

INTRODUCTION TO THE SYMPOSIUM: THE ROLE OF A CORPORATE LAWYER

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March 3, 2004 was a memorable day in the history of Capital University Law School. In the afternoon, the Law School held the 25th Annual John E. Sullivan Lecture.¹ In the evening, it hosted the Centennial Gala celebrating the 100th anniversary of the founding of the Law School. As well as being its most prestigious lecture, the Annual John E. Sullivan Lecture is Capital University Law School's longest continuing lecture series. It was established to honor Professor Emeritus John E. Sullivan, a dedicated teacher and scholar who joined the Law School faculty in 1953. Professor Sullivan also served as acting dean and academic dean during his academic career, and he was the senior member of the faculty for several years before he accepted emeritus status in 1988. The Sullivan Lecture Series is made possible through an endowment established by Herbert and Margitha Kunmann, friends and benefactors of Capital University Law School.

For a full one-quarter of its history, the Sullivan Lecture has been presented annually by distinguished legal scholars who have addressed topics of significance to the Law School, legal education, and the legal profession, as well as the larger community. The 2004 Sullivan Lecture continued this tradition by focusing on a current matter of critical importance to both the legal profession and society—the role of the corporate lawyer. As the title of this Symposium indicates, we engage here in a renewed evaluation of the role of the lawyer in response to two recent, inextricably linked events—the collapse of the Enron Corporation and the enactment of the Sarbanes-Oxley Act of 2002.

Enron's collapse and the internal improprieties that led to its collapse have triggered re-evaluations of corporate governance in the United States, including re-evaluation of the role of both in-house and outside corporate counsel.² Soon after Enron's collapse various voices began asking—"where were the lawyers?" Legal commentators also began new inquiries about the corporate lawyer's obligations.

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¹ For more information about the Capital University Law School John E. Sullivan Lecture, visit the *Capital University Law Review* web site at <https://culsnet.law.capital.edu/LawReview/Sullivan.asp>.

² Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097, 1098 (2003).

Perhaps the spotlight on lawyers should not be surprising. Based on facts reported by the press and revealed in various documents and hearings, the actions of Enron's attorneys invited scrutiny. According to the allegations, Enron's attorneys not only blessed potentially fraudulent transactions, but also conducted an investigation largely viewed as a whitewash. Moreover, courts and commentators have long questioned the appropriate governance role of the corporate attorney. Some of the earliest commentators on U.S. corporate and securities law focused on the relationship between companies and lawyers. As the role of attorneys has evolved, there have been repeated attempts to impose special obligations on corporate attorneys. Such efforts parallel periodic calls for broader reforms of corporate governance.³

In assessing the role of lawyers from the lessons to be learned from Enron, attention quickly turned to the issue of the lawyer's disclosure of confidential corporate information either to officers or directors within the organization, or, perhaps, to persons outside the organization.⁴

Scholars in a range of disciplines have debated the extent to which an attorney should be permitted or required to disclose corporate misconduct, either to a higher authority within the corporation, or to outside authorities. Hired gun advocates argue that disclosure obligations are inconsistent with the lawyer's role and undermine his capacity to serve the best interests of his client. Gatekeeper proponents argue that a narrow insistence on client primacy is inconsistent with the profession's obligations to the public.⁵

To be sure, a legislative response was soon forthcoming. Congress enacted the Sarbanes-Oxley Act of 2002, in its words, "to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws."⁶ As noted in one corporate securities treatise, the Sarbanes-Oxley Act is a "securities regulation smorgasbord."⁷ The statute, *inter alia*,

³ *Id.* at 1099 (footnote omitted).

⁴ *See id.* at 1102.

⁵ *Id.*

⁶ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

⁷ HAROLD S. BLOOMENTHAL, SECURITIES LAW HANDBOOK § 1.32, at 31 (2003).

- Establishes a Public Company Accounting Oversight Board to oversee the audit of public companies that are subject to the securities laws;⁸
- Provides for auditor independence;⁹
- Increases corporate responsibility in the area of audit committees, financial reports, conduct of audits, forfeiture of certain bonuses and profits, and prohibits insider trading during pension fund blackout periods;¹⁰
- Requires the Securities and Exchange Commission (Commission or SEC) to issue rules setting minimum standards of professional conduct for attorneys appearing or practicing before the Commission;¹¹
- Adds civil penalties to disgorgement funds;¹²
- Provides for enhanced financial disclosures;¹³ and
- Requires the promulgation of rules for conflicts of interests for security analysts.¹⁴

Responding to a concern that existing rules of professional conduct for lawyers did not adequately direct corporation counsel to report illegal conduct to the corporation's board of directors, Congress provided in section 307 of the Sarbanes-Oxley Act:

Not later than 180 days after . . . [July 30, 2002], the Commission shall issue 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,

⁸ Sarbanes-Oxley Act of 2002 §§ 101-109.

⁹ §§ 201-209.

¹⁰ §§ 301-308.

¹¹ § 307.

¹² § 308.

¹³ §§ 401-409.

¹⁴ § 501.

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 directors not employed directly or indirectly by the issuer, or to the board of directors.¹⁵

The SEC has now issued regulations under the authority of section 307 of the Sarbanes-Oxley Act.¹⁶ The regulations include a provision on the corporate lawyer's duty to report "up-the-ladder" within the corporation.¹⁷ The regulations also include a provision on the corporate lawyer's duty to "report out" to the Commission.¹⁸ Permissive withdrawal by the lawyer is

¹⁵ § 307. For some early reactions to Sarbanes-Oxley's reporting requirements for corporate counsel, see generally *The Evolving Legal and Ethical Role of the Corporate Attorney After the Sarbanes-Oxley Act of 2002*, 52 AM. U. L. REV. 575 (2003); Chi Soo Kim & Elizabeth Laffitte, *The Potential Effects of SEC Regulation of Attorney Conduct Under the Sarbanes-Oxley Act*, 16 GEO. J. LEGAL ETHICS 707 (2003); Darlene M. Robertson & Anthony A. Tortora, *Reporting Requirements for Lawyers Under Sarbanes-Oxley: Has Congress Really Changed Anything?*, 16 GEO. J. LEGAL ETHICS 785 (2003).

¹⁶ See Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. § 205 (2004).

¹⁷ § 205.3(b).

If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer . . . the attorney shall report such evidence to the issuer's chief legal officer . . . or to both the issuer's chief legal officer and its chief executive officer . . . forthwith. By communicating such information to the issuer's officers or directors, an attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of an issuer.

§ 205.3(b)(1).

¹⁸ § 205.3(d).

An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

(i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;

(ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, . . . suborning

(continued)

implicit in section 205.3 of the Commission's regulations.¹⁹ As of the time of this writing, the Commission is still considering proposals regarding the evolving concept of "noisy withdrawal."²⁰

As recognized by the General Counsel of the Commission, the attorney conduct rules, expressed both in section 307 of the Sarbanes-Oxley Act and in the Commission's newly promulgated rules, have generated considerable debate within the legal profession.

[T]he Commission's attorney conduct rules have been the subject of a great deal of debate within the bar, much of it focused on the issue of when an attorney may—or must—disclose to the Commission serious misconduct by a public company. Among other things, this debate has highlighted a number of apparent tensions: between the duty to serve shareholder interests, on the one hand, and the duty to protect client confidences, on the other; between federal authority to regulate attorneys appearing and practicing before the Commission and traditional state regulation of attorneys; and between competing policy views about the appropriate role of lawyers as gatekeepers under the federal securities laws.²¹

Before turning to the presenters' critiques of the responsibilities of corporate lawyers' after Enron and Sarbanes-Oxley, it may be worthwhile to briefly review here the basic tenets of lawyers' professional responsibility. We begin by remembering that our profession is a self-regulating profession. For the most part, the rules that govern our professional conduct are not imposed upon us by outside regulators. On the contrary, we make the rules that govern most of our professional activities.

perjury, . . . or committing any act . . . that is likely to perpetrate a fraud upon the Commission; or

(iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

§ 205.3(d)(2).

¹⁹ See § 205.3.

²⁰ See Giovanni P. Prezioso, Speech by SEC Staff: Remarks Before the American Bar Association Section of Business Law 2004 Spring Meeting (April 3, 2004), available at <http://www.sec.gov/news/speech/spch040304gpp.htm>.

²¹ *Id.*

Professor Stephen Gillers reminds us that because law is a self-regulating profession, there are two levels of professional responsibility for lawyers: (1) that of the *individual lawyer* to act in accordance with the client's trust and within the norms of the profession; and (2) that of the *profession* to promulgate and enforce appropriate standards of conduct for the members of the profession.²²

In his opening comments in his professional responsibility materials, Professor Roy Simon delivers the message that "[t]he bedrock of the attorney-client relationship is the client's trust of the attorney. If the client does not trust the attorney, the attorney-client relationship is in serious trouble."²³ Professor Simon posits that "[t]he client's trust of the attorney rests on two things: (1) *secrecy* and (2) *loyalty*."²⁴ Clients must be able to trust their lawyers.²⁵ Lawyers must keep private and confidential the things that they learn about clients.²⁶ Clients must also be able to trust them to work for and never against their interests.²⁷ Clients should be able to trust their lawyers to avoid conflicting loyalties, or at least to tell them when a loyalty conflict might arise.²⁸

It is the concept of *secrecy* with which we are most concerned here. The plight of lawyers is that they continually face potentially conflicting duties. The first potential conflict is between the lawyers' duties owed to one client and their duties owed to another client when their clients have different interests. The second potential conflict is between lawyers' duties owed to their clients and their duties owed to the public. This conflict of duties is often characterized as the duty of zealous representation of the client versus the duty to society as an officer of the court. The role of *secrecy* in these conflicting duties is highlighted by Professor Simon:

²² See Stephen Gillers, *Can a Good Lawyer Be a Bad Person?*, 2 J. INST. STUD. LEGAL ETHICS 131, 135-36 (1999). Professor Gillers argues that if the legal profession has promulgated a rule providing that, in a specific situation, a lawyer is not to breach client confidentiality and warn a third party of impending danger, it may be the profession, not the individual lawyer, who has acted improperly. See *id.* "It is asking too much to expect lawyers to risk their careers in order to assure the result that most nearly comports with truth The real quarrel is with the profession that wrote the rule. The lawyer can set the rule up in defense but its collective authors cannot." *Id.* at 135.

²³ Roy Simon, *Lawyers and the Legal Profession* 6 (Manuscript for 4th ed.) (Matthew Bender 2003).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

Rules that prohibit disclosure deprive society of information—information that might help solve crimes, resolve disputes, or lead to fairer transactions. The stronger the secrecy rules are (*i.e.*, the harder they are to overcome), the more information society gives up. The weaker the secrecy rules, the less society gives up. The idea is to strike the right balance to serve the interests of clients and of society.²⁹

Rules of *confidentiality* in legal ethics codes have two components—a basic definition of what information it covers and a list of exceptions that permit or require disclosure of otherwise protected information.³⁰ The strength of the duty of confidentiality depends upon both when disclosure is permitted or required and what information is covered by or excluded from the exception.³¹ There are parallel questions about the *attorney-client privilege*. The protection of the privilege will depend upon both the circumstances in which the client will be considered to have waived the privilege, and the extent of the exceptions to the privilege.³²

Next we must identify exactly who is a *client*. With limited exceptions, the lawyer disciplinary rules create fiduciary duties only to a person or organization who is a “client.” If a person or organization is not a client, then lawyers do not owe that person a duty of confidentiality under Rule 1.6 of the American Bar Association (ABA) Model Rules of Professional Conduct³³ or DR 4-101 of the ABA Model Code of Professional Responsibility.³⁴ But once a person or an organization has become a client, then the secrecy protections last forever—even after the client’s death,³⁵ and, with limited exceptions, even after the client becomes a *former client*.³⁶

When the client is a business organization, rather than an individual, the lawyer’s tasks are even more difficult. Rule 1.13 of the ABA Model Rules states: “[A] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”³⁷ Until 2003, Rule 1.13(b) provided that when the corporation’s lawyer knew that a corporate official may be violating a legal

²⁹ *Id.* ch. 4, at 1.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ See MODEL RULES OF PROF’L CONDUCT R. 1.6 (2003).

³⁴ See MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101 (1989).

³⁵ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 77 (2000).

³⁶ *Id.* § 132.

³⁷ MODEL RULES OF PROF’L CONDUCT R. 1.13(a) (2003).

obligation to the corporation that was likely to result in substantial injury to the organization, the lawyer could proceed as is reasonably necessary in the best interests of the corporation by referring the matter up-the-ladder within the organization, including, if warranted, to the highest authority that could act for the corporation.³⁸ But Rule 1.13(b) authorized the lawyer to do no more.³⁹

The limitation of this “*reporting up*” requirement is amplified in the language of Rule 1.13 comment 3: “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, are not as such in the lawyer’s province.”⁴⁰

But with the coming of the new millennium and the revelations of Enron and WorldCom and financial fraud generally on a scale previously unknown, or at least not understood, came a shift in the legal profession’s view of the lawyers’ duties to their client versus their duties to society. Two new exceptions to the lawyer’s duty of secrecy in Rule 1.6 that had been rejected by the ABA House of Delegates in 2001 were reconsidered and approved in August 2003.

First, Rule 1.6(b)(2) was added to permit lawyer disclosures to prevent a client from committing a crime or fraud reasonably certain to substantially injure another’s financial interests or property and which the client has used or is using the lawyer’s services to further.⁴¹

Second, Rule 1.6(b)(3) was added to permit lawyer disclosures to prevent, mitigate, or rectify substantial injury to financial interests or property that is reasonably certain to result at some point in the future, or has already resulted from the client’s crime or fraud if the client used the lawyer’s services to further the crime or fraud.⁴²

In addition, Rule 1.13(b) was amended in August 2003 to provide a presumptive “*reporting up*” requirement in certain circumstances.⁴³ The new language of Rule 1.13(b) provides:

Unless the lawyer reasonably believes that it is not necessary in the best interests of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances,

³⁸ MODEL RULES OF PROF’L CONDUCT R. 1.13(b) (2002).

³⁹ *See id.*

⁴⁰ MODEL RULES OF PROF’L CONDUCT R. 1.13 cmt. 3 (2003).

⁴¹ *Id.* R. 1.6(b)(2).

⁴² *Id.* R. 1.6(b)(3).

⁴³ *See id.* R. 1.13(b).

to the highest authority that can act on behalf of the organization⁴⁴

The strength of this presumptive “reporting up” requirement is reflected in the amended comment 3 to Rule 1.13, which now provides:

Paragraph (b) makes clear, however, that 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.⁴⁵

But even more importantly, Rule 1.13(c) was also amended to permit, but not require, a lawyer for an organization to reveal client confidences *outside* the organization in narrower circumstances.⁴⁶ As the new comment 6 to Rule 1.13 now makes clear, this “*reporting out*” authority is a further exception to client confidentiality, beyond the exceptions contained in Rule 1.6.⁴⁷

The new language in Rule 1.13(c) provides that a lawyer who has been unable to halt serious corporate wrongdoing even after bringing the problem to the attention of the organization’s highest authority

may reveal information relating to the representation *whether or not Rule 1.6 permits such disclosure*, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.⁴⁸

The new language in Rule 1.13 comment 6 drives this point home:

Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation Under Paragraph (c) the lawyer may reveal such information only when the organization’s highest authority insists upon or fails to address the threatened or ongoing action that is clearly a violation of law, and then only to

⁴⁴ *Id.*

⁴⁵ *Id.* R. 1.13 cmt. 3.

⁴⁶ *Id.* R. 1.13(c).

⁴⁷ *Id.* R. 1.13 cmt. 6.

⁴⁸ *Id.* R. 1.13(c) (emphasis added).

the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization⁴⁹

With this brief history in mind, we turn to the insights of the Symposium presenters.

Professor Thomas D. Morgan, Oppenheim Professor of Antitrust and Trade Regulation Law at The George Washington University Law School, was the 2004 Sullivan Lecturer. Professor Morgan is a quintessential thinker on a wide range of important legal issues. He has been at the forefront of the field of legal ethics for over two decades. Professor Morgan personifies what Anthony Kronman calls the "lawyer-statesman."⁵⁰ Dean Kronman defines the "lawyer-statesman" in the following manner:

The lawyer-statesman [is] possessed of great practical wisdom and exceptional persuasive powers devoted to the public good but keenly aware of the limitations of human beings and their political arrangements⁵¹

. . . .

[A] devoted citizen [who] cares about the public good and is prepared to sacrifice his own well-being for it . . . it is not only his motives that make him a better citizen than most. He is distinguished, too, by his special talent for discovering where the public good lies and for fashioning those arrangements needed to secure it. The lawyer-statesman is a leader in the realm of public life, and other citizens look to him for guidance and advice⁵²

Preeminent among the traits that define the lawyer-statesman's special character is the trait of prudence or practical wisdom.⁵³

[T]he claim that someone has good judgment is understood to be a claim about his character and not merely the breadth of his learning or the brilliance of his mind. . . . [T]he lawyer-statesman's professional standing

⁴⁹ *Id.* R. 1.13 cmt. 6.

⁵⁰ See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 11-52 (1993).

⁵¹ *Id.* at 12.

⁵² *Id.* at 14-15.

⁵³ *Id.* at 15.

is as much to be explained by who he is as what he knows.⁵⁴

He has “virtue and not just expertise.”⁵⁵ Dean Kronman could have used Professor Thomas Morgan as his model for his “lawyer-statesman.”

Professor Morgan begins his analysis by asking who a corporate lawyer represents and to whom a corporate lawyer owes duties of loyalty and confidentiality.⁵⁶ He argues that the lawyer’s entity client is a web of interests—investors, employees and managers, suppliers, customers, and governmental units—that must be recognized if the lawyer is to serve the entity client’s interests.⁵⁷ He suggests that because these varied interests are affected by a business client, lawyers sometimes “take refuge in the fiction that the client is an impersonal entity that captures and accommodates all of these interests.”⁵⁸

Professor Morgan expresses frustration that before Enron and the Sarbanes-Oxley Act, many people thought that no one had been thinking about the role of modern corporate lawyers.⁵⁹ In response, Professor Morgan sets out his taxonomy of the ABA Model Rules of Professional Conduct that govern the actions of lawyers representing business entities.⁶⁰ These include both rules of limitations on lawyers’ actions and rules that reinforce affirmative ideals about the role of corporate counsel.⁶¹ For the most part, these rules are antecedent to the Sarbanes-Oxley Act.⁶²

Next, Professor Morgan argues that the Sarbanes-Oxley Act and the accompanying SEC regulations “have complicated the lawyers’ duties, but have added little additional public protection At their best, the Sarbanes-Oxley regulations reinforce what lawyers should have known for many years to be the applicable standards.”⁶³

Professor Morgan sees Enron as an extreme example of an entity attempting to make more efficient use of financial capital and offering new products in unfamiliar industries.⁶⁴ He suggests that the Enron lawyers’ role in the financial collapse may have been relatively modest, perhaps

⁵⁴ *Id.* at 16.

⁵⁵ *Id.*

⁵⁶ Thomas D. Morgan, “*The Client(s) of a Corporate Lawyer*,” 33 CAP. U. L. REV. 17, 19-20 (2004).

⁵⁷ *Id.* at 22-25.

⁵⁸ *Id.* at 25.

⁵⁹ *Id.* at 30.

⁶⁰ *Id.* at 30-36.

⁶¹ *Id.*

⁶² *Id.* at 30.

⁶³ *Id.* at 36.

⁶⁴ *Id.* at 43-46.

irrelevant.⁶⁵ But Professor Morgan then asks the important question whether, because of the risk involved, lawyers should withdraw when their clients begin offering new products in unfamiliar industries?⁶⁶ Or, if lawyers believe that innovative clients are valuable to the economy, would the lawyers' withdrawal be irresponsible?⁶⁷

Professor Morgan's central thesis is that this is the ultimate dilemma posed by the Enron scenario where entity clients attempt to make efficient use of assets in areas that the lawyers, and perhaps the clients themselves, do not understand.⁶⁸ Professor Morgan concludes that providing quality legal services in a post-Enron age requires that lawyers: (1) become informed about the issues that are important to their clients; (2) recognize that corporate clients involve and affect many different interests; (3) be prepared to solve tomorrow's issues and that law schools must prepare them to be able to do so;⁶⁹ (4) must do more than simply ask who has authority to act on the corporate client's behalf; (5) do not need more substantive regulation; and (6) must be capable to deal with issues that are new to us, as did our predecessors.⁷⁰

Three distinguished panelists presented commentaries on Professor Morgan's paper.

First, Columbus lawyer Mark H. Aultman, a frequent commentator on issues of legal ethics, suggests that "the idea of a 'client' is the underlying concept that now defines lawyers' identities in American legal ethics."⁷¹ Both the reality and ideal of a definable client, able to make decisions and give directions to a lawyer concerning client objectives, have diminished with the increased organizational complexity of entity clients.⁷² He believes that legal ethics rules have been slow to adapt.⁷³

Mr. Aultman acknowledges that the "Sarbanes-Oxley Act was an occasion for changes in the ABA's ethics rules governing lawyers' ability to make disclosures concerning client wrongdoing."⁷⁴ But, given the limitations in Model Rule 1.13, he believes that so far as corporate

⁶⁵ *Id.* at 46.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 46-47.

⁶⁹ Traditionalists in the legal academy may be dismayed to hear Professor Morgan urge that bar examinations should not continue to drive students to take courses such as "trusts and estates" when what law students now need to be able to competently practice law are more courses in "corporate finance" and "foreign languages."

⁷⁰ *Id.* at 47.

⁷¹ Mark Aultman, *Legal Ethics Rules and Corporations: What's "Client" Got to Do with It?*, 33 CAP. U. L. REV. 49, 49 (2004).

⁷² *Id.* at 49-50.

⁷³ *Id.* at 59.

⁷⁴ *Id.* at 52.

wrongdoing is concerned, these changes are unlikely to make much difference in what lawyers do.⁷⁵ He criticizes Model Rule 1.13, which limits the corporate lawyer's duty to report up and to permissively disclose outside the corporation only when it is either in the corporation's best interests or the conduct is likely to substantially injure the corporation.⁷⁶

For Mr. Aultman, it is not just the extent of injury to the corporation that is important, but "the extent of injury to others, both inside and outside a corporation's hierarchy of authority, including investors and injured or defrauded persons with no other corporate connection."⁷⁷ He objects to putting the corporate client on the same footing as personal clients when requiring the lawyer to recognize client autonomy and give deference "to reasonable decisions by people in the best position to know what their interests are."⁷⁸

In his view, what is needed is to redefine lawyer responsibilities and broaden lawyer discretion to take into account the complexities of effective corporate decision-making.⁷⁹ He believes that there is very little that can be done to accomplish this by using broad "all-purpose" ethics rules, supposedly applying uniformly to all clients.⁸⁰

Second, Professor Susan Saab Fortney, the George H. Mahon Professor of Law and the Associate Dean for Student Affairs at Texas Tech University School of Law, compares the actual effect to date of the Sarbanes-Oxley statute and SEC regulations with the initial view by many lawyers that they are a radical departure from the basic principles of lawyer independence and client confidentiality.⁸¹ She begins by comparing the bar's reaction to the Sarbanes-Oxley Act and subsequent regulations to earlier reactions—first to the SEC actions against lawyers in the 1970s, and later to the banking regulators claims against lawyers in the 1980s.⁸² Professor Fortney argues that section 307 of the SEC regulations and the changes in the ABA Model Rules suggest that both the SEC and the organized bar influenced each other, chilling the SEC's rush to require lawyers to make an immediate "noisy withdrawal" and also causing the ABA to abandon arguments that the SEC lacked congressional authority to issue reporting-out rules.⁸³ She finds that lawyers are in a period of

⁷⁵ *Id.* at 52-53.

⁷⁶ *Id.* at 56.

⁷⁷ *Id.* at 57-58.

⁷⁸ *Id.* at 59.

⁷⁹ *Id.* at 59-60.

⁸⁰ *Id.* at 60.

⁸¹ Susan Saab Fortney, *Chicken Little Lives: The Anticipated and Actual Effect of Sarbanes-Oxley on Corporate Lawyers' Conduct*, 33 CAP. U. L. REV. 61 (2004).

⁸² *Id.* at 61-68.

⁸³ *Id.* at 68.

uncertainty, especially on the possibility of collisions between the SEC's regulation of lawyers and the regulation of lawyers by state supreme courts.⁸⁴

Professor Fortney conducted her own on-line survey and interviewed experienced corporate lawyers to determine if the statute, regulations, and changes in the ABA Model Rules have changed the conduct of corporate and securities lawyers. One year after the effective date of the "up-the-ladder" requirement, she finds that the effects have not been dramatic.⁸⁵ The requirements appear to provide lawyers with leverage in dealing with recalcitrant or unyielding constituents who are not acting in the organization's best interests.⁸⁶ The statute appears to have made clients more receptive to lawyer advice on proper conduct.⁸⁷ She also finds that lawyers, like clients, are concerned about liability, and that this has forced law firms to devote more time to ethics training and compliance.⁸⁸ She finds that "this reorientation or re-examination of responsibilities may prove to be the greatest impact of Sarbanes-Oxley on lawyer conduct, even [when Sarbanes-Oxley] may not technically apply to the circumstances of representation."⁸⁹

Professor Fortney finds that the initial effects of the new regulations appear to parallel the consequences of the SEC actions against lawyers in the 1970s and banking regulators' claims against lawyers in the 1980s.⁹⁰ She concludes that corporate lawyers' concerns over liability may cause them to reassess their roles and take steps to limit their liability.⁹¹ If this concern over liability exposure contributes to lawyers focusing more on ethically representing organizations, then Sarbanes-Oxley will raise the ethical bar for all lawyers.⁹²

Last, Professor Edward C. Brewer III, Professor of Law at the Salmon P. Chase College of Law at Northern Kentucky University, was the third commentator at the Sullivan Lecture. He argues that the authority given to the SEC to regulate lawyers by the Sarbanes-Oxley Act means that there is a new decision-maker in the field of legal ethics. In the words of the old west, "there's a new sheriff in town." Professor Brewer claims that unlike state supreme courts or bar disciplinary boards, the SEC has no direct connection and no beholding to the legal profession. Its core values are

⁸⁴ *Id.* at 68.

⁸⁵ *Id.* at 79.

⁸⁶ *Id.* at 79.

⁸⁷ *Id.* at 79.

⁸⁸ *Id.* at 79.

⁸⁹ *Id.* at 80.

⁹⁰ *Id.* at 80.

⁹¹ *Id.* at 80.

⁹² *Id.* at 80.

mandated by statute and shaped by other thinking often undeterred by the viewpoints of regulated persons (such as lawyers) or even other regulators (including, for example, state supreme courts). He finds that the SEC's core values of full and timely disclosure are contrary to the legal profession's core value of confidentiality, and that the SEC has its own style and methods that are very different from those of traditional regulators of the profession.

Professor Brewer's written paper may appear in a later issue of the *Capital University Law Review*.

