirement has reportedly been Commissioner Harvey J. Goldschmid, on leave from Columbia Law School, where he is Dwight Professor of law. *See, e.g.*, Harvey J. Goldschmid, Speech by SEC Commissioner: A Lawyer’s Role in Corporate Governance: The Myth of Absolute Confidentiality and the Complexity of the Counseling Task (Nov. 17, 2003), *at* <http://www.sec.gov/news/speech/spch111703hjg.htm>.

⁹² Implementation of Standards of Professional Conduct for Attorneys, *supra* note 91.

⁹³ I so characterized it in testimony before the United States House of Representatives, (continued)

Sarbanes-Oxley process is well-meaning, it is largely a distraction from the lawyer obligations to which lawyers should primarily be attuned.⁹⁴

III. SOME CONCRETE EXAMPLES

It may help better understand my six propositions to use some difficult issues faced by United States corporations as examples. We will consider three examples in which corporate managers pursue the otherwise desirable goal of seeking to use resources more efficiently. First, we will look at efforts to make more productive use of human capital, better known as employees, by shipping jobs overseas. Second, we will consider efforts designed to yield greater longevity out of physical capital, better known as plant and equipment, by minimizing compliance with environmental regulations. Third, we will consider attempts to maximize the earnings impact of financial capital by using either new kinds of financial instruments or old kinds of instruments in new ways. It should be obvious that—in economic terms—efforts to use capital more efficiently are presumptively good, but in the examples I have mentioned, short-term efficiency may not be the only relevant issue.

1. *Making more efficient use of human capital.*

One of America's greatest strengths has been its middle class. Employees of American lawyers' corporate clients who hold jobs with substantial pay and benefits comprise the backbone of the American middle class. As we all now know, whether from the news or from personal experience, many such American jobs are at risk or have already disappeared.⁹⁵

At the same time, one of the great advantages of an integrated global marketplace is the ability of Americans to buy goods that have been produced all over the world. Americans buy goods that they believe provide the most value for their price. Our desire to capitalize on that kind of value puts inexorable pressure on producers to cut labor costs. The result has been the employment of lower-cost workers by many corporate clients—most visibly, workers in Mexico, China, and India.⁹⁶

Committee on Financial Services Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises, *Hearing on the Role of Attorneys in Corporate Governance*, Feb. 4, 2004.

⁹⁴ The addition of the SEC as an enforcement authority may, of course, give the standards new significance to lawyers who had previously made a safe bet that their state disciplinary agency would focus its enforcement efforts on lawyers whose offenses would require fewer prosecutorial resources. However, whether the SEC will become proactive in its own enforcement activity remains to be seen.

⁹⁵ Diane E. Lewis, *Report Says Sending of US Jobs Overseas is Accelerating: Forrester Predicts 588,000 This Year*, BOSTON GLOBE, May 18, 2004, at G3.

⁹⁶ *Id.*; Morton M. Kondracke, *Demagoguery Aside, Outsourcing of Jobs Is a Real Threat to U.S.*, ROLL CALL, May 17, 2004, available at <http://www.rollcall.com/issues/cgi->
(continued)

The decision to ship jobs abroad is not inherently sinister; our clients make the decision because they can get an equally good result at far less cost, even allowing for the cost of shipping the materials and finished products. The lower cost, in turn, allows the client to maintain itself in a marketplace in which producers from all over the world are operating in the same manner.

Does a lawyer have any role to play in such decisions? If I was correct at the outset that the employees of a corporate client are among its most important constituent groups—and that, speaking figuratively, they are one of the “clients” of the corporate lawyer—it is hard not to say that the lawyer should be involved in the client’s decision, in at least a counseling role. Remember that under Model Rule 2.1, advice about what is narrowly legal simply may not be enough as to decisions that have a broader impact on the corporate client.⁹⁷

However, assume that lower labor costs will benefit customers, another one of the important constituent “client” of the corporation. Also assume that outsourcing production will benefit shareholders, yet another of the important “client” interests. What advice should the lawyer give? Is retaining the work of loyal employees more important than rewarding those who supply financial capital when the company needs a good supply of both for its long-term success? Would it be relevant if the employees had taken a pay cut recently to help the company survive when sales were down? Suppose the city where the company operates has given the company tax breaks for the last decade in order to keep those jobs in town?

Unfortunately, these questions do not have easy answers, but at least some corporate managers seem to act as if employees and the larger community do not really “count” in the calculation of relevant interests. Undoubtedly, business clients—like most profit-maximizing actors—are more than willing to accept a free ride on the decency of others. Though not an endearing quality of our clients, it is neither illegal nor unusual. Furthermore, in a competitive marketplace, every dollar paid in wages is one less dollar possibly needed for survival. It is not difficult to see how a client can believe that the entity’s interest, seen fully from almost any perspective, is served by significant savings of labor costs.

Lawyers rationalize that we do not have a conflict of interest when we seek to help the corporation reduce those costs. In the words of comment b to section 131 of the Restatement:

An organization . . . is an aggregation of multiple interests, if

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⁹⁷ See MODEL RULES OF PROF’L CONDUCT R. 2.1 (2003) (stating: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. 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.”).

only because it is made up of multiple persons or entities. Persons initially forming an organization are linked by a common interest that partly transcends their individual interests. . . . An organization's lawyer thus is said to represent the entity and not the elements that make it up. A lawyer for an organization serves whatever lawful interest the organization defines as its interest, acting through its responsible agents and in accordance with its decisionmaking procedures.⁹⁸

The Restatement language is impersonal, but as a statement of the technical conflict of interest issue, it is hard to deny. I have started with this example because, in the aggregate, how to deal with the problem of the loss of manufacturing and service jobs presents a serious question of national policy. It simply is not a question that many decision-makers in corporate clients see as their personal responsibility.

My bottom line conclusion in this first example is that a lawyer has authority—and in some cases even an obligation—to counsel the corporate client that pursuit of short-term profit may forfeit long-run good will and wind up costing the client more than it gains. It even might be appropriate to recommend that any significant outsourcing moves be considered and approved by the board of directors because of the long-term consequences they may entail.

Beyond such advice, however, it would be hard to justify doing more. One cannot call the decision to purchase products from abroad rather than manufacture them in this country an act that is either criminal or fraudulent. The decision is ultimately a moral and business judgment; the lawyer's perspective is not inherently better than that of corporate managers. This first example, in short, serves to illustrate a decision that is not the lawyer's to make and for which the lawyer should not be held morally responsible.

2. *Making more efficient use of physical capital.*

Assume that the client wants to make its existing physical assets more productive, or perhaps simply to avoid spending money for new assets. One way to do both, we will assume, would be to evade environmental regulations applicable to the company.

My point in stating the example in this way is to present a situation involving a serious risk that the conduct is illegal. At the same time, of course, environmental issues are far from open-and-shut. The nature of the regulatory requirements and appropriate ways of measuring compliance may be matters for dispute, and extensions of time in which to comply might also be available.

What is the proper role of the corporate lawyer when the client is delaying

⁹⁸ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 131 cmt. b (2000).

the obligation to comply or even when the corporate lawyer is aiding in non-compliance with environmental requirements that limit the efficient use of physical capital? Interestingly enough, it initially appears that this is a situation where the interests of most of the affected "client" groups align. Employees, managers, investors, and customers all seem to benefit in the short-run if resources do not need to be devoted to improving the physical assets.

Of course, if environmental regulations are properly drawn, they will only require that a business avoid the environmental damage that an economist would want the company to internalize as a real cost of doing business.⁹⁹ But even seen in this way, avoiding environmental burdens is much like avoiding taxes: It is a way to externalize some of the costs of doing business and shift them to the public generally. Each of us would selfishly like to do that, but the law exists to set some limits on our doing so. Asking abstractly what would serve the interest of the corporation's "client" groups turns out to be irrelevant to the question of what role the corporate lawyer should play in such decisions.

This example also allows us to focus on an inherent ambiguity in Model Rule 1.13(b): What does it mean to say that the lawyer must act when something is "likely to result in substantial injury" to the client?¹⁰⁰ One can always say, generally, that a conviction of a serious criminal offense will produce "substantial injury."¹⁰¹ But suppose the conviction can be delayed for several years or the penalty can be reduced? Indeed, what if the violations might go undetected and be known only to the client and the lawyer? One

⁹⁹ See SICHEL & ECKSTEIN, *supra* note 22, at 205-07 ("One important role of government is to force producers and consumers to internalize—meaning to bear themselves—the costs of any externalities they generate.").

¹⁰⁰ The complete text of Model Rule 1.13(b) reads as follows:

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2003).

¹⁰¹ See GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING* 409-10 (1998).

could say that a lawyer must always assume the worst and act accordingly, but one can also doubt whether a lawyer's obligation is that stark.

Indeed, this issue also underlies an important exception to the lawyer's Rule 1.13(c) authority to report instances of serious wrongdoing to persons outside the corporation. ABA Model Rule 1.13(d) provides:

Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.¹⁰²

One can make a strong argument based upon this language—and its counterpart in the Sarbanes-Oxley regulations—that as long as the lawyer can mount a non-frivolous defense to a criminal charge of a regulatory violation, the lawyer's role must be to hunker down with the client and resist the charge. At least the lawyer must do so insofar as the time gained thereby seems to further the client's economic well being in the short run.

That argument is admittedly plausible, just as it would be if the client were trying to minimize its tax bill. However, it seems to largely ignore the consequences in the event that the lawyer and client prove to be wrong in their calculation about the client's likely exposure. Prosecutors and jurors are likely to have little sympathy for the assertion that it seemed cheaper to risk regulatory non-compliance than to conform to the law's requirements.¹⁰³ A lawyer and her client ignore this downside risk at their peril. Counseling against a known regulatory violation—and then withdrawal if the client refuses to comply—seems to me to be the lawyer's only proper course.

But even that obligation should be seen as having an important qualifier built into it. Increasingly often, many corporate lawyers do not in fact “know” that misconduct is associated with the apparently lawful work that those lawyers do. Illegal conduct does not always come with a clear label, and more and more, lawyers work on pieces of a task with little sense of the big picture.¹⁰⁴ Even conscientious lawyers who want to prevent corporate illegality will often find such conduct hard to identify and interdict.

The other side of that point is, in some ways, even more troubling. A

¹⁰² MODEL RULES OF PROF'L CONDUCT R. 1.13(d) (2003). *See also* 17 C.F.R. § 205.3(b)(6) (2004).

¹⁰³ *See, e.g., In re Am. Cont. Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424, 1449-52 (D. Ariz. 1992); Stephen Labaton, *Law Firm for Lincoln to Pay to Settle Suits*, N.Y. TIMES, June 16, 1990, at 31; Stephen Labaton, *U.S. Moves to Freeze Assets of Law Firm for S.&L. Role*, N.Y. TIMES, Mar. 3, 1992, at A1.

¹⁰⁴ *See* Morgan, *A Complication, Not a Contribution*, *supra* note 46, at 24-25; Morgan, Comments (Dec. 17, 2002), *supra* note 90; Morgan, Comments (Apr. 7, 2003), *supra* note 90.

lawyer can sometimes mistakenly believe things to be illegal when they are not. The damage to reputations of persons falsely accused or the damage from delay of important client initiatives while an investigation proceeds are just a few examples of the possible significant consequences of excessive interjection of attorney caution into corporate decision making.¹⁰⁵ That is not a call for lawyer indifference. Rather, it is a suggestion that we all need to have the humility to recognize that there can be a downside to lawyer intervention—all the while not ignoring the sometimes enormous downside to inaction.

Finally, the time and involvement of lawyers in reviewing and challenging the legality of corporate action is not inexpensive. The catastrophic losses suffered by investors and employees as a result of a particular corporate bankruptcy make it easy to believe that almost any cost, no matter how great, should have been incurred to prevent the harm that results. One does not have to ignore real losses, however, to recognize that requiring lawyers to go out looking for trouble will potentially impose great costs on companies whose employees are not engaged in illegality at all.¹⁰⁶

There is a risk, in short, that imposing reporting obligations on lawyers will have the effect of becoming a “lawyer relief act.” Giving lawyers a license—albeit stated as an ethical obligation—to act as expensive internal corporate investigators may impose more costs on the nation’s law-abiding clients than it will save for other clients who would otherwise act illegally.

3. *Making more efficient use of financial capital.*

Finally, we come to Enron. Its rise and fall is a long story, not completely told even in the Powers Report,¹⁰⁷ the several books about the disaster,¹⁰⁸ and an examiner’s report for which the bankruptcy estate is said to have been billed \$100 million.¹⁰⁹ I certainly would not have time to tell the whole story here even if I knew it all, but I think for our purposes the story can best be seen as one of history’s most ambitious efforts to make efficient use of financial capital.¹¹⁰ It represents, not an aberrational event, but the world that corporate lawyers are increasingly likely to face.

Once a company has received all of its tax benefits and achieved all of the efficiencies it can in labor and physical capital, making more efficient use of financial capital is about all that is left. My sense is that, to many lawyers, the

¹⁰⁵ See Morgan, *A Complication, Not a Contribution*, *supra* note 46, at 2.

¹⁰⁶ See *id.*

¹⁰⁷ POWERS, *supra* note 5.

¹⁰⁸ See, e.g., BRYCE, *supra* note 5; FOX, *supra* note 5; MCLEAN & ELKIND, *supra* note 5; SWARTZ & WATKINS, *supra* note 5.

¹⁰⁹ Anthony Lin, *Enron Examiner Billed Estate for \$100 Million*, LAW.COM, at <http://www.law.com/jsp/article.jsp?id=1069801691295> (Dec. 5, 2003).

¹¹⁰ See Frank Partnoy, *A Revisionist View of Enron and the Sudden Death of “May,”* 48 VILL. L. REV. 1245, 1250 (2003).

world of financial capital is a house of mirrors in which following what is going on will prove very hard indeed.

When I was in my twenties, I remember that an otherwise very intelligent older lawyer who had lived through the Great Depression assured me that banks now keep all deposits in their local vault ready to pay depositors in currency on demand. I am sorry, but he was wrong. They do not. What we think of as money is largely a series of promises—some from the government and some from private intermediaries. We run a multi-trillion dollar economy on such promises because we assume people are following the rules that underlie the financial system. It is not that the rules always make sense—they do not—but as long as we *act as though* the rules make sense, somehow the system keeps running.¹¹¹

Enron took the financial system where few had gone before. After the Enron collapse, it is hard to see the company as anything other than a gigantic fraud, but it is important to consider how the company got to be the darling of Wall Street that it was until October 16, 2001.¹¹²

Enron began life as a mundane gas pipeline company.¹¹³ Seeing a business opportunity in the deregulation of energy in the early 1990s,¹¹⁴ Enron began to create markets in products whose prices had theretofore been set by regulation.¹¹⁵ To take a very simple illustration: Enron would enter into contracts with gas producers to buy large quantities of gas in the future.¹¹⁶ Then, if a consumer wanted 100,000 cubic feet of natural gas two years from now, Enron would promise to provide it at a price greater than the price that Enron had contracted to pay.¹¹⁷ In its early business model, Enron would buy and sell on its own account and profit on both sides of the transaction.¹¹⁸

Later, Enron tried to avoid assuming the risk and capital cost involved in acquiring rights to the actual gas. It tried to become a “virtual company” by setting up an on-line trading system designed to reduce the costs at which companies could make deals with each other.¹¹⁹ Enron projected huge profits from making this service available.¹²⁰

Later, the deals became more complex and involved products that Enron

¹¹¹ See, e.g., CHARLES F. DUNBAR, *THE THEORY AND HISTORY OF BANKING* 23 (1922).

¹¹² See Witt & Behr, *Losses, Conflicts Threaten Survival*, *supra* note 2.

¹¹³ FOX, *supra* note 5, at 1.

¹¹⁴ *Id.* at 11-14.

¹¹⁵ See *id.* at 1, 11, 19.

¹¹⁶ *Id.* at 23.

¹¹⁷ *Id.*

¹¹⁸ See generally Partnoy, *supra* note 110.

¹¹⁹ William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1288 (2002).

¹²⁰ See *id.*

did not know better than many others.¹²¹ At one point, for example, Enron sold contracts guaranteeing the weather, or rather agreeing to pay the contract holder if less or more than normal rainfall damaged the holder's business.¹²² This kind of "insurance"—what Enron called selling "hedges"—was not uniquely available from Enron, but Enron purported to have proprietary methods for creating derivative securities with which to hedge its own risks and make larger than normal profits in the process.¹²³

Enron did its best to become a company with as few physical assets as possible, but its activities did not allow it to avoid such assets altogether.¹²⁴ When the assets appreciated in value, Enron reported the appreciation as current Enron earnings.¹²⁵ Then, in order to avoid showing any later decline as a corresponding loss, it hedged against such a loss of appreciation by getting another party to guarantee to buy the assets at the appreciated price for a period of time into the future.¹²⁶

If all of this had been done in arms-length transactions with third parties, no one would have called it "fraud." However, that would have been expensive for Enron because the cost of such guarantees would be high, if they would be available at all.

Thus, the contracts that Enron used for much of this internal hedging were with entities that Enron had itself created and whose assets consisted primarily of Enron's own stock.¹²⁷ These so-called "special purpose entities" had no other purpose than to guarantee against loss in value of the appreciated property.¹²⁸

At one time, proceeding in this way apparently seemed to be a sure thing. If the value of the appreciated property went up, the hedging company would never have to pay. If the value of the property went down but the price of Enron stock remained high, the hedge could make good of the decline. Only if the price of *both* the appreciated property and the Enron stock declined would there be a problem. That is, of course, exactly what happened. When the hedging entity lacked the assets to buy the property whose price it had guaranteed, Enron had to show a loss. Once a general loss of confidence in Enron's promises began, because its promises comprised a great portion of Enron's total assets, Enron swiftly declined into bankruptcy.¹²⁹

¹²¹ See FOX, *supra* note 5, at 135.

¹²² *Id.* at 133-35.

¹²³ See Partnoy, *supra* note 110, at 1250-63.

¹²⁴ See FOX, *supra* note 5, at 60, 104.

¹²⁵ See *id.* at 40 (discussing Enron's use of the "market-to-market" accounting method).

¹²⁶ See Partnoy, *supra* note 110, at 1252-53.

¹²⁷ See FOX, *supra* note 5, at 63.

¹²⁸ See POWERS, *supra* note 5, at 4, 36-38.

¹²⁹ I am relying largely on the excellent analyses of Enron's decline found in Douglas G. Baird & Robert K. Rasmussen, *Four (or Five) Easy Lessons from Enron*, 55 VAND. L. REV. (continued)

I spell this story out, however loosely, not simply to rehash the Enron events, but to suggest that representing Enron could not have been easy. Enron was doing things the world had rarely, if ever, seen before on this scale. Further, at least as initially conceived, they were practices that seemed to bring new efficiency to the extraordinarily-important deregulated market for energy.

Indeed, Enron was acting within a world of corporate finance whose terms it was partly creating as it went along. Telling Enron executives that its activities might violate regulatory standards must have been like telling the Wright brothers about the risks of products liability. One could do it, but the counsel would not likely deter people who saw themselves as pioneers.

Much of what Enron's lawyers are charged with doing is improperly complying with the rules for structuring special purpose entities, or improperly certifying that transactions were sales when they were really loans instead. One can criticize the lawyers if they made either kind of mistake, but it seems increasingly likely that both misplaced confidence in the underlying business model and foolish application of that model to product markets that Enron did not understand were what ultimately led to Enron's demise. The lawyers' role was likely relatively modest, if relevant at all.

One could say that any lawyer should withdraw when confronted by clients offering new products in unfamiliar industries because—as the Vinson & Elkins experience with Enron demonstrates—the downside risk to reputation and potential liability is great if one is wrong.¹³⁰ Yet one could equally argue that innovative clients are potentially among the most valuable players in the national and world economy and that the need of such clients for high-quality lawyers would make such lawyers' withdrawal inherently irresponsible.

IV. CONCLUSION

That, I submit, is the ultimate dilemma that comes to lawyers from Enron. As our clients are put under more and more pressure to make efficient use of assets that their lawyers often do not understand, how can lawyers provide the kind of quality service that clients—and the broader public—have a right to

1787 (2002) (discussing lessons learned from Enron's bankruptcy filing); Bratton, *supra* note 119 (reviewing the Enron case and its implications on the self-regulation scheme of corporate governance); Partnoy, *supra* note 110 (arguing the “conventional story” of Enron involving the alleged fraud related to Special Purposes Entities is incorrect and that the regulatory response to Enron was misguided); Robert Prentice, *Enron: A Brief Behavioral Autopsy*, 40 AM. BUS. L.J. 417 (2003) (discussing the shortcomings of law and economics theory and the implications of Enron in advancing support for applying a ‘behavioral decision theory’ to legal issues). For an excellent five part news account of Enron's deals and collapse, see Behr & Witt, *Five Part Series*, *supra* note 5.

¹³⁰ See, e.g., *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 235 F. Supp. 2d 549, 659-69, 704-05 (S.D. Tex. 2002).

expect?

My conclusion takes us back to the propositions with which I began. First, the issues that are important to our clients must become the issues about which lawyers become informed. The law and legal services are largely irrelevant to issues other than those faced by clients.

Second, lawyers need to understand—as do responsible decision-makers in our corporate clients—that the client incorporates and affects many interests. Any course of conduct that shortchanges some of those interests is, ultimately, likely to shortchange them all.

Third, lawyers cannot continue to be prepared only to solve yesterday's problems, and law schools cannot graduate lawyers who are unprepared for tomorrow's issues. Bar examinations, for example, should not continue to drive students to take courses like trusts and estates—a perfectly good course but a field in which most lawyers will never practice—when many students actually need more training in corporate finance and, increasingly, foreign languages. Law schools and bar leaders who fail to understand the changing world will shortchange both their students and those students' later clients.

Fourth, lawyers cannot retreat to asking simply who has authority to decide an issue on the client's behalf. That question is relevant—the lawyer is typically not the decision-maker—but it is insufficient to capture the lawyer's central role: counseling the client, helping identify key decisions, and then helping move those issues to a higher level in the corporate hierarchy for resolution.

Fifth and sixth, what we do not need is more substantive regulation of lawyers. We have enough of that already if lawyers will only read and comply with the law's directions. The ABA Model Rules, especially since the August 2003 amendments, present nuanced distinctions and good direction for lawyers trying to counsel clients to obey the law. Sarbanes-Oxley is now a fact of life, but trying to make it tougher is likely only to make it more draconian.

The old lawyer tasks of saving taxes, preparing regulatory reports, and resolving disputes look very tame alongside making off-shore deals, reining-in self-dealing CEOs, and making sense of heretofore unknown financial instruments. But in some sense, lawyers have always had to face issues that—at least to them—were new. Our predecessors were somehow able to meet the challenge. It is time for us to quit whining about how hard the practice of law has become and prepare to meet the challenges that *we* face equally well.

