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The Higher Calling: Regulation of Lawyers Post-Enron

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THE HIGHER CALLING: REGULATION OF LAWYERS POST-ENRON†

Keith R. Fisher*

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This Article discusses some of the inadequacies in the current ethical regulation of the legal system and proposes a new approach to crafting and contextualizing rules of legal ethics. The proliferation of specialties and subspecialties in law practice, together with the inadequacies of prevailing ethics regulation and the vagaries of ethics rules formulations from state to state have not served either the public or the legal profession well. Manipulation, motivated by politics and self-interest, of the ideology of the organized bar to adhere to ethical rules predicated on an antiquated and unrealistic model of a unified legal profession has likewise been counterproductive. Emblematic of the problem is the “one size fits all” nature of the Rules of Professional Conduct and their ill-suitedness to business law, as opposed to litigation, practice, all of which leads to an atmosphere of indeterminacy in the ethical standards applicable to business lawyers. Part I of this article briefly traces the source and nature of the problems facing ethical regulation of the legal profession, briefly highlighting the practical shortcomings of some antidotes proposed by other scholars. Part II examines the various ethical scandals that have plagued the legal profession over the last 35 years. These scandals began with the National Student Marketing case and include the recent string of corporate scandals which brought to light the unethical behavior of corporate insiders, including lawyers and advisors, which ultimately resulted in the passage of the Sarbanes-Oxley Act of 2002. Part III of this Article endeavors to synthesize some insights from public choice theory into the structural shortcomings of the existing attorney regulatory system. From those insights, one would expect state courts and state bar regulatory agencies to be (and, indeed, they have been) co-opted by the elite bar and not adequately regulating those lawyers in corporate and federal regulatory practice—including especially those practice areas that affect public investors, public markets, and the economy as a whole. Part IV offers a critique of the current approach to attorney regulation, which has featured piecemeal attempts to federalize legal ethics. Part IV proceeds to illustrate the types of approaches to legal ethics which should be avoided. Finally, Part V concludes with a proposal for a partial federal regulation of legal ethics. The model of partial federal regulation offered is by no means the only, or necessarily the optimal, solution, but hopefully it will spark additional discourse that might lead to a workable system for providing business lawyers with the solid, thoughtful, and objective ethical guidance they need. Consistent with this proposal, Part V identifies and highlights a few areas of ethical concern specifically in need of regulatory attention.

Introduction

A doctor, a clergyman, and a lawyer are sitting in a slowly sinking rowboat in shark-infested waters within sight of a nearby island. The doctor and the clergyman attempt to swim ashore to get help but, to the horror of onlookers on the beach, are devoured by the sharks. The lawyer is not devoured but is actually assisted speedily to shore by two of the sleek man-eaters. When asked why it was that he was
not devoured like his two companions, the lawyer replies: "Professional courtesy." This joke has long maintained its popular place on the hit parade of that subspecies of American humor—lawyer jokes—because it adds a certain piquancy to the popular perception of lawyers as predators on society, though it addresses none of the substance behind that perception.

Contrast another more recent—very slightly off color—joke. The madam of a house of ill repute welcomes an extremely well-dressed man, who asks for Natalie. The madam assures him that Natalie is one of her most exclusive and expensive ladies and tries to interest him in someone else, but he insists on Natalie. No one else will do. When Natalie makes her appearance, she tells the well-dressed man that her fee is $1,000 in cash. The man agrees without hesitation, promptly hands over that amount in cash, and accompanies Natalie upstairs. The following evening, the well-dressed man returns and once again asks for Natalie. Natalie, surprised, warns the man that she does not offer volume discounts and will

1. Professor Marc Galanter has delivered a wonderfully entertaining lecture laced with arcane scholarship on the subject of lawyer jokes, and he provides a variant to this one that dates it back to the 1940’s:

A minister, a scientist, and a lawyer were adrift on a life raft in the tropics. At last they sighted land. But the wind died down while they were still a short way off the beach. The lawyer, the only one who could swim, volunteered to go ashore with a line and pull the raft to land. The minister knelt and prayed for his safety. Then the lawyer dived in. His companions saw the black fin of a shark making straight for him. The shark disappeared, then came up on the other side, having passed under the swimmer. Shortly they saw an even bigger shark darting toward him, but this one also swerved just in time. After the lawyer had reached shallow water, the minister said to the scientist, "There, you Doubting Thomas, there is proof of the power of prayer." "Power of prayer, hell!" retorted the scientist. "That was just professional courtesy."

Marc Galanter, Changing Legal Consciousness in America: The View from the Joke Corpus, 23 CARDOZO L. REV. 2223, 2229 n.23 (2002) (citing FUN FARE: A TREASURY OF Reader’s Digest WIT AND HUMOR 200 (Reader’s Dig. Ass’n ed., 1949)).

2. Sharks are, of course, the quintessential predators. Galanter notes the derivation of the linkage between lawyers and "sharks": "By the early Eighteenth Century, the term refers to a pickpocket or a rapacious swindler; by the early 19th century, it is sea-farer’s slang for a lawyer." Galanter, supra note 1, at 2228 n.20 (citing 15 OXFORD ENGLISH DICTIONARY 181 (2d ed. 1989)); see also ERIC PARTRIDGE, A DICTIONARY OF SLANG AND UNCONVENTIONAL ENGLISH 751 (London, Routledge & Paul eds., 5th ed. 1961); HAROLD WENTWORTH & STUART BERG FLEXNER, DICTIONARY OF AMERICAN SLANG 463 (Crowell ed., 2d ed. 1975). Sharks, in turn, were subjected to the ignominy of being termed "sea lawyers." Galanter, supra note 1, at 2228–29 n.21 (citing HENRY HUPFELD, ENCYCLOPAEDIA OF WIT AND WISDOM: A COLLECTION OF OVER NINE THOUSAND ANECDOTES . . . COMPILED DURING A PERIOD OF FIFTEEN YEARS, WITH A SPECIAL REGARD TO MERIT AND PROPRIETY 106 (David McKay ed., 1871)).
still demand her usual fee, which the man once again tenders before accompanying her upstairs. On the third night, the entire place is abuzz when the same well-dressed man shows up yet again to ask for Natalie, tenders the $1,000 fee, and upstairs they go. Later, Natalie privately expresses to him her astonishment: No one has ever before asked for (or been able to afford) her services two nights in a row, much less three. "Where are you from?" she asks. "Cincinnati," he replies. "Really? I'm from Cincinnati too!" says Natalie. "I know," the man says. "I'm a lawyer. Your father just died, and your sister engaged me to be the executor of his estate. She asked me to deliver your inheritance of $3,000."

This joke, unlike the first, provides context for the lawyer's predation. It is not merely the appearance of impropriety engendered by the setting but also the shameless self-dealing by this unscrupulous lawyer. Some might object to this characterization and point out that the lawyer's behavior, despite having given him an interest in the transaction, does not actually impair his ability to perform the legal services for which he has been engaged. Nor does it impair his ability (if required) to render impartial advice and counsel to the client. If the latter approach seems not entirely unreasonable, it is because such an apologia exemplifies the kinds of arguments that have from time to time been advanced by the organized bar to defend allegations of professional misconduct. Indeed, it is this tendency toward minimization, palliation—at times, even justification—of profoundly unethical behavior on the grounds that it does not clearly violate existing rules of professional conduct that has produced the current climate of ethical indeterminacy and unaccountability and has given us Enron, WorldCom, Tyco, and a host of other depredations arising from outright abdication of professional standards.

That indeterminacy and lack of accountability arise in large part from the dominant, essentially adversarial, paradigm of legal ethics that informs the bar-drafted rules of professional conduct. Accurately (though somewhat disparagingly) characterized as the "hired gun" model of legal ethics, this approach favors unwavering commitment to clients, even if that commitment produces immoral or unjust results. Under that model, often referred to in the litera-

3. See infra notes 245–300 and accompanying text.
ture as the "dominant view," "a lawyer must—or at least may—pursue any goal of the client through any arguably legal course of action and assert any non-frivolous legal claim." Axiomatic to this view is that our legal system works best in conjunction with an adversarial search for the truth, with each side represented by a lawyer relatively unfettered when it comes to advocating the client's interests.

Admittedly, the prevailing ethics rules enjoin lawyers not to aid their clients in unlawful conduct. Seldom, however, are matters so clear cut, and practicing lawyers, particularly lawyers representing clients in sophisticated business transactions, learn to become experts at detecting and exploiting varying shades of gray. Conduct is not "unlawful" merely because it is on the cutting edge. Lawyers, however, are also comfortable—perhaps too comfortable—with the proposition that conduct is not unlawful unless there is precedent squarely on point that declares it so; to the extent there are distinguishing facts, the lawyer will often (and often self-righteously) assert the client's entitlement to representation coupled with the fact that the lawyer is not "knowingly" assisting any illegality. It is a technique not dissimilar to that often employed by a good bridge

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7. See Model Rules of Prof'l Conduct R. 1.2(d) (2002).
8. See infra note 229.
player when faced, as declarer, with the task of making a difficult contract: one imagines the lie of the opponents’ cards to be such as will permit a particular line of play to succeed and then proceeds to play the hand as though the cards do, in fact, lie that way. The lawyer simply imagines that what the client seeks to do is legal, then proceeds to represent the client as though the client’s object is, in fact, lawful, and takes refuge in the soft, bar-crafted ethical cocoon where lawyers rarely, if ever, “know” that a client is acting unlawfully.

In this mindset, the legal system itself becomes the lawyer’s armory. In representing a client in litigation, the courtroom lawyer will make use of every authority, policy, and rhetorical technique in a single-minded campaign of zealous advocacy. The advocate’s sole objective is to win. Partisanship and moral non-accountability are the principles that animate the representation. The advocate is thus a warrior for hire, a mercenary—the lawyer version of the Japanese ronin or the clichéd “hired gun” of the American western. Traditional models of legal ethics not only support but also extol this view.

What becomes problematic is the extension of this mindset outside the litigation context to the world of business lawyering. The “hired gun,” in the latter context, “acts as a cynical manipulator of the tools made available by a complex legal system. He takes advantage of the forms and the letter of the law, rather than the spirit or

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11. Considerable literature discusses the ethical and philosophical underpinnings of the advocate’s role. See, e.g., Stephen L. Pepper, The Lawyer’s Amoral Ethical Role: A Defense, A Problem, and Some Possibilities, 1986 AM. B. FOUND. RES. J. 613 (1986); LUBAN, supra note 5; Murray L. Schwartz, The Professionalism and Accountability of Lawyers, 66 CAL. L. REV. 669 (1978) [hereinafter Schwartz, Professionalism]; Murray L. Schwartz, The Zeal of the Civil Advocate, 1983 AM. B. FOUND. RES. J. 543 (1983). Even for the courtroom lawyer, however, the notion of moral non-accountability is somewhat problematic. (Few people, for example, viewed the jury nullification and other tactics employed by the so-called “dream team” who defended O.J. Simpson when he was prosecuted for his ex-wife’s murder as morally neutral). Some of Ted Schneyer’s writings posit that this so-called “standard conception” of adversary representation is oversimplified in failing to consider alternative visions of the trial lawyer’s role. See generally Ted Schneyer, Moral Philosophy’s Standard Misconception of Legal Ethics, 1984 WIS. L. REV. 1529 (1984); Ted Schneyer, Some Sympathy for the Hired Gun, 41 J. LEGAL EDUC. 11 (1991).

intent, to maximize his client's narrowly defined and essentially asocial goals.\textsuperscript{13}

Although many lawyers despair at this state of affairs and the bar's seeming inability to rectify it,\textsuperscript{14} something must be done to stem the tide of predation and, if this is not a pipe dream, restore what seems now to have become a debased, dishonored, and disreputable "trade" of law\textsuperscript{15} to its former, loftier status of a "learned profession." This comprehends the ideals of a "Higher Calling"—ideals that prompted many to go to law school in the first place and make careers in the law. Reform is imperative not merely because of public outrage at the excesses of corporate greed and professional dereliction. For lawyers to have devolved into little more than small-minded, common, often grasping tradesmen is to have besmirched the majestic ideals and illustrious escutcheon that is responsible for inventing, and later for safeguarding, our fragile democracy, and for championing the rights of the underprivileged and the oppressed.\textsuperscript{16}

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\textsuperscript{14} Cf. DEBORAH L. RHODE, \textit{IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION} 213 (2000) ("Despite their considerable influence in American life, many lawyers perceive themselves as uncharacteristically powerless in the face of the profession's own problems.").

\textsuperscript{15} See ROSCOE POUND, \textit{THE LAWYER FROM ANTIQUITY TO MODERN TIMES} 9-10 (1953) (explaining that the essence of professions is that they are practiced with a spirit of public service, unlike a trade, which aims primarily at personal gain). Commenting on the recent dissolution of the venerable Boston firm Hill & Barlow (a firm founded in 1895 that had been involved in a number of high-profile cases going back to the defense of accused anarchists Nicola Sacco and Bartolomeo Vanzetti, and numbered among its alumni not only federal and state judges but also three former Massachusetts governors), one partner lamented, "The legal profession ... has become much more of a business, and profit and the billable hour have become the bane of the profession ... [T]he profession needs to take stock and look at what it is we became lawyers for, to see whether those principles are consistent with the profit motive that seems to be driving lawyers more and more." Scott Bernard Nelson, \textit{Hill & Barlow Firm Decides to Dissolve}, BOSTON GLOBE, Dec. 9, 2002, at A1 (quoting former Massachusetts Bar Association President Michael Greco).

\textsuperscript{16} Robert Gordon eloquently summarizes the ideal:

America in the early republic faced a vacuum of law, governance, and leadership authority. After the Revolution it turned out that the new states, the new nation, and the new economy required more regular and sustained attention to governance than part-time legislators and juries could provide. America did not have, and did not want, a powerful career civil service. Lawyers stepped forward to fill the vacuum. They had the credentials and the legitimacy because they had articulated the grievances of the Revolution in legal terms; they had drafted the new Federal and State Constitutions, and gradually got them accepted as legal texts subject to lawyers' arguments and judges' interpretations. Lawyers made law and legal discourse and legal procedures into primary modes of governance and dispute-settlement in the new nation.
That "higher calling" is not limited to public service or activism in support of a cause. It is a philosophy of how law should be practiced, and it should permeate all areas of practice, all specialties and sub-specialties.

Likewise it should inform and animate the manner in which the practice of law is regulated, but, in that regard, the self-regulatory scheme characteristic of the organized bar has turned out to be a dismal failure. Its response to over 35 years of sequential (and sequentially more damaging to the public image of lawyers) scandals has been woefully inadequate to stem the tide of lawyer misconduct. Yet no fetor of scandal, no amount of public odium, has led to any meaningful reform. Lawyers have continued to enjoy the benefits of self-regulation to a degree unprecedented in the

They dominated high offices, state and federal, elective and appointive; and (after early experiments with lay judges) achieved a complete monopoly of the upper judiciary—whose professional quality was fairly high, especially considering how little they were paid. Nearly all successful lawyers moved regularly in and out of politics and public service. By the 1830s Tocqueville was calling lawyers the American "aristocracy"—more legitimate than a gentility class because they were an aristocracy of merit.

Over the next two centuries, lawyers, on leave from practice, as a sideline to practice, and in the regular course of representing clients, continued to take the lead in building state structures and legal infrastructures for the new republic. They tried, with partial success, to rescue judicial selection from partisan patronage and make it based on merit.

As political statesmen, lawyers tried, though they ultimately failed, to devise legal solutions to the great political conflicts over slavery and reconstruction of the defeated South. They responded more successfully to the opportunities for leadership opened up by industrialization, which brought with it all the problems of deaths and injuries from accidents, labor conflicts, polluted skies, urban poverty, corruption of government, absorption of new immigrant groups, concentrated economic power, and urgent demands for new systems of regulation informed by educated expertise. Lawyers took the initiative in the Progressive and New Deal reform movements, leading another wave of state-building, this time to construct and staff the commissions and agencies of administrative government. Lawyers on leave from New York City practice dominated the senior policy posts of State, War, and Defense for the entire nineteenth century and for most of the last. They also labored to build an infrastructure of public and private international law to civilize the conduct of commerce, diplomacy, and war, and to protect human rights.


17. As Luban has observed, "[t]he entire enterprise of self-regulation is built on the premise that, when it comes to the practice of law, lawyers have some special insight into the public good." LUBAN, supra note 5, at 2.
American experience. As discussed below, insights from public choice theory show that this state of affairs has conferred upon the bar enormous privileges.

From those to whom much is given, much is expected. The question is thus starkly posed: whether the legal profession remains completely capable of self-regulation, of providing legal services with honesty, integrity, and decorum, and of accepting fiduciary responsibilities not merely to clients but to a broader definition of interests a "learned profession" should serve. After pondering that question in an era when lawyers' values increasingly are degraded to pecuniary measurements and to the crass cost-benefit analysis of "what's in it for me?", when, under the ubiquitous "everybody else does it" standard of conduct, all things that are not expressly and specifically prohibited are deemed permissible, and when the evident collapse of ethical standards under the quotidian pressure of business generation and the gaping maw of unadulterated greed has given rise to a dizzying succession of corporate scandals, the answer, though painful and reluctant, must be "No"—or, at least, "Not completely."

That answer occasions a fundamental rethinking of how lawyers ought to be regulated. The deterioration of ethical standards, the toothlessness of state disciplinary mechanisms (even in the wake of referrals by a federal regulatory agency), and the preoccupation of the organized bar with relatively unimportant (except from the viewpoint of economic protectionism) topics, such as the debates centering on multi-jurisdictional practice vs. the unauthorized practice of law (something not even worthy of discussion in the European Union)—all as we move from one ignominious ethical transgression to another, heedless of the harm being done to innocent third parties and to the reputation of the profession—cry out for such a fundamental rethinking. After so many missed opportunities at course correction since the early 1970's, the lofty but


19. See infra notes 385-402 and accompanying text.

20. See infra notes 330-47 and accompanying text.

21. See infra note 91.
hollow rhetoric animated by the bar's self-interest can no longer suffice.

At a minimum, the bar needs a firmer and unbiased hand on the tiller to right that course. This article purposes to highlight, via synopses of the key scandals, some of the inadequacies of the current system of lawyer regulation and to raise the curtain on what seems now to be the inevitable and only workable solution: partial federal regulation of the field of legal ethics.

Part I of this Article will briefly trace the source and nature of the problem and touching on the practical shortcomings of some antidotes others have proposed. Part II will review the "highlights" (if the reader will excuse the expression) of those 35 years of mischief and scandal, beginning with the National Student Marketing case and culminating in the recent, seemingly never-ending, series of revelations of malfeasance by corporate insiders and the transgressions (often implicit, but occasionally explicit and outright derelictions of professional obligations) of their lawyers and other advisors, all leading to the Sarbanes-Oxley Act of 2002\textsuperscript{22} and the SEC's controversial rulemaking.\textsuperscript{23} Part III endeavors to synthesize some insights from public choice theory into the structural shortcomings of the existing attorney regulatory system. Part IV offers a critique of the extant "hunt and peck" approach to federalizing legal ethics and illustrates the kinds of approaches to be avoided, especially the "overkill" approach consistently taken by the Office of Thrift Supervision (OTS).\textsuperscript{24} Finally, Part V concludes with a simple proposal for partial federal regulation of legal ethics and a few suggested areas for regulatory attention.

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\textsuperscript{24} \textit{See infra} notes 431–37 and accompanying text.
I. OF NOSTALGIA AND NONACCOUNTABILITY, TECHNOLOGY AND TUSSLE

Historically, the legal profession has justified its autonomy from external regulation by the commitment of law practitioners to clients and to public service, subordinating the lawyers' financial self-interest, as distinguished from businessmen.\(^{25}\) This is a powerful image that was for many years purveyed in the literature, largely without dissent, to lawyers and law students.

When lawyers of the baby boomer generation were earning their law degrees, the role models of the day may have varied somewhat depending upon the locality of one's practice, but all were pillars of the bar with not merely local but national reputations. In Washington, D.C., for example, there were appellate legends like E. Barrett Prettyman, Jr., trial lawyer legends like Edward Bennett Williams, and lawyer-statesman legends like Leon Jaworski and Clark Clifford;\(^{26}\) in New York, various names like Henry King, Arthur Livan, Henry Harfield, and John McCloy ring memory's bell. Other recollections of the same era might cite additional names in these jurisdictions, and, of course, there were different pillars of the bar in other jurisdictions as well. Law graduates of the preceding generation might have venerated such erstwhile legal movers and shakers as Dean Acheson and John Foster Dulles—people of the ilk referred to by Dean Anthony Kronman as "lawyer-statesmen."\(^{27}\)

The point of this brief iconography is not to journey down memory lane but to furnish a foil for the (by now) well-documented and possibly pandemic disillusionment and discontent of lawyers with the practice of law.\(^{28}\) Flames of disillusionment

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25. Cf. Harlan F. Stone, The Public Influence of the Bar, 48 Harv. L. Rev. 1, 6–7 (1934) (disparaging the transformation of many lawyers into, in the words of former Chief Justice of the United States, "obsequious servant[s] of business . . . tainted with the morals and manners of the market place in its most antisocial manifestations," and decrying the phenomenon of a lawyer's income becoming "the measure of his professional status").

26. The latter's reputation was irrevocably tarnished in later years by the BCCI scandal. See infra notes 237–42 and accompanying text.


and dissatisfaction with the legal profession are not unique to practicing lawyers; they are even more apparent among the public at large and have been fanned ever higher by the recent, and seemingly endless, spate of corporate and securities scandals that have festooned the newspaper headlines over the past two years. That public mistrust is only heightened by bar rhetoric that gives the impression of condoning conduct contrary to commonly-held concepts of morality by asserting that lay people lack the specialized training and expertise to appreciate the refined professional judgments made by lawyers.

Perhaps the indelible imprint of lawyers' early career impressions combined with human nature make inevitable the temptation to wax nostalgic about the caliber of the legal profession in bygone days. The dynamics of the practice of law did not then appear to have been simply about money. Nonetheless business

(1988) (observing that "[p]roponents of the adversary ethic say or imply that traditional republican legal ethics have either been abandoned or redefined"); cf. ABA COMM. ON PROFESSIONALISM, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 3 (1986), reprinted in 112 F.R.D. 243, 254 (1987) [hereinafter ABA BLUEPRINT] (noting that 68% of corporate users of legal services believed legal professionalism had decreased over time); see also James W. Jones, The Challenge of Change: The Practice of Law in the Year 2000, 41 VAND. L. REV. 683, 695 (1988) (chronicling recent changes in legal profession and concluding optimistically that "[t]oday's lawyers have the opportunity to reshape the legal profession at a crucial time in its history").


30. See infra notes 245–300 and accompanying text.

31. See, e.g., Jack R. Bierig, Whatever Happened to Professional Self-Regulation?, 8 B. LEADER 18 (1983) ("The fact that a professional serves people by bringing highly specialized training to bear upon their problems lies at the root of professional self-regulation. Lacking this specialized training, lay persons cannot fully understand what professionals do and cannot evaluate the judgments that professionals may make."). Moral philosopher Sissela Bok has pointed out the danger of this sort of rhetoric. See Sissela Bok, Can Lawyers Be Trusted?, 138 U. PA. L. REV. 913 (1990); cf. Thomas H. Morawetz, Lawyers and Conscience, 21 CONN. L. REV. 383, 395 (1989) ("There is nothing inherent in the lawyer's role that should exempt her from moral criticism.").

32. Others have done so with considerable eloquence. See, e.g., MARY ANNE GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994); KRONMAN, supra note 27; SOL M. LINOWITZ & MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY (1994). While this may be a "generational" phenomenon, it is interesting that all three of the above books place the practice of law at its ethical apex in the post-World War II prosperity of 1950's America. See also ABA BLUEPRINT, supra note 28.

33. Here is a view from the 1950's that will strike contemporary readers as thoroughly anachronistic. "[A] large number of lawyers picture themselves as white knights in shining armor devoted to their profession with an intensity characteristic of a genius. When a client comes in with his legal problem, the concern of the lawyer is the solution of the problem. The question of his fee is usually in the dim background of his mind and is often
ness flowed, seemingly effortlessly, to these individuals and their law firms, and the proof lined office and library book shelves with expensive printed appellate briefs and those ubiquitous, hefty, bound volumes comprising the documentation of large corporate transactions, usually embossed on the spine with gold lettering displaying the highly recognizable names of Fortune 500 companies and leading Wall Street banking houses. Nor were these titans of the bar regarded by the lay public as predators or as glorified tradesmen, but as honorable, knowledgeable, tough-minded but fair, and sometimes elegant practitioners of a learned profession. They moved seamlessly from law office to courthouse to board room, in and out of public service, and were the brain trust without whose assistance many momentous transactions and events of the legal and business worlds (often affairs of state as well) could not have been conceived, much less successfully implemented. (There was, to be sure, a "dark side" as well to this exemplar, an ugly, hypocritical, discriminatory underbelly to the elite bar, but the breadth of accomplishment of the most celebrated of these elite lawyers was inspirational to the younger generation, which was either ignorant of the organized bar's history of institutionalizing that "dark side" or else was prepared to rationalize it as symptomatic of the societal shortcomings of a less enlightened era).

The foregoing, admittedly nostalgic, unified vision of lawyers and the legal profession underlies much of the belief system that looked on by him as a necessary evil." Eugene C. Gerhart, The Art of Billing Clients, LAW OFF. ECON. & MGMT. 29, 29-30 (1960), quoted in Elizabeth Kovachevich & Geri L. Waksler, The Legal Profession: Edging Closer to Death with Each Passing Hour, 20 STETSON L. REV. 419, 430 (1991); cf. ABA BLUEPRINT, supra note 28, at 3 ("Has our profession abandoned principle for profit, professionalism for commercialism?").

34. Contrast the more contemporary view in Robert F. Cochran, Jr., Honor As a Deficient Aspiration for "The Honorable Profession": The Lawyer as Nostromo, 69 FORDHAM L. REV. 859 (2000).

35. Thus iconography turns to iconoclasm: the names mentioned here were all white males; those who were descendants of recent immigrants or members of religious minorities had only recently fought their way to membership in this elite club, while women and racial minorities were still struggling. GLENDON, supra note 92, at 28, 35; see also JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 102-29 (1976) (stating attorney regulation has favored social and racial elites, offering historical examples of barriers to entry raised by prominent members of the bar and law professors in order to "purify" the profession, typically at the expense of minorities, such as the repression of African-American and Jewish applicants in Pennsylvania during the period 1933-43).

36. I came to feel that the American lawyer should regard himself as a potential officer of his government and a defender of its laws and constitution. I felt that if the time should ever come when this tradition had faded out and the members of the bar had become merely the servants of business, the future of our liberties would be gloomy indeed.
animates the manner in which regulation of the bar has evolved over the course of the twentieth century, but the image, if it were ever an accurate depiction, is increasingly anachronistic. Instead, law has become much like any other service business, such as advertising, stock brokerage, accounting, and various types of consulting. Today, lawyers in private practice, ranging from solo practitioners to partners in large, elite urban law firms, are all endeavoring one way or another to peddle usually fungible services (with rare exceptions) into a saturated, highly competitive market for a shrinking client base. The business—for “business” it is, and big business too—is now dominated by large, multi-jurisdictional firms, managed by autharchy or anarchy (usually poorly, in either event), and having a propensity to expand their geographic and product markets primarily by acquisition of pre-existing practices or practice groups rather than by internal growth. The touchstone for these acquisitions is not the mobility of law firm partners, which has become commonplace, but the portability of their billings; these transfers of allegiance are deals that are little, if at all, different from standard acquisitions of non-publicly traded businesses, with the acquiring law firm’s focus being on (A) annual revenues (with seven figures being a threshold of intense interest), (B) the potential for conflicts with the firm’s existing clientele, and (C) verification (preferably by accounting records from the old firm) of the new practice’s billable hours, realization rates, and accounts receivable. In such a purely economic transaction, new

HENRY L. STIMSON, HENRY L. STIMSON & McGEORGE BUNDY, ON ACTIVE SERVICE IN PEACE AND WAR xxii (1947).
37. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 54 (1986).
40. Natural corollaries to the increased mobility of lawyers and law practices are fading institutional loyalties and often unseemly jockeying for position with in-house counsel of corporate clients. The latter, in turn, have become far more canny, jettisoning traditional law firm alliances in favor of choosing individual lawyers (often on the basis of price competition and a “beauty contest” in which law firms can display their “wares”) just as they would any other service provider, but even then only where outsourcing is imperative, i.e., because it is more cost-effective than doing the work in-house or because highly specialized legal work is called for.
partners' professional credentials, philosophy, or legal writings are matters of, at most, perfunctory interest.

Competition for clients has become ferocious. The old model of old-line corporate clients aligned with, and sending their business to, particular law firms as their exclusive outside general counsel has given way to savvy corporate law departments (frequently populated by elite law firm expatriates) shopping for law firms for particular projects or particular specialties. Often, the company dispenses with outside counsel altogether and does the work in-house.

Within the partnership ranks of law firms facing this "brave new world," life is radically different. The mobility of partners and groups has already been noted, and acquisitive firms will even "raid" the competition to secure the services of rainmakers or "product lines" they covet. Where once law firm partners were bound to each other by strong ties of loyalty, now economics is everything; where once compensation was "lock step," based on seniority, now it is based on an "eat what you kill" model of business generation; where once being elected to the partnership was the pot of gold at the end of the rainbow, now it is a dubious distinction, no more secure than any other type of employment, and law firms will cut the equity interests of (or even dismiss) partners who are not considered to be sufficiently productive. To anyone who has seen the "blood on the floor" during the periodic (usually annual or biennial) spectacle of partners engaging in internecine conflict over how large a piece of the pie they get to take home, this tableau is all too familiar.

Changing technology has also transmogrified law practice. In the late 1970's, lawyers generally relied upon their secretaries and other support staff for the actual physical preparation of legal documents. Lawyers drafted documents on legal pads or using

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41. Cf. Kagan & Rosen, supra note 13, at 423 (noting that, even by the mid-1980's, this independent, outside general counsel role "has been declining as a proportion of the large firm lawyers' work, to the point that it is now comparatively infrequent").

42. See generally Carl D. Liggio, The Changing Role of Corporate Counsel, 46 EMORY L.J. 1201, 1210 (1997) (retention of firms as outside general counsel giving way to selective reliance on individual attorneys with specialized expertise); Milton C. Regan, Jr., Foreword: Professional Responsibility and the Corporate Lawyer, 13 GEO. J. LEGAL ETHICS 197, 198 (2000) (noting that corporate clients now seek specialized, rather than general, services from outside law firms); Robert Eli Rosen, The Inside Counsel Movement, Professional Judgment and Organizational Representation, 64 IND. L.J. 479, 489 (1989) (offering and discussing the motto, "retain lawyers and not law firms").

43. See Chayes & Chayes, supra note 12, at 293–94 (noting expansion of corporate law departments has shifted work away from elite law firms).
dictating machines and gave them to others to type. Some firms used so called “mag cards,” typewriters attached to a primitive form of word processor using magnetic cards, allowing the user to save one page of typewritten text per card, but most people still used regular typewriters. Most photocopiers were not high-speed, so typists relied on carbon paper to make duplicates. If mistakes were made in typing, or edits were necessary, the document had to be retyped. As a result, the lawyer had every incentive to make the first draft as good as possible.

Fast forward to today. Most lawyers do not rely on secretaries for document production but prepare and edit their own documents with personal computers and sophisticated word processing software, enabling them easily to cut and paste from pre-existing forms or other documents and facilitating editing. The ease of editing seems, however, to have significantly diminished the overall quality of legal documents, particularly among younger or less-experienced lawyers. Without the low-tech disincentives to producing a mediocre first draft, there is a temptation to “throw” any old thing onto the word processor on the assumption that it can be cleaned up in the editing process. That assumption is often unjustified: changes in primary and secondary school standards in the intervening thirty years now produce college graduates (and ultimately law school graduates) whose writing skills leave a lot to be desired. Spell check and grammar check software cannot cure that defect. As the old saying goes, you can’t make a silk purse out of a sow’s ear.

In conjunction with this “deprofessionalization” of lawyers, clients have become savvier about the market for legal services and considerably more demanding. An easy illustration from business

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44. For example, the substantial amounts of time required for retyping from scratch, and the lawyer having to proofread each retyped version afresh.

45. See, e.g., Roger J. Miner, Confronting the Communication Crisis in the Legal Profession, 34 N.Y.L. SCH. L. REV. 1 (1989) (complaining that briefs are deficient and that legal writing is a disservice to clients from point of view of appellate judge); Tom Goldstein, The Law: Drive for Plain English Gains Among Lawyers, N.Y. TIMES, Feb. 19, 1988, at B7 (recounting Wisconsin Supreme Court Justice Bablitch’s lectures to law students about the poor condition of legal writing); cf. Matthew J. Arnold, Comment, The Lack of Basic Writing Skills and its Impact on the Legal Profession, 24 CAP. U. L. REV. 227 (1995); Erik M. Jensen, Reflections in Editing a Law Journal for Law Teachers, 2 WYO. L. REV. 119, 123 (2002) (criticizing quality of written submissions by legal writing instructors: “[G]iven the quality of American law students’ writing these days, I’d be inclined to say we have the blind leading the blind, but that would be unfair to the blind.”). Arguably, however, this problem goes back much farther in time. See William L. Prosser, English as She is Wrote, 7 J. LEGAL EDUC. 155, 162 (1954) (reprint of essay originally appearing in 1939) (decrying law students’ lack of writing ability but despairing of law schools’ ability to remedy the problem).
law practice is the amount of time the lawyer has to deliver work product to the client. As recently as the typewriter/mag card days, clients received the documents when they were ready and not before. With the advent of overnight courier services, clients began to expect document delivery the next day, so lawyers began to dance to the tune of getting the document drafted and edited in time to make the final dash to the nearest overnight courier's office before it closed, usually sometime between 8:00 and 9:00 p.m. Next came the proliferation of fax technology, and clients demanded same-day delivery of the document. With the advent of e-mail, production time has become even more compressed. But Rome wasn't built in a day. The effect of this time pressure on document quality is emblematic of the problem that lawyers in a fast-paced society face generally: they lack time for reflection and for the application of mature, sober, and detached judgment to client problems.

Nor is it any longer the norm for large, corporate clients to come to the lawyer's office. The lawyer is expected to come to them, and travel time compresses the time available for law practice even further. Older readers may remember the 1950's Saturday night television western drama in which a professional gunman (nowadays, he might be called a "troubleshooter") carried a business card saying, "Have Gun, Will Travel" (an *echt* hired gun!). Now it might read "Have Laptop, Will Travel."

One thing has not changed: the same characteristics of ingenuity and indispensability that have always been hallmarks of the best lawyers continue to describe the work of elite lawyers today. All too often, however, those skills have been perverted to facilitate not the momentous but the nefarious. From the business lawyer's perspective, part of the problem lies in the indeterminacy of ethical standards applicable to his specialized practice.

The normative precepts that should guide lawyers in the litigation sphere and those in the corporate/ regulatory counseling realm occupy two different orbits around Planet Ethics. While these orbits may intersect from time to time, they more frequently diverge. The disparate nature of the tasks performed distinguishes the overall content of those normative precepts. As one would expect, the corporate/ regulatory counselor's orbit is much tighter. The dynamics of business transactions, which—in sharp contrast to the litigation model—presuppose continuing, often long-term, and essentially non-hostile relationships, and the imperatives of compliance with complex skeins of federal and state regulation all require conservative, objective, and dispassionate advice and
counsel. To be effective, the counselor must be disinterested, unbiased, and in a position to exercise utter independence of judgment and action. He must be free to research and examine the pertinent facts so that the advice and counsel ultimately given will be both reasoned and reasonable, both reliable and worthy of reliance.

These precepts have only grown in importance as lawyers are increasingly thrust into tangled, labyrinthine business and regulatory milieus. Rarely are business lawyers engaged nowadays to give advice where there are black and white, clear-cut answers. They do not enjoy the luxury of the litigator's more simple and direct role as advocate. As the global regulatory environment in which businesses operate becomes ever more complex, the distinctions between and among various shades of gray have grown correspondingly more numerous and more subtle. More often than not, businesses and business lawyers must operate in a zone of uncertainty. Detachment, neutrality, and candor then become all the more indispensable to the counseling role. While the counselor's loyalty is primarily to the interests of his client, ascertaining what those interests are may not always be simple.

Ideally, the business lawyer should undertake an assessment of the matter at hand that is unbiased and that takes fully into account whether and to what extent another (whether that other be another party to a transaction or some entity or constituency—e.g., a government agency in the case of a regulated business or the investing public in the case of a publicly held enterprise—to which (or whom) the client owes some legal obligation) might come out differently on the matter if in possession of all the pertinent factual information. In some circumstances, as with representing a regu-

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46. The latter qualification is extremely important. It resonates strongly with the common definition of "materiality" under the federal securities laws in terms of the information that an investor might find important in making a decision to buy or sell securities, and, obviously, investors would dearly have liked to have known the kind of information that was concealed in a number of recent corporate scandals. See infra notes 245–300 and accompanying text. Furthermore, federal regulators during the S&L crisis and during the BCCI scandal, to name but two examples, would dearly have liked to know information that was deliberately concealed from them or, worse yet—as was alleged in the infamous Kaye, Scholer and Jones, Day matters involving Charles Keating and Lincoln Savings & Loan of Irvine, California—was information that should have been available during the examination process but for the efforts of lawyers to obstruct access by the examiners and to falsify records made available to them. See generally In re Am. Com't Corp. Lincoln Sav. & Loan Sec. Litig., 794 F.Supp. 1424, 1450 (D. Ariz. 1992) (presenting testimony that "Jones, Day partners knew ACC Lincoln personnel were preparing loan underwriting summaries [after loans in question] had already been closed. [And] that Jones, Day attorneys participated in creating corporate resolutions to ratify forged and backdated corporate records"); ABA WORKING GROUP ON LAWYERS' REPRESENTATION OF REGULATED CLIENTS, LABORERS IN DIFFERENT
lated client outside the litigation context, the lawyer may have the further obligation of cooperating with (or, at a minimum, refraining from actions that would impede, or assist a client’s efforts to impede) regulators’ information gathering efforts—an issue aired most dramatically in the 1992 enforcement proceeding brought by the Office of Thrift Supervision (OTS) against Kaye, Scholer.47

In contrast, the litigator’s orbit is much broader and more elliptical, appropriately so, at least if we hold to the underlying premise that the purely partisan, adversarial process is institutionally and procedurally well-equipped to promote the search for “truth” and the interests of “justice.” In that context, all parties are presumed48


48. Of course, the usual presumptions about litigation resources and capabilities may at times be unfounded. See, e.g., LUBAN, supra note 5, at 64-65; RHODE, supra note 14, at 55-56. This is especially problematic where a huge disparity between opposing parties’ resources unbalances and undermines the adversary system’s underlying assumptions because
to have essentially unfettered access to the relevant facts (i.e., via
the discovery rules, with the usual exceptions, e.g., those for privi-
leged information) and relevant law (i.e., through their lawyer
advocates) on which the ultimate outcome will be predicated, as
well as the benefit of a proctor (i.e., the judge, magistrate, arbitrator)
to deter misrepresentations and other abuses of the process.
Here, a lawyer is free to be—and encouraged to be—totally parti-
san because it is up to opposing counsel to expose factual and legal
weaknesses in arguments being advanced on the client's behalf.\textsuperscript{49}
This largely\textsuperscript{50} absolves the litigator of accountability for “truth” or
“justice.”\textsuperscript{51}

Obviously, differences between business lawyering and litigation
could be fleshed out in considerably more detail. Yet even the con-
densed and familiar description offered here of the fundamental
disparities between two distinct roles commonly played by lawyers
in our society vitiates the utility of any “one size fits all” set of
rules—”model” or otherwise—of professional ethics. The defect of
such rules is that they, in David Wilkins's felicitous phrase, “suppress[] context.”\textsuperscript{52}
For 35 years, the mischief that has flowed from
that defect and from an anachronistic view of the legal profession
and its ethical obligations has given us one after another in a series
of scandals, each more damaging to the public—and to public per-
ception of the legal profession—than the last.\textsuperscript{53}

only rarely does David defeat Goliath. Those particular concerns are, however, outside the
scope of this Article.

49. See generally Fried, supra note 5.

50. The exceptions are prohibitions against counseling, suborning, or aiding and abet-

51. See Schwartz, Professionalism, supra note 11, at 673 (introducing concepts of “parti-
sanship” and “nonaccountability”).

52. Wilkins, Context, supra note 47, at 1152. Fred Zacharias has noted that the ABA eth-
ics codes, addressed as they are to the entire bar, are inadequate when it comes to crafting
rules for specialized areas of practice. See Fred C. Zacharias, Specificity in Professional Responsi-
bility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics, 69 Notre Dame L. Rev. 223
(1993).

53. As Enron's share price fell from a high of nearly ninety dollars to around twenty-
five cents, its 401(k) plan—in which 15,000 employees participated—lost 1.3 billion dollars.
1. See also Patrick J. Purcell, The Enron Bankruptcy and Employer Stock in Retire-
ment Plans 1, 3 (Jan. 22, 2002) (CRS Report for Congress) available at
http://www.americanbenefitscouncil.org/documents/rs_21115.pdf (on file with the Uni-
versity of Michigan Journal of Law Reform) (stating Enron stock traded at over $80 a share
in January 2001 and less than 70¢ a share in January 2002, and 62% of Enron 401(k) plans' as-
sets as of Dec. 31, 2000 were in Enron stock). In addition, while the damage occasioned by
these scandals to the integrity of the markets may well be incalculable, not so the probable
loss to shareholder value. Indeed, one year after the Enron debacle had surfaced, the stock
market, already depressed by the bursting of the “hi-tech bubble,” had lost an additional $7
Ethicists have advanced essentially three types of criticisms of the "hired gun" model. First, they argue that it subordinates the exercise by the lawyer of moral and professional judgment. Second, they observe that the underlying philosophy of partisanship is tainted by the bar's economic self-interest. Third, it is anti-contextual and seeks to regulate specialists in the same manner as is applied to that idealized and endangered species, the "general practitioner."

The first line of criticism asserts that the model subordinates interests that should rather be emphasized. Lawyers should consider non-client interests (e.g., justice or morality) when making professional judgments. David Luban and William Simon have both argued that lawyers should assume greater responsibility for judging the ends proposed by clients or potential clients. Luban, for example, suggests that the hired gun model is disrespectful of the law because adherence to the model rejects the notion that law possesses any ideal meaning and results instead in "instrumental" behavior that treats the law as an amoral tool to be used only to satisfy the client's objectives. He suggests replacing that model with a "morally activist" model in which the lawyer "shares and aims to share with her client responsibility for the ends she is promoting..." and also cares more about the means used than the bare fact that they are legal.

Frequently invoked as a basis for criticizing the dominant legal ethics paradigm is the conspicuous absence, particularly in the high-profile legal scandals of the past thirty-odd years, of lawyers exercising independent judgment about what is in the client's best

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trillion in value. Some might argue that the market will eventually recover and this loss is transient; perhaps that is so, for an artificial construct vaguely referred to as "the market," but the losses are certainly not transient to the millions of investors whose "nest eggs" were wiped out.

54. LUBAN, supra note 5; SIMON, supra note 5.
55. Luban refers to it as the "principle of partisanship." LUBAN, supra note 5, at 7, 11–18.
56. Id. at 18. Professor Luban identifies two species of "instrumental" behavior, "false formalism" and "false idealism," each of which he condemns. Id. He characterizes false formalism as arguments urging the technical letter of the law in a manner designed to subvert its spirit and false idealism as arguments intended to defeat the letter of the law by recourse to some underlying policy that animates the law. Id. Of course, as Luban acknowledges, these typical modes of lawyer behavior can only be wrong if one can identify a "true" spirit or meaning of the law. Id.
57. Id. at xxii. "As a result," Luban continues, "the morally activist lawyer will challenge her client if her representation seems to her morally unworthy; she may cajole or negotiate with the client to change the ends or means; she may find herself compelled to initiate action that the client will view as betrayal; and she will not fear to quit." Id.
interests, rather than reflexively (and uncritically) empowering client autonomy. Zealously representing a client "within the bounds of the law" is a very open-textured concept that depends, quite obviously, on one's conception of what "the law" is. William Simon's position is that the conception endorsed by the so-called "dominant view" is a hybrid recipe consisting chiefly of formalism and legal positivism—namely that "law" consists of nothing more than a set of rules—spiced with a pinch of libertarianism that permits the bar to envelop itself with the noble self-image of heroes construing such rules broadly against oppression of clients by the state. Professor Simon argues for a more flexible conception of what "law" is, a conception broad enough to encompass not merely a strict construction of the language of legal regimes but also their broad underlying purposes, adding to the recipe a soupçon of the common law's adaptability—putting old wine in new bottles, to extend the Epicurean metaphor—and adopting new legal standards from a larger context of societal norms. His antidote to the deleterious social effects of the "hired gun" model, then, is that "[I]awyers should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice." For Simon, unlike Luban, justice is not congruent with morality but denotes instead "legal judgments grounded in the


59. Representing a client "within the bounds of the law" was explicit under the prior regime of the Model Code, but the concept has been adulterated under the Model Rules by a surfeit of concern with the client's wishes. Canon 7 of the Model Code provided, "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." The same principle was set forth in the Ethical Considerations. See Model Code of Prof'L Responsibility EC 7-1 to 7-3 (1969). The pedigree of this notion goes back at least as far as the original ABA Canons of Professional Ethics, which pronounced that "the great trust of the lawyer is to be performed within and not without the bounds of the law." ABA Canons of Prof'L Ethics Canon 15 (1908). Cf. Model Rules of Prof'L Conduct R. 1.2(a) (2003) (providing that a lawyer shall abide by her client's decisions concerning objectives of the representation). The sop to lingering notions about the exercise of professional judgment is the assertion—hardly appropriate to be denoted as a "rule" per se—that representation of the client "does not constitute an endorsement of the client's political, economic, social or moral views or activities." Id. at R. 1.2(b).

60. See also Susan P. Koniak, The Law Between the Bar and the State, 70 N.C. L. Rev. 1389, 1448 (1992) ("The central and recurring theme in the profession's narratives portrays the lawyer as champion, defending the client's life and liberty against the government, which is portrayed as oppressor, willing, ready and able to use its power to destroy the individual and the values society holds dear.").

61. David Wilkins also calls for a more contextual approach to ethical norms. See Wilkins, Context, supra note 47.

62. Simon, supra note 5, at 54–62.
methods and sources of authority of the professional culture.\textsuperscript{63} Their two approaches are closer than might at first appear, however, given that what Simon means by "professional culture" is one in which lawyers will make "judgments that often, though not invariably, incorporate moral norms, including norms that sometimes justify ad hoc nullification or even conscientious resistance to laws whose operation is conspicuously unjust."\textsuperscript{64}

Both Simon and Luban hypothesize situations where a lawyer must choose between the client's objectives and the interests of justice. Such approaches are often criticized by the private bar as being overly academic. As Enron and the other contemporaneous corporate scandals have amply demonstrated, however, the resolution of such ethical dilemmas is no longer a matter of purely academic interest. Moreover, there are clearly some situations where the uncritical furtherance of the client's desires is anathema to what are, or should be, commonly shared moral imperatives.\textsuperscript{65}

Admirable and valuable as they are to the burgeoning discourse on legal ethics, both Luban's and Simon's work suffer—and this is no criticism of their work but a sad reflection of reality—from inevitable practical difficulties. In the frenetic, rough-and-tumble world of contemporary law practice, (A) few busy lawyers have the time to read such books; (B) fewer have the inclination to read them; (C) fewer still have actually read them; (D) of that minority, fewer yet, even in the so-called "elite" law firms, will have the requisite background in, or intellectual proclivities toward, moral philosophy and legal theory to internalize those readings and transform them into a workable \textit{modus operandi} for the quotidian pressures of law practice; and (E) the standards advocated by Luban and Simon, thoughtful as they are, nonetheless display some of the very same characteristics of vagueness that plague

\textsuperscript{63} Id.

\textsuperscript{64} Robert W. Gordon, \textit{The Radical Conservatism of the Practice of Justice}, 51 Stan. L. Rev. 919, 922–24 (1999) (reviewing Simon, supra note 5, and also pointing out other respects in which Simon's approach differs from Luban's).

\textsuperscript{65} One example of such clear-cut instances include the hiding of design defects of the Ford Pinto. See Luban, note 5 supra, at 206–17. Another is the Cigarette Papers episode, in which tobacco industry lawyers sheltered behind the cloak of confidentiality and the protections afforded by the attorney-client privilege and the work product doctrine industry-sponsored research into the relationship between cigarette smoking and health problems, even when that research unambiguously contradicted public representations to regulators and to the public at large. See Stanton A. Glantz \textit{et al.}, \textit{The Cigarette Papers} (1996); see also Bruce A. Green, \textit{Thoughts about Corporate Lawyers after Reading The Cigarette Papers: Has the "Wise Counselor" Given Way to the "Hired Gun"?}, 51 DePaul L. Rev. 407 (2001).
bar-crafted rules of professional conduct. What lawyers in the trenches need is a set of clear rules and standards of ethical conduct that will inform their decisionmaking in the cut and thrust of the competitive, pressure-cooker environment in which they find themselves. As the bar-crafted rules do not adequately perform this function, alternatives must be considered.

A second criticism of the partisan or "hired gun" philosophy that is seen as dominating bar-crafted rules of legal ethics is that the derivation of that approach proceeds less from a principled and comprehensive assessment of ethical issues facing legal practitioners than from the collective, economic self-interest of the organized bar. To be sure, the self-interested nature of many professional ethics rules has been well-recognized by economists, sociologists, and the legal academy, both in general and with regard to specific rules. Indeed, the American Bar Association's principal purpose in promulgating the original 1908 Canons of Professional Ethics was protectionist. "Rules of ethical deviance were neither universal nor timeless. They were applied by particular lawyers to enhance their own status and prestige. Deviance was less an attribute of an act than a judgment by one group of lawyers about the inferiority of another." Evidence of protectionism is

66. Rarely, of course, are situations quite as clear-cut as the Ford Pinto or Cigarette Papers episodes. When ethical dilemmas move into realms of uncertainty and indeterminacy, as they more commonly do, one finds few business lawyers steeped in moral philosophy. Furthermore, Luban's notion of "moral activism" presupposes the existence of a commonly shared morality, a proposition that is increasingly problematic in a large, predominantly secular, and pluralistic society such as ours.


69. See, e.g., Rhode, supra note 14, at 143–83 (proposing lawyer self-interest permeates virtually all aspects of attorney regulation).

70. See, e.g., Daniel R. Fischel, Lawyers and Confidentiality, 65 U. Chi. L. Rev. 1, 3–9 (1998) (stating confidentiality rules are structured primarily for the benefit of lawyers); Stephen Gillers, What We Talked About When We Talked About Ethics: A Critical View of the Model Rules, 46 Ohio St. L.J. 243, 270–72 (1985) (stating conflict of interest rules are structured primarily for the benefit of lawyers); Deborah L. Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491, 507–46 (1985) (proposing that character and fitness requirements for admission to the bar are designed principally to assist lawyers); see also Benjamin Hoorn Barton, Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation, 33 Ariz. St. L.J. 429 (2001); cf. Daniel R. Fischel, Multidisciplinary Practice, 55 Bus. Law. 951, 974 (2000) (taking the example of prohibitions on fee sharing and noting that proponents of that prohibition "have attempted to cloak their arguments in the rhetoric of 'professionalism,' 'lawyer's independence,' and the 'public interest,' [though] their goals are no different from any other trade union or interest group pursuing economic protectionism").

71. Auerbach, supra note 35, at 50. See also Karlin v. Culkin, 162 N.E. 487, 488–89 (N.Y. 1928) (Cardozo, C.J.) (castigating "unscrupulous minority" of the bar for "[a]mbulance
abundant. It animates greater difficulty in bar examinations (and the concomitant decline in bar passage rates),$^{72}$ unauthorized practice of law rules against multi-jurisdictional practice,$^{73}$ and the opposition to multidisciplinary practice as well.$^{74}$ The pervasiveness of protectionist responses$^{75}$ is nowhere more evident than in the

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$^{72}$ See Deborah J. Merritt et al., *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929, 929 (2001) (noting sharp decline in bar passage rates since 1994). Whether characterized by the somewhat punning phrase "raising the bar" (as in the article title just cited) or as "pulling up the ladder," such practices confer economic benefits upon existing practitioners, who can justify higher fee structures premised on the profession's higher qualification and entry standards without themselves having to meet those standards because they are "grandfathered" in. See Barton, *supra* note 70, at 441-44.

$^{73}$ See, e.g., Birbrower v. Superior Court, 949 P.2d 1 (Cal. 1998) (invalidating a retainer agreement, and fees billed thereunder, by a New York law firm to an originally New York-based client who later expanded its business and business presence into California in connection with settlement of a dispute (otherwise subject to arbitration) with a Delaware firm having its principal place of business in California, but curiously ruling that work performed for the California operations of the client by the New York firm in New York was severable from the "illegal" California-based work); *In re* Ferrey, 774 A.2d 62 (R.I. 2001) (denying fees to a Massachusetts lawyer representing a client before a Rhode Island administrative body, even though that body had admitted the lawyer *pro hac vice*). The Rhode Island Supreme Court arrogated unto itself alone the prerogative of *pro hac vice* admission and held that the administrative body's action was invalid. *Id.*


$^{75}$ An interesting take on the subject is offered in a recent article by Andy Perlman, who identifies protectionism as one of the reasons that representational rules and structural rules of ethics suffer from the lack of any unifying theory. See Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 FLA. L. REV. 977 (2003).
organized bar’s opposition to the proposed rules of the SEC pursuant to the statutory mandate of SOXA.\textsuperscript{76}

A third, and equally cogent, criticism of the hired gun model is that it seeks to impose a “one size fits all” method of regulating legal ethics upon an increasingly fragmented profession composed of fewer and fewer “general practitioners”\textsuperscript{77} and more and more specialists and sub-specialists in the proliferation of complex, highly regulated areas of practice.\textsuperscript{78} To talk in the 21st century about “the legal profession” is to speak of a nonexistent, monolithic construct that is, at best, a holdover of 19th century images of small-town or local law practice\textsuperscript{79} and, at worst, a figment of the imagination.\textsuperscript{80} Though the A.B.A.’s original 1983 Model Rules of Professional Conduct,\textsuperscript{81} which made certain rudimentary distinctions between a lawyer acting as an “advocate” or as a “counselor,”\textsuperscript{82} represented an acknowledgment of bar pluralism conspicuously absent from earlier avatars that relied exclusively on the adversarial litigation role model,\textsuperscript{83} the primacy of trial lawyers’ (and, in par-

\begin{thebibliography}{99}
\bibitem{76} See infra notes 304–28 and accompanying text.
\bibitem{78} See, e.g., JOHN P. HEINZ & EDWARD O. LAMMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 3 (1982) (“It has been apparent for some time that the simple view of the bar as a single, unified profession no longer fits the facts.”); David B. Wilkins, Legal Realism for Lawyers, 104 HARV. L. REV. 468, 515–18 (1990).
\bibitem{79} James W. Jones, Future Structure and Regulation of Law Practice: An Iconoclast’s View, 44 ARIZ. L. REV. 537, 541 (2002) [hereinafter Jones, Future Structure]. As Jones explains:
\begin{quote}
Our current paradigm sees the prototypical lawyer, much like the English barrister, as an independent, self-employed litigator who, as a generalist, serves as the personal representative of his clients and who, because of his unique skills and devotion to public service, is entitled to an exclusive franchise to a range of activities known as the ‘practice of law.’ Clients, under this model, are seen as autonomous individuals who lack the specialized knowledge of the lawyer concerning the processes, requirements, and language of the law and, thus, are vulnerable to the system.
\end{quote}
\textit{Id}. See also David B. Wilkins, Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics, in EVERYDAY PRACTICE AND TROUBLE CASES 68–108 (Austin Sarat et al. eds., 1998).
\bibitem{80} As Professor Wolfram has pointed out, the assumption that “all lawyers are sufficiently homogeneous to conform to common standards... was probably unfounded [even] in 1908,” when the A.B.A. first promulgated canons of professional ethics. WOLFRAM, supra note 37, at 54.
\bibitem{81} Model Rules of Prof’l Conduct (1983).
\bibitem{82} Compare id. art. 2 (Counselor) with id. art. 3 (Advocate).
\bibitem{83} See, e.g., WOLFRAM, supra note 37, at 54; Schwartz, Professionalism, supra note 11, at 670 (discussing failure of Model Code to make distinctions between litigation and counseling); E. Wayne Thode, The Ethical Standard for the Advocate, 39 TEX. L. REV. 575, 578–79 (1961) (discussing failure of 1908 Canons to address practice other than litigation); cf. MODEL CODE OF PROF’L RESPONSIBILITY (Preliminary Statement 1969) (setting standards for “all lawyers, regardless of the nature of their professional activity”).
ticular, criminal defense lawyers') concepts of zealous advocacy of, and unswerving loyalty to, the client continues to force square pegs into round holes.

Some tragic consequences of that disjunction are chronicled in Part II.

II. FROM NATIONAL STUDENT MARKETING TO ENRON AND OTHER RECENT SCANDALS

He saw a Lawyer killing a Viper
On a dunghill hard by his own stable;
And the Devil smiled, for it put him in mind
Of Cain and his brother, Abel.

The decline of lawyers’ professional ethics can begin innocently enough, but that downward slope can be slippery indeed. Facilis est descensus Averno. Let us briefly make a vicarious descent:

- Can it be ethical to alarm or intimidate corporate executives with the suggestion that particular conduct might lead (however remote that prospect might be) to individual criminal liability (i.e., introducing the prospect not merely of a fine for the corporate entity but of imprisonment) in order to induce them to authorize massive expenditures for an internal corporate investigation by the law firm?
- Can it be ethical for a law firm to staff a matter for a corporate client with the highest level employees who could conceivably perform particular tasks (e.g., using junior associates rather than nonlegal staff to photocopy

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84. See Rhode, supra note 14, at 55 (criticizing “bar’s overreliance on criminal defense as an all-purpose paradigm for the lawyer’s role”).
85. Cf. Jones, Future Structure, supra note 79, at 541 (explaining that rules for governing the legal profession assume that litigation is the normative setting for legal work); Carrie Menkel-Meadow, Ethics and the Settlements of Mass Torts: When the Rules Meet the Road, 80 CORNELL L. REV. 1159, 1188 (1995) (“[T]he Model Rules still represent an ethics for lawyers who are presumed to be engaged in a generic practice, with a focus on litigation—even transactional problems are analyzed with an assumption of the adversary model.”).
86. Samuel Taylor Coleridge, The Devil’s Thoughts, in 1 THE COMPLETE WORKS OF SAMUEL TAYLOR COLERIDGE 320 (Ernest Hartley Coleridge ed., 1912).
boxloads of corporate documents), thereby inflating firm billings?  

- Can it be ethical to mark-up long distance telephone charges, facsimile charges, and overnight courier charges, to impose charges per key-stroke of word processing done by secretarial staff, and to charge 25¢ or 50¢ per page for photocopying (when the going rate commercially is 5¢), and passing on these inflated charges to clients in their bills for legal services?  

- Can it be ethical to represent a corporate client against a hostile takeover but to refuse to consider a legal defense simply because it would have a deleterious impact on an investment banking client that refers millions of dollars of business to the law firm?  

- Can it be ethical, to paraphrase Roger Cramton, to "assist . . . the managers of insolvent or nearly insolvent [clients when one knows, or ought to know, they are]

87. Of course, worse practices abound, including fictitious hours and double billing. For review of some of these practices, see, for example, Lisa G. Lerman, Lying to Clients, 138 U. Pa. L. Rev. 659, 703-04 (1990). See also Lisa G. Lerman, Blue Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers, 12 GEO. J. LEGAL ETHICS 205 (1999) (discussing sixteen case histories).

88. These practices were rife in large law firms in the 1980s and early 1990s, until adverse publicity in the trade press led to an ABA ethics opinion condemning this practice, among others. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993).

89. Another much more shocking example of the lengths to which some lawyers will go (or, more properly, the depths to which they will descend) from the hostile takeover milieu has been chronicled. See Philip B. Heymann & Lance Liebman, M&A: The Conoco Takeover, in THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES, 106, 117-18 (1988). As summarized by David Luban:

At one point in the complex machinations, Seagram's entered a hostile tender offer for Conoco. Joseph Flom, Conoco's chief legal advisor in the tender fight (and the dean of mergers and acquisitions lawyers), suggested a number of strategies for fending off the takeover. Among them was a plan to alert Conoco's Arab suppliers that Seagram's was owned by Edgar Bronfman, a Jew who was highly active in Jewish affairs. Flom reasoned that if the suppliers made a fuss, then Conoco's board could not permit a potentially devastating change in ownership. The plan was carried out successfully. Here, assuming the account is correct, the lawyer has created a potential international incident, fomented and utilized antisemitism, and—perhaps—obstructed a legitimate and worthwhile market transaction. Yet here too the standard conception of the lawyer's role seems to preclude any moral criticism of the tactic.

cooking the books, lying to regulators, and defrauding investors . . . "?90

From a conventional ethical viewpoint, merely to ask such questions is, of course, to answer them. Yet, state bar associations and their disciplinary arms have been appallingly unable or unwilling (or both) to take effective steps to dissuade such behavior.91

Indeed, for approximately 35 years, a succession of frauds (e.g., National Student Marketing in the late 1960's to early 1970's, O.P.M. in the 1970's, abusive tax shelters of the 1970's and early 1980's, several of the more spectacular S&L failures during the S&L crisis of the 1980's and early 1990's,92 the global BCCI bank fraud of that same period, and now Enron, Tyco, WorldCom, etc. at the dawn of the 21st Century) have raised questions about lawyers' professional obligations when they know, or with the exercise of ordinary professional diligence should know, that corporate insiders or agents are engaged in unlawful activity, breaches of fiduciary duty to the lawyers' actual client (the corporation) that are likely to cause harm to third persons and/or the corporation.

The unvarnished truth is, of course, that none of these frauds could have been successfully perpetrated without the assistance of lawyers, usually skilled and knowledgeable lawyers from the nation's most elite law firms. That simple truth underlies the drafting and enactment of SOXA § 307, as evidenced by the contemporaneous

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90. Roger C. Cramton, Partners in Crime: Law Schools and the Legal Profession, 19 CORNELL L. FORUM 2, 5 (1993). Such assistance often includes, as chronied below, the rendering of legal opinions predicated on facts the lawyer knows, or with the exercise of reasonable diligence should know, are untrue.

91. Criticism of the efficacy of lawyer disciplinary proceedings comes from many quarters: the former Chief Justice of the United States, the ABA (somewhat unexpectedly), and (quite expectedly) public interest groups. See, e.g., SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AMERICAN BAR ASS'N, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1 (1970) [hereinafter CLARK REPORT]; SHARON TISHER ET AL., BRIDGING THE BAR TO JUSTICE 86–117 (1977); Warren E. Burger, The Decline of Professionalism, 65 FORDHAM L. REV. 949, 950 (1995); HALT, Lawyer Accountability, available at http://www.halt.org/reform_projects/lawyer_accountability (on file with the University of Michigan Journal of Law Reform). In a speech delivered September 20, 2002, former SEC Chairman Harvey Pitt asserted that, despite scrupulous record-keeping of referrals by the Commission to state bar associations for disciplinary action, there seems to have been no response from the state bars. Rachel McTague, Pitt Says SEC Will Take on Assignment of Disciplining Lawyers if State Bars Do Not, 79 BNA BANKING REP. 530 (Sept. 30, 2002).

92. To name but a few of the most notorious: Lincoln Savings & Loan of Irvine, California; American Diversified Savings Bank of Costa Mesa, California; Vernon Savings & Loan of Dallas, Texas; and Centrust Savings of Miami, Florida. See generally MARTIN MAYER, THE GREATEST-EVER BANK ROBBERY 293–94 (1990, rev. 1992).
remarks of certain Senators. For example, Senator Michael Enzi (R-Wyo.), referring to the corporate scandals that precipitated SOXA, observed “that probably in every transaction there was a lawyer who drew up the documents involved in that procedure.”

Even more telling was the statement by a co-sponsor of § 307, a former partner and CEO of Goldman Sachs, Senator Jon Corzine:

In fact, in our corporate world today—and I can verify this by my own experiences—executives and accountants work day to day with lawyers. They give them advice on almost each and every transaction. That means when executives and accountants have been engaged in wrongdoing, there have been some other folks at the scene of the crime—and generally they are lawyers.

A. National Student Marketing

1. The Ethical Problems—A planned merger between National Student Marketing Corp. (NSM) and Interstate Corp., companies represented, respectively, by two distinguished law firms, New York's White & Case (W&C) and Chicago’s Lord, Bissell & Brook (LB&B), was on the verge of foundering. Shareholder approval had been solicited based on disclosures that the acquirer, NSM, anticipated a $700,000 profit for the first nine months of that year, but, on the day of closing, NSM's accountants had developed cold feet and had not delivered the "comfort letter" (confirming that the $700,000 profit projection was consistent with GAAP) called for in the definitive merger agreement. The accountants had cold feet for good reason: the $700,000 profit represented to the sharehold-

94. 148 CONG. REC. at S6556 (statement of Sen. Corzine). As is well known, similar sentiments were expressed in the aftermath of the S&L crisis.
95. Rather than litigate, W&C, without admitting or denying the Commission's findings, stipulated to a consent order requiring it to comply with the federal securities laws and ordering it "to adopt, effectuate and maintain procedures in connection with its representation of clients in matters involving the federal securities laws." SEC v. Nat'l Student Mktg. Corp., Litigation Release No. 7012 (May 2, 1977) (on file with author). Among the procedures were "provisions relating to the taking on of certain new clients, review of certain registration statements by a second partner of the firm experienced in securities matters who is not otherwise involved in the transaction, and identification of certain circumstances involving the issuance of securities to the public where consultation with other partners within the firm is required." Id.
ers was non-existent and an accurate projection for the period in question was in fact a loss.

In *Securities and Exchange Commission v. National Student Marketing Corp.*, the SEC sued both law firms for allowing the deal to close without disclosing this material change in NSM's financial condition and prospects to the shareholders; indeed, not only did the lawyers allow the deal to close despite a huge discrepancy in the financial statements, but they also delivered at closing opinion letters to the effect that the merger complied with applicable laws.

The SEC asserted that the rules of ethics required any lawyer who knows his client is committing fraud to endeavor to persuade the client to desist, and, failing that, to disclose the fraud. Interestingly, in 1972, at the time the case was brought, this ethical norm was endorsed by the American Bar Association and was part of the *Model Code of Professional Responsibility*, then the prevailing body of rules governing lawyers because it had been almost universally adopted by the states.

The complaint sought injunctive relief designed to prescribe a flow chart of attorney conduct in such situations:

1. endeavor to get the clients to postpone the merger, and thereupon revise the documents to make them not misleading and resubmit them to the shareholders;

2. if that fails, endeavor to impede the closing of the transaction by refusing to provide requisite opinions of counsel; and

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97. *Id.* at 714–15.
99. *Model Code of Prof'l Responsibility* (1969). The extant (1969) version of DR 7-102(B)(1) provides: "A lawyer who receives information clearly establishing that...[h]is client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal." This language restated what had been the prevailing (and longstanding) ethical rule under the predecessor regime, the *Canons of Professional Ethics*, which provided in pertinent part: "When a lawyer discovers some fraud or deception has been practiced, ...he should endeavor to rectify it; at first by advising his client, and if his client refuses to forgo the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps." *Canons of Prof'l Ethics* Canon 41 (1908).
100. *Wolfram, supra* note 37, at 56.
(3) if that fails, resign the engagement and disclose the client fraud to the SEC and the shareholders.  

The bar vigorously and stridently opposed this approach, arguing that any such ethical precept was, in effect, "trumped" by another ethical principle—the lawyer's duty of confidentiality.  

To continue this whist/contract bridge metaphor, the SEC's complaint posited what was at the very least a no trump regime, or possibly even a different trump system, embodying a contrary hierarchical array of ethical duties—one where the obligations of rectification and disclosure in the case of client fraud would trump the duty of confidentiality, either in general or, at the very least, where necessary to stop the fraud.

In an article published ten years ago, Susan Koniak offered a trenchant critique of the court's somewhat bizarre decision in National Student Marketing. On the one hand, it held that the lawyers had violated the federal securities laws by knowingly and substantially assisting the client fraud, even where the extent of the lawyer's conduct was, in effect, to stick his head, ostrich-like, in the sand and pretend not to see the fraud. "Silence or inaction in such situations is wrong," the court opined, "[because] the attorneys' responsibilities to their corporate client required them to take steps to ensure that the information would be disclosed to the shareholders."  

Koniak pointedly criticized the court for begging the question. Not only did the court fail to specify what those steps should be, or even what the lawyers did in the case that violated the securities laws, but it went on to say: "[I]t is unnecessary to determine the precise extent of their obligations here, since ... [the lawyers] took no steps whatsoever to delay the closing ... But, at the very least, they were required to speak out [to their clients] at the clos-


102. See, e.g., ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 287 (1945), interpreting the predecessor to the Model Code, the CANONS OF PROF'L ETHICS (1908): "We do not consider that either the duty of candor and fairness to the court, as stated in Canon 22, or the provisions of Canon 29 [requiring disclosure of perjury] or Canon 41 [requiring disclosure of fraud to the injured party or tribunal] ... are sufficient to override the purpose, policy and express obligation [to keep client confidences] under Canon 37."


105. Id. at 713.

106. Koniak, supra note 103, at 1081 ("What steps? There's the rub.").
As Koniak observed, the words "at the very least" suggest that further obligations, such as disclosure, resignation, or both, might be appropriate, but the court declined to take a position, to grant the SEC's requested injunction, or even to explain why specification of a securities lawyer's obligations in this setting was "unnecessary." Instead, the court merely invited the organized bar to reconsider its position: "The very initiation of this action . . . has provided a necessary and worthwhile impetus for the profession's recognition and assessment of its responsibilities in this area." Amazing is it not, what six years of litigation can yield?

Even more pernicious than the court's abdication of its responsibility to come to grips with the issues raised by the case was the equivocal message conveyed by the decision. On the one hand, the bar was presumed to enjoy plenary self-regulatory authority over the conduct in question, even to the extent of defining for itself (potentially at odds with the regulatory pronouncements of the SEC) what constitutes securities fraud, notwithstanding the bar's known proclivities toward elevating client confidentiality above all other ethical values. Furthermore, the court declined to enjoin LBL to revamp its internal policies and procedures in a manner that would minimize the risk of repeating the misconduct identified in the case, because the court assumed that the firm would voluntarily take "appropriate steps" to see to it that its lawyers "conform their conduct to the dictates of the law." This sent a strong message to the bar that its hegemony over professional regulation was undiminished by the regulatory context of the case.

To justify its refusal to sanction the lawyers, the court expressed its confidence that the defendants' "professional responsibilities as attorneys and officers of the court" would lead them to honor the court's interpretation without force. The court's confidence in the lawyers before it, and by extension in all lawyers, rings hollow. According to the court, the lawyers before it aided securities fraud, and the bar needed the SEC's threat of force to mend its ways . . . [Yet], according

108. Koniak, supra note 103, at 1081.
110. Id. at 716–17. Sadly, the firm failed to take those steps, an omission that only came to light seventeen years later when it was sued for similar securities law violations and ended up settling for $24 million. See Tim O'Brien, Some Firms Never Learn, AM. LAW., Oct. 1989, at 63–64.
to the court, [it] need not back its interpretation with force because lawyers, members of the bar, are involved. The court seems to have been determined to perpetrate the myth that lawyers, unlike the rest of the populace, are so committed to the law (at least as articulated by courts) that no power is needed to ensure the legal community’s obedience. At the same time, the court seems to have been all too aware that this is a myth—a myth that might be shattered if courts articulated with any precision what a lawyer must do instead of just sitting there. Rather than test the myth and risk shattering it, the court abdicated its responsibility, leaving the state and the bar to battle over the shape of the law.\footnote{Koniak, supra note 103, at 1083 (citations omitted).}

On the other hand, as Koniak notes, the court did not brand the SEC’s enforcement posture as inappropriate or illegitimate.\footnote{Id. at 1081–82.} Far from it: The court did accept the notion that the lawyers in the case were culpable to some unspecified degree.\footnote{As for closing opinions asserting that the merger complied with applicable laws, the court concluded that this was not sufficient to constitute “substantial” assistance to securities fraud so as to give rise to aiding and abetting liability. See Nat’l Student Mkig., 457 F.Supp. at 715. Koniak has more recently criticized this aspect of the court’s decision as well: “[T]hat reasoning conflicts with the court’s holding that silence during the meeting constituted substantial assistance.” Susan P. Koniak, When the Hurlyburly’s Done: The Bar’s Struggle With the SEC, 103 COLUM. L. REV. 1236, 1252 (2003). Arguably, Koniak’s criticism does not go far enough. Opinions of counsel such as those exchanged at the National Student Marketing closing are, in fact, indispensable to the parties’ ability to consummate the transaction and are frequently a condition precedent (as they were, in fact, in National Student Marketing) to the parties’ obligations to close. See, e.g., SAMUEL C. THOMPSON, JR., BUSINESS PLANNING FOR MERGERS AND ACQUISITIONS 784 (2d ed. 2001). Put another way, the transaction cannot close without delivery of those opinions and, by delivering them under these circumstances, the lawyers were allowing their work product to be used by the client to effect a fraudulent result. Hence, to require of the lawyers some affirmative persuading or cajoling activity to motivate the client to “do the right thing” was actually superfluous, when all they needed to do was refuse to deliver the requisite closing opinions. See infra notes 153–55 and accompanying text for more on the efficacy of this campaign. At the same time that it gave comfort to the ABA, however, National Student Marketing sent an implicit message to the federal government that it may under appropriate circumstances be able to use its enormous power to coerce the bar into reconsidering its position on ethical issues, thereby creating the institutional incentives for the OTS’s use of administrative enforcement actions against law firms, including its notorious 1992 action against Kaye, Scholer.}
agency into the prerogative of the states to regulate and discipline attorneys.  

2. The Regulatory Response—The ABA had a double-barreled reaction to the SEC's stance in the NSM case. Both barrels were aimed at strengthening the citadel of client confidentiality, which the bar has since conveniently (if mistakenly) characterized as one of its "core values." 

First, the ABA amended the Model Code's DR 7-102(B) in 1974 to vitiate the lawyer's disclosure obligation thereunder "when the information is protected as a privileged communication." Given the breadth with which the bar interprets the scope of privileged communications, this effectively renders any affirmative obligation on the part of attorneys to rectify client fraud nugatory. As a leading legal ethics treatise tartly observes, "To

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115. Faced with a storm of professional outrage, the SEC took a considerably more modest position in In re Carter and Johnson, 47 S.E.C. 471 (1981) (explaining that when a lawyer with significant responsibilities in the effectuation of a company's compliance with the disclosure requirements of the federal securities laws becomes aware that his client is engaged in a substantial and continuing failure to satisfy those disclosure requirements, his continued participation violates professional standards unless he takes prompt steps to end his client's noncompliance); see infra notes 147-52 and accompanying text.

116. That characterization came in connection with the ABA House of Delegates' rejection in 2000 of the recommendations of its Commission on Multidisciplinary Practice. See John Gibeaut, "It's a Done Deal": House of Delegates Vote Crushes Chances for MDP, A.B.A. J., Sept. 2000, at 92. That rejection was accompanied by a resolution on "core values of the profession" that provided, in pertinent part, "1. It is in the public interest to preserve the core values of the legal profession, among which are ... [c.] the lawyer's duty to hold client confidences inviolate." ABA House of Delegates Resolution adopted July 2000, § 1(c), available at http://www.abanet.org/cpr/mdprecom10F.html (on file with the University of Michigan Journal of Law Reform). Nathan Crystal has elegantly demonstrated that this notion lacks a sound footing from either the historical or the policy points of view. See Nathan M. Crystal, Core Values: False and True, 70 FORDHAM L. REV. 747, 756-62 (2001).

117. See supra note 99 (discussing 1969 version).


119. A somewhat bizarre application of these principles arose in Massachusetts where a law firm was sued for knowingly failing to disclose in a private placement memorandum that its client was insolvent. Paradoxically, the court concluded that the firm might be liable in negligence to third parties that it knew would rely on its legal work, but not for intentionally misleading behavior, as was alleged here. Austin v. Bradley, Barry & Tarlow, P.C., 856 F.Supp. 36, 40 (D. Mass. 1993). Though the case was decided ten years after introduction of the Model Rules, Massachusetts remained governed by its version of the Code of Professional Responsibility. In balancing the duty of confidentiality against the duty owed to third parties, the court curiously failed to come to grips with the Code's requirement that the lawyers endeavor to rectify client fraud when their services were being used to further it. Instead, the court found the law firm's economic interests in keeping the client happy and
effectively repeal the duty to rectify fraud, while nominally preserving it, is surely disingenuous.\textsuperscript{120}

Second, the ABA adopted a policy statement that threw down the gauntlet:

Any principle of law which, except as permitted or required by the [Model Code], permits or obliges a lawyer to disclose to the S.E.C. otherwise confidential information should be established only by statute after full and careful consideration of the public interests involved and should be resisted unless clearly mandated by law.\textsuperscript{121}

Professor Koniak’s criticism of this language, and of subsequent language in the policy statement expressing apprehension about lawyers being deterred from maintaining client confidences by an “erroneous position of the S.E.C. or a questionable lower court decision,”\textsuperscript{122} is succinct and devastating.\textsuperscript{125} Her main point is that implicit in the bar’s language and lobbying efforts is the notion that lawyers as a group (ill-defined, of course, though presumably the ABA hierarchy, which is dominated by the Section on Litigation, is really referring to itself) “know better”\textsuperscript{124} than the legislative and executive branches of government what the law is and will construe contrary pronouncements that infringe upon lawyers’ turf as narrowly as possible, and a “call to arms” for members of the bar to resist.\textsuperscript{125}
Koniak's enthusiasm for deconstructing the National Student Marketing decision is manifest. Yet the case is "becoming an anachronism," not merely because the harm pales beside that caused by the other scandals summarized here in Part II, but because of more recent judicial decisions condoning far worse lawyer conduct in connection with securities matters. The oft-excoriated Fourth Circuit decision in Schatz v. Rosenberg held that lawyers could substantially assist clients in committing fraud in a securities transaction and escape liability even where they knew of the fraud and had "papered" the deal. The Fourth Circuit again, in Fortsen v. Winstead, McGuire, Sechrest & Minick, though acknowledging the law firm's violation of pertinent securities laws as well as a formal opinion of the ABA Standing Committee on Professional Ethics, refused to hold the firm liable for failing to question clients about their clients' compliance with the law or to compel lawyers to give advice resolving all doubts in favor of regulatory restrictions would evoke serious and far-reaching disruption in the role of the lawyer as counselor, which would be detrimental to the public, clients and the legal profession." ABA Policy Statement, supra note 121, at 545. This formulation owes much to the "criminal defense" mindset of the bar's ethics dogma, but "[b]ar rhetoric that casts the lawyer as a 'champion against a hostile world' seems out of touch with most daily practice. The vast majority of legal work assists corporate and wealthy individual clients in a system that is scarcely hostile to their interests. When a Wall Street firm representing a Fortune 500 corporation squares off against understaffed regulators or a victim of unsafe products, the balance of power is not what bar metaphors imply." RHODE, supra note 14, at 55.


128. See, e.g., Geoffrey C. Hazard, Jr., Schatz Ruling Errs on Legal, Moral Basis, NAT'L J., Jan. 20, 1992, at 17; Peter C. Kostant, Sacred Cows or Cash Cows: The Abuse of Rhetoric in Justifying Some Current Norms of Transactional Lawyering, 36 WAKE FOREST L. REV. 49, 56 (2001); Langevoort, supra note 127, at 87–88; Richard W. Painter & Jennifer E. Duggan, Lawyer Disclosure for Corporate Fraud: Establishing a Firm Foundation, 50 SMU L. REV. 225, 244 (1996). See also David Luban, Contrived Ignorance, 87 GEO. L.J. 957, 979 n.52 (1999) (explaining that the "court simply rolled outright lies into the category of nonfraudulent nondisclosures" and in responding to argument that Maryland's stringent legal ethics rules required disclosure or withdrawal, "stated that ethics rules are not rules of civil liability—completely ignoring the Schatzes' point that ethics violations should establish liability under federal securities law, not under the ethics rules"); Richard M. Philips, Client Fraud and the Securities Lawyers' Duty of Confidentiality, 49 WASH. & LEE L. REV. 823, 826–28 (1992) (characterizing Schatz as an extreme case and noting that, even within the securities bar, there is concern that the "obligation of silence" under Model Rule 1.6 "undermines public confidence in the integrity of the profession").

129. 943 F.2d 485 (4th Cir. 1991).

130. 961 F.2d 469 (4th Cir. 1992).

illegal schemes. In another case, knowingly misrepresenting to buyers of securities and their counsel that the issuer was not in default on loan obligations and that the proposed transactions would not constitute a further default, as well as warning them against communicating directly with the lender in question, was astonishingly deemed by a district court to be a suitable occasion for awarding summary judgment to the law firm, a decision that was initially affirmed on appeal, only to be finally reversed en banc, albeit with several judges in dissent.

Other courts have demonstrated institutional reluctance—indeed, distaste—for anything smacking of imposing liability for failure to "tattle" on clients, even where the lawyers affirmatively threatened third parties (securities analysts, journalists, and even members of the public!) if they should investigate or publish articles about the client's financial condition, or where the lawyer was also a director whose board colleagues were buying a minority shareholder/director's stock without disclosing to their seller colleague the existence of secret negotiations to buy the company.

134. The disparaging "tattling" motif—an all but outcome determinative characterization because of the word's primal, stigmatizing connotations from typical elementary school experience—appears to have originated with, of all people, Judge Frank Easterbrook, in Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 497 (7th Cir. 1986) ("Neither lawyers nor accountants are required to tattle on their clients in the absence of some duty to disclose."); and to have been quoted with approval in a number of other cases. See, e.g., Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1207 (11th Cir. 2001); Schlaifer Nance & Co. v. Estate of Andy Warhol, 927 F.Supp. 650, 661 (S.D.N.Y. 1996), aff'd, 119 F.3d 91 (2d Cir. 1997); Abell v. Potomac Ins. Co., 858 F.2d 1104, 1133 (5th Cir. 1988), vacated on other grounds, 492 U.S. 914 (1989); In re Infocure Sec. Litig., 210 F.Supp. 2d 1331, 1353 (N.D. Ga. 2002); Morin v. Trupin, 711 F.Supp. 97, 113 (S.D.N.Y. 1989). That the quoted language from Judge Easterbrook's opinion begs the question posed in all these cases (i.e., whether there is a duty to disclose) is, perhaps, too obvious a point for judges fond of the anathematizing "tattling" label to trouble themselves about. Cf. In re Rospatch Sec. Litig., Nos. 1:90-CV-805, 1:90-CV-806, 1992 WL 226912, at *7 (W.D. Mich. July 8, 1992) (characterizing Schatz and Barker as "pure tattling cases"); Ferguson v. Lurie, No. 89 C 2283, 1990 WL 180582 (N.D. Ill. Oct. 31, 1990) (holding the allegations of the second amended complaint sufficient to survive motion to dismiss and not implicating Barker's concern with tattling on clients).
137. Camp v. Dema, 948 F.2d 455, 463 (8th Cir. 1991). The court's conclusion that the information was not significant because it was confidential stands legal analysis on its head. Apart from the oddity of condoning negotiations for sale of the company that can be kept "confidential" from a member of the board, it was only because of the nondisclosure of those secret negotiations that the fraud and deception in question could have taken place.
In these cases, whether the court chooses to hide behind the analytically bankrupt "tattling" metaphor or not, the point is not simply imposing liability for merely keeping silent but for affirmatively—and knowingly—involving oneself in furthering the client's fraud. Thus, these decisions are actually much worse than *National Student Marketing*. There, while the SEC sought to hold the lawyers responsible for failure to take steps to stop the merger once they learned that shareholder approval had been procured on the basis of false financial information, there was no evidence of *scienter* at the time the false and misleading disclosure statements were prepared or filed and no evidence that the lawyers desired to facilitate the fraud. Thus the bar's public relations campaign in the wake of *National Student Marketing* has been unusually successful in predisposing the judiciary to distend client confidentiality—even to cover circumstances where lawyers threaten lawsuits in order to dissuade investors or others from self-help to learn the truth—and thereby largely immunize business lawyers from the consequences of their own misconduct.

The question that one wants to ask with respect to this tactic of threatening investors to prevent them from learning material facts, however, and one that keeps recurring in case after case like a fugue subject, is: "What could these lawyers have been thinking?" Is there any way, other than by recourse to the most extreme interpretation of what it means to be a zealous advocate, to justify that...


139. Cf. *In re Carter & Johnson*, 47 S.E.C. 471 (1981) (explaining that the SEC, in the context of a Rule 2(e) disciplinary proceeding, found no willful aiding and abetting in lawyer silence or inaction in the face of client misconduct, but rather lawyers who were "simply at a loss for how to deal with a difficult client") For discussion of SEC administrative actions and Rule 2(e), see infra notes 141-55 and accompanying text.
sort of behavior, especially when, outside the litigation context, the "zealous advocate" characterization is inapt and inappropriate?

So much for private securities litigation, but what of the possibility of an SEC proceeding? Sadly, the bar's campaign has been quite effective in diluting this alternative as well, and, since 1981, relatively few such proceedings have been brought against lawyers. Indeed, the frequency with which one encounters the "revolving door" phenomenon with securities lawyers from elite firms becoming senior SEC officials (including Commissioners), developing close working relationships with both career SEC staff and other "revolving door" personnel, and then returning to private practice makes that agency unusually susceptible to regulatory capture by the private securities bar.

In the aftermath of the court's unsatisfying decision in *National Student Marketing* and the unremitting hostility of the private bar, the Commission developed an understandable preference for proceeding administratively. The first significant action against a law firm was *In re Keating, Muething & Klekamp*, in which the Commission alleged that the law firm had prepared for its client a variety of documents and legal opinions and had provided legal advice and a range of legal services in connection with transactions in which the filings made with the SEC contained untrue statements of material facts and material omissions of fact. The proceeding, which was brought under the SEC's Rule 2(e), was contemporaneous with a civil injunctive action filed against the client, its controlling shareholder, chairman and president, Ohio magnate Carl H. Lindner,

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142. 17 C.F.R. § 201.2(e) (1979). Under Rule 2(e), the SEC reserves the right to discipline professionals appearing or practicing before it whom it finds to lack the requisite qualifications, to lack character or integrity (or to have engaged in unethical or improper professional conduct), or to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws. *Id.* During the SEC's 1995 revisions of its rules of practice, Rule 2(e) was recodified as Rule 102(e), 17 C.F.R. § 201.102(e), but without any substantive change to its language or scope.
and two of the name partners, Charles H. Keating, Jr. and Donald P. Klekamp. Both proceedings were settled by consent.

In the Rule 2(e) proceeding, the Commission declined to impose any sanction against the law firm but preferred to announce standards of attorney conduct prospectively. Commissioner Roberta Karmel, in dissent, questioned the SEC's authority to discipline lawyers under Rule 2(e) and expressed the belief that "it is repugnant to our adversary system of legal representation to permit a prosecutorial agency to discipline attorneys who act as counsel to regulated persons. The frequently made distinction between the lawyer as an adversary versus the lawyer as an advisor cannot and should not be made by an agency with significant prosecutorial responsibilities." This drew a retort from Chairman Harold Williams, who wrote separately to point out that "Federal courts have recognized the authority of agencies generally to discipline professionals who practice before them," and to assert that he could not "accept that the Commission should now, as a matter of law, reverse itself, conclude that it lacks an authority which it has repeatedly exercised, and deny its ability to shield its administrative mechanisms from those professionals who have demonstrated a capacity and willingness to abuse those processes." More widely known is the Commission's landmark Carter & Johnson proceeding. The case concerned falsely rosy reports of financial condition intended to deceive lenders. The lawyers, outside securities counsel, advised the client to make appropriate disclosures, but the client refused. In dismissing the case, the Commission concluded that the lawyers in question had neither aided and abetted the issuer's disclosure violations nor violated established standards of professional conduct. The Commission also rejected the staff's position that taking no action while the client committed securities fraud constituted ethical and professional misconduct. However, the Commission did take the opportunity

143. This was the very same Keating who, within a few years, would preside over one of the largest and most damaging financial frauds in U.S. history, Lincoln Savings & Loan of Irvine, California.
145. Id. at *17. Rule 2(e) dated back to the 1930's, and since that time, the Commission had brought over 100 proceedings thereunder against lawyers and eighty against accountants. Id.
146. Id. at *18.
148. Id. at 500-12.
149. Id. at 511-12.
to announce a prospective standard for lawyers with significant responsibilities regarding a company's compliance with the disclosure requirements. If such a lawyer should become aware that his client is engaged in a substantial and continuing failure to satisfy those disclosure requirements, his continued participation would violate professional standards unless he took prompt steps to end the client's noncompliance.\(^\text{150}\) While initially counseling that accurate disclosure would adequately discharge the lawyer's obligation, the Commission stated that there may come a point at which a reasonable lawyer must conclude his or her advice is not being followed or sought in good faith.\(^\text{151}\) At that point, the lawyer would be required to take some other action, such as approaching other members of the company's management or its board of directors, or even resigning from the representation, to avoid the inference of having been co-opted into the scheme of non-disclosure.\(^\text{152}\)

Since *Carter & Johnson*, the SEC has followed a practice, first announced in 1982 by then-General Counsel Edward Greene, of not commencing a Rule 2(e) proceeding against an attorney in the absence of a prior determination by an Article III court that the attorney was guilty of wrongdoing in connection with securities laws.\(^\text{153}\) The agency's punctilious observance of this practice, and the inordinate attention that it gives to proceedings against members of the private securities bar,\(^\text{154}\) is a strong indication of the

\(^{150}\) Id. at 511.
\(^{151}\) Id. at 511–12.
\(^{152}\) “What is required, in short, is some prompt action that leads to the conclusion that the lawyer is engaged in efforts to correct the underlying problem, rather than having capitulated to the desires of a strong-willed, but misguided client.” Id. at 512. Applying this standard in a subsequent proceeding in the Salomon Brothers government securities trading scandal, the Commission held that Salomon's chief legal officer, knowing that a trader had submitted false bids on Treasury securities, should have taken affirmative measures to cause the misconduct to be addressed. These measures ranged from taking the matter straight to the board of directors, resigning from the representation (difficult when one is a full-time employee), or disclosing to regulatory authorities. See *In re Gutfreund*, SEC Release No. 34-31554, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,067 (Dec. 3, 1992).


degree to which the SEC has been subject to regulatory capture by elite securities attorneys.\textsuperscript{155}

\section*{B. Tax Shelter Opinions}

1. The Ethical Problems—In general, tax shelters are nothing more than tax-advantaged investments making use of benefits and tax preferences Congress has provided in the Internal Revenue Code. In addition to enjoying a return on the investment, the purchaser may benefit from a deduction or tax credit that serves to reduce or “shelter” taxable income from other sources. There is nothing intrinsically wrong or unethical about either purchasing or marketing a tax shelter or furnishing counseling or other legal services in connection with such shelters, because there is no legal or ethical obligation to pay more in taxes than the law requires. Nevertheless, as with other investment vehicles, there is potential for abuse.

Beginning in the early 1970's, tax shelters began to be marketed to smaller, middle-class investors who previously could not have afforded them. As that decade wore on, with the advent of double-digit inflation, soaring interest rates, and high marginal tax rates, demand for such investments skyrocketed, and unscrupulous promoters saw an opportunity to sell investments that were not genuinely intended to exploit areas of business (e.g., energy) upon which Congress had, for policy reasons, decided to confer tax preferences, and that, in fact, had no business purpose or investment rationale other than tax avoidance.\textsuperscript{156} These “abusive” tax shelters took advantage of a number of factors, including the limited audit resources of the Internal Revenue Service (IRS), the high cost of audits relative to the anticipated return, and the fact that ordinary investors could be inoculated against severe tax penalties because they reasonably relied on legal opinions rendered in connection with the investment offering and could not, therefore, be proved

\textsuperscript{155} Nor is it an accident that most of these articles in the preceding footnote were published in the \textit{Business Lawyer}, the official journal of the ABA's Business Law Section, which is dominated by the securities bar. See infra note 428 and accompanying text.

\textsuperscript{156} For example, land flips and other transfers of property at artificially inflated prices, passing off nonrecourse debt as risk debt, sham trading to create losses, and allocating income and tax deductions in limited partnerships in a manner totally at odds with economic reality.
by the IRS to have acted recklessly or fraudulently (or, indeed, even negligently).

Thus, after years of banging its head against the wall in failed attempts to crack down on these abusive tax shelters directly, the IRS realized that the most promising avenue of attack was against the legal opinions themselves. Three genres of legal opinions aided significantly in promoting such shelters, and they shall be categorized here as (i) phantasms, (ii) "pure" hypotheticals, and (iii) selective ignorance. Phantasms were legal opinions proceeding from a set of meticulously identified factual assumptions that allowed the opinion giver to opine favorably from the tax perspective (based, of course, solely on those factual assumptions), even though those assumptions did not necessarily bear any resemblance to reality. "Pure" hypotheticals were opinions proceeding from naked sets of facts, the tax consequences of which were clearly spelled out, but without any hint of even a remote connection to the actual facts of an actual transaction or investment opportunity. Selective ignorance opinions gave consideration to only some (and usually, the least difficult or controversial) of the tax issues raised by a particular transaction or investment opportu-

157. As argued in Part IV, infra, one pervasive problem in federal agency actions against lawyers is the agency's inherent conflict of interest. Federal agencies, like governmental units anywhere, are chronically understaffed and underfunded. Nothing would please them better than to be able to deputize the private bar to assist them in performing their appointed regulatory functions. This temptation, and the linkage of claims brought with the agency's substantive policies, causes many attorney disciplinary proceedings (e.g., SEC Rule 2(e) proceedings, see supra notes 141-55 and accompanying text) or enforcement actions (e.g., OTS proceedings against law firms, see infra notes 430-39 and accompanying text) to lose the appearance of fairness. Arthur Best noted a similar problem with respect to the Treasury's effort to crack down on tax shelter opinions:

When [Treasury] proposed standards for lawyers who write opinions for planned tax shelter transactions tensions such as those described in connection with the SEC's work developed, leading the ABA's Committee on Ethics and Professional Responsibility to issue an opinion that countered some of Treasury's standards. Compare Tax Shelters; Practice Before the Internal Revenue Service, Proposed Treas.Regs., 45 Fed. Reg. 58,594 (1980) (allowing opinions given with due diligence in representing facts) with ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 346 (revised 1982) (forbidding knowing or grossly incompetent "false opinions which ignore or minimize serious legal risks or misstate the facts or law.").


158. If, as was frequently the case, the facts differed from those assumed, the opinion was not worth the paper on which it was written.

159. Effectively, then, the "pure" hypotheticals were a subspecies of the "phantasm" opinions described in the preceding footnote, and of comparable value.
nity while ignoring—indeed, not even identifying the existence of—the others.\footnote{160}

Previously, the Treasury Department had promulgated regulations, commonly referred to as Circular 230,\footnote{161} that governed tax practice before the IRS. In 1980, the Treasury decided to amend Circular 230 to set forth stricter standards of conduct for attorneys providing tax shelter opinions that were intended for distribution to investors (most, if not all, of whom were not, of course, the attorneys' clients) as part of the offering materials.\footnote{162}

2. The Regulatory Response—First, the regulatory response should be bifurcated into two components: the regulatory response from the Department of the Treasury and the regulatory response from the bar.

When the bar failed to take up the gauntlet promptly, the Treasury stepped into the vacuum and promulgated revisions to Circular 230 that sparked some controversy. First, the proposed revisions required tax lawyers to exercise due diligence in order to ensure (1) that the facts relevant to the offering were fully and fairly described in the offering materials, (2) that pertinent legal issues were fully and fairly described therein, and (3) that the tax opinion was properly described therein.\footnote{163} Second, the proposed revisions prohibited tax practitioners from issuing any opinion other than one taking the position that it was more likely than not that the bulk of the tax benefits described in the offering would be available to investors.\footnote{164} While some bar groups were sympathetic to the

\footnote{160. From the investor's point of view, this category of opinions was the most pernicious, inasmuch as the investor was likely to be lulled by the opinion into believing that all the important tax issues relating to a particular tax shelter had been considered and analyzed by competent counsel. Even where the text of the legal opinion specified that it was addressing solely certain issues, lay persons would not realize the significance of such an implicit disclaimer or even entertain a moment's suspicion that a professional would give an opinion treating less than all of the relevant tax issues.}

\footnote{161. See 31 C.F.R. § 10.0 et seq (2002). The scope of Circular 230 encompasses a range of matters, including eligibility for admission to practice, standards of practice, and disciplinary measures.}

\footnote{162. Actually, the Treasury originally endeavored to persuade the bar to adopt appropriate guidance. See Robert Mundheim, Remarks on Standards for Tax Attorneys, 15 DAILY TAX REP. J-1 (Jan. 22, 1980), reprinted in BERNARD WOLFMAN & JAMES P. HOLDEN, ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE 175 (2d ed. 1985). When those efforts at moral suasion came to naught, the Treasury resorted to rattling its sabers by threatening regulation and, when the bar was slow to act, actually promulgated amendments to Circular 230. See Dept. of the Treasury, Tax Shelters; Practice Before the Internal Revenue Service, Proposed Rule, 45 Fed. Reg. 58,594 (Dep't of the Treasury Sept. 4, 1980) (to be codified at 31 C.F.R. pt. 10).}

\footnote{163. Id.}

\footnote{164. Id. at 58,597.}
need for regulation, the reaction of the bar as a whole was decidedly negative. Predictably, the principal defect complained of was that regulation of lawyers was the purview of the bar, not the federal government. 165

Within a year, in response to the Treasury's proposed revisions, the ABA Standing Committee issued a formal opinion 166 declaring that an attorney providing a false opinion 167 was violating the disciplinary rules of the Model Code 168 and establishing eight aspirational (i.e., derived from the Model Code's Ethical Considerations) principles as guidance 169 for lawyers issuing tax shelter opinions. 170 The guidance was indeed well conceived and fairly
comprehensive, and was drafted with due regard to what ought to be the lawyer’s obligations when called upon to issue a tax shelter opinion. For the most part, however, it had no teeth and served only as guideposts for state disciplinary authorities, who would only adventitiously take uniform positions (assuming they took any positions at all) on the subjects covered by Formal Opinion 346.

For these reasons, and others, the Treasury, though it had been tempted to withdraw its own tax shelter rules in favor of Formal Opinion 346, ultimately determined to issue a further revamped Circular 230. Effective in mid-1984, the revised Circular 230 incorporated many of the standards in Formal Opinion 346, but also went its own way on certain (usually technical) points. The major difference was that Circular 230 represented positive law, enforceable by sanctions as severe as suspension or disbarment from practice before the I.R.S., as opposed to the soft-pedaled standards of an ABA ethics opinion the majority of which were couched in aspirational terms (and thus did not necessarily subject lawyers to disciplinary action for violation thereof).

Overall, the reaction of the bar to the Treasury’s concerns about abusive tax shelter opinions was extremely professional and cooperative. Formal Opinion 346 took an objective view of the problems and, strikingly, included reasonable duties of investigation and inquiry as affirmative obligations for lawyers practicing in this area. This was all the more surprising, given the ABA’s normally adversarial stance with the IRS. Had the organized bar reacted to the other scandals described herein with equivalent consentience and polish, much of the harm—to the profession, to

171. Not only considerations of nationwide uniformity in federal tax practice, but also the simple fact that tax is a multi-profession practice whose practitioners encompass not only lawyers but a variety of nonlawyers—including accountants (CPAs are automatically admitted to practice before the IRS. See 31 C.F.R. § 10.3(b) (1966)) and enrolled agents (e.g., enrolled actuaries), who of course are not bound by Formal Opinion 346, tilt the scale in favor of federal standards.


173. Contrast this with the allergic reaction by the Business Law Section to any intimation of such duties.

174. The ABA’s general position has been that the IRS is neither a “true tribunal” nor a “quasi-judicial institution” because of its lack of impartiality, but is instead an adversary to whom the lawyer owes no greater duty than is owed to any other adversary. See generally ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 314 (1965). See also ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 85-352 (1985) (stating lawyers have no obligation to disclose an aggressive position on a tax return to the IRS because the filing of such a return could realistically be regarded as the “first step in a process that may result in an adversary relationship between the client and the IRS”).
its public image, and to the public at large—could have been averted.

C. O.P.M.

1. The Ethical Problems—O.P.M. Leasing Services, Inc. (O.P.M.) was a company engaged in widespread fraud in amounts ($210 million) which, at the time (late 1970's), seemed considerable, but which pale by comparison with later events (the S&L crisis, Enron et al.). The ideas for the scheme itself were nothing terribly elaborate. O.P.M. was ostensibly in the business of leasing office equipment (e.g., computers), and the income stream from the leases, as well as the underlying equipment itself, were used to secure substantial loans from banks and other lenders. So far, this describes a plain vanilla financing arrangement. Where the fraud crept in was in the details of the security arrangements. A single piece of equipment would be pledged as collateral for multiple loans from different lenders (each kept ignorant of the others), and inflated values would be ascribed to certain pieces of equipment in order to justify larger loan amounts. Yet, the fraud took in a number of extremely sophisticated players, including American Express, Chase Manhattan Bank, and what was then Lehman Brothers Kuhn Loeb.

The law firm of Singer, Hutner, Levine & Seeman had prepared the documentation for O.P.M.’s leasing transactions and had furnished legal opinions to O.P.M. ’s lenders intended to provide them with adequate assurances as to the value and legitimacy of the collateral against which they were advancing funds. When the scheme began to unravel, the firm took the position that, for 10 years, it too had been bamboozled by O.P.M.’s fraudulent conduct and only learned of it in 1980 when an executive vice president confessed it to the lawyers. Yet the nature of the ongoing client relationship was

175. At times, O.P.M. would use the proceeds from a fraudulently obtained loan from Bank Y to make payments on an earlier fraudulently obtained loan from Bank X—a variation on the classic pyramid scheme.

176. A concise description of these and other relevant facts may be found in Stuart Taylor, Jr., Ethics and the Law: A Case History, N.Y. TIMES, Jan. 9, 1983, (Magazine) at 31-33. A more elaborate rendering is found in the Report of the Trustee Concerning Fraud and Other Misconduct in the Management of the Affairs of the Debtor, In re O.P.M. Leasing Servs., Inc., No. 81 B 10553 (Bankr. S.D.N.Y. Apr. 25, 1983), parts of which are excerpted in HAZARD ET AL., supra note 120, at 304-08. O.P.M. factual matters set forth herein are culled from those sources and depend upon them for accuracy.
such that, by that time, the lawyers already knew a number of facts that should have put them on notice that something was amiss. First, they knew that O.P.M. was constantly experiencing liquidity problems; second, they knew that O.P.M. had pleaded guilty to check kiting; on top of that, O.P.M. had instructed Singer, Hutner not to forward any of the lease transaction documentation to the lessees, a request sufficiently at odds with both common sense and mainstream legal practice as to have raised red flags that illegal or fraudulent conduct might be afoot. Furthermore, the firm was aware that, even though the leases called for the lessees to make insurance payments on the leased equipment, O.P.M. itself was making those payments, and was even making some of the lease payments that were being forwarded to the lenders.

If all that were not enough, Singer, Hutner received a letter from O.P.M.'s CFO upon his resignation from the company in June 1980. The resignation letter explicated the CFO's discovery of substantial amounts of O.P.M. borrowings that had been procured by fraud. Meetings with the CFO's lawyer led to revelations of further details. O.P.M.'s business was a tissue of multimillion-dollar fraud and deceit—including false documents upon which the law firm had relied in preparing its opinions—and, like all pyramid schemes, could only survive by the perpetration of additional fraud.

Singer, Hutner, confronted now with credible evidence, to which it could not turn a blind eye, that its services had been (and continued to be) employed to assist in the perpetration of a massive fraud, took advice on its professional obligations from two ethics consultants, whose opinion was music to the firm's ears. First, New York's stricter than usual version of Model Code's DR 7-102(B) absolutely barred the firm from making any disclosures whatsoever about client fraud. Second, the firm could ethically continue to represent O.P.M. by taking O.P.M.'s assurances (if made in writing) that no ongoing fraud was being

177. The two legal ethics consultants were Joseph McLaughlin (later a federal judge) and Henry Putzel.
178. The original ABA version, by contrast, provided:

A lawyer who receives information clearly establishing that his client . . . in the course of the representation, perpetrated a fraud on a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, . . . shall reveal the fraud to the affected person or tribunal . . .

MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(b) (1970).
committed and giving them the benefit of the doubt, although lacking a reasonable basis for believing such assurances. Third, while the firm should make efforts to root out evidence of any past wrongdoing, New York's overarching obligation of confidentiality bound Singer, Hutner to keep everything it learned secret, all the while continuing to close new loans for O.P.M. Fourth, the firm need not check the authenticity of documents purporting to show that O.P.M. had sufficient collateral to repay the loans, even when those documents were being provided to lenders in order to obtain new financing. Fifth, there was no obligation to withdraw or disavow the possibly false opinion letters and documents that Singer, Hutner had "unwittingly" provided to lenders in the past in support of loan applications by O.P.M., even though lenders were continuing to rely on those documents, apparently on the theory that "leaving the victims of a past fraud in the dark was not an ongoing fraud."179

By following that advice, in due course, Singer, Hutner enabled O.P.M. to commit even more fraud as, to their chagrin, they "discovered" when the house of cards came tumbling down. Then and only then, when the horses had long bolted, Singer, Hutner decided to close the barnyard door and resign, having succeeded in the interim in assisting O.P.M. in procuring another $80–90 million in fraudulent loans.180 Despite the magnitude of the fraud and the flagrant abuse of its services in effecting it, the firm adhered to its posture of non-disclosure to those who had been defrauded. Nor did Singer, Hutner tell the successor law firm of O.P.M.'s use of its former lawyers to commit fraud, and, all too predictably, the new law firm assisted O.P.M. in obtaining yet another $15 million in fraudulent loans before the whole scheme was uncovered and reported to federal authorities.181

When O.P.M.'s victims later sued Singer, Hutner for having been an accomplice to its client's fraud, the firm—in a pattern seen again and again during the S&L crisis—settled the claims, but admitted no wrongdoing, insisting, rather, that it had acted in accordance with the law and the highest ethical standards of practice that placed the duty of confidentiality to the client above all other obligations.182

179. Taylor, supra note 176, at 46.
180. Id. at 49.
182. Peter Fishbein and Kaye, Scholer would make a similar argument a decade later to justify their conduct toward federal savings and loan regulators in the course of the Charles
2. *The Regulatory Response*—Commentators have noted that the notoriety of the O.P.M. case

is attributable largely to the coincidence that the revelation of the lawyers’ role in the fraud coincided with professional and public debate in the early 1980s on the tension between loyalty to one’s client, including the obligation to keep client secrets, and protecting others from harm at the client’s hands—a debate fueled by the ABA’s then ongoing effort to revise the Model Code, the effort which ultimately gave rise to the Model Rules.¹⁸³

Indeed, while O.P.M., with its lawyers’ assistance, was bilking every lender unlucky enough to do business with it, the Kutak Commission had been busy preparing recommended revisions to the ABA’s rules of ethics. Among the recommendations was a limited authorization—not a mandate upon the lawyer but a discretionary ability—to disclose client fraud, but only under circumstances in which the client had used the lawyer’s services to accomplish the fraud. The ABA House of Delegates resoundingly rejected that proposal, basically within a month of publication of the *New York Times* exposé on O.P.M. and Singer, Hutner. What was adopted, instead, was the original version of Model Rule 1.6, which, while perfectly willing to sacrifice client confidences on the altar of the bar’s self-interest when the lawyer’s own liability is at issue, forbade disclosure for acts of civil or criminal fraud, and indeed only permitted disclosure in the event of *future* (not even past) crimes likely to result in death or substantial bodily injury.¹⁸⁴

Keating Lincoln Savings and Loan debacle. See *infra* notes 216–31 and accompanying text. By a bizarre twist of fate, Fishbein and Kaye, Scholer were the successor counsel to O.P.M. after Singer, Hutner’s belated resignation.


¹⁸⁴. As originally adopted, Model Rule 1.6 provided:

Confidentiality of Information. (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b). (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or (2) to establish a claim of 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
Simultaneously, Rule 4.1, requiring lawyers to be truthful in statements to others, made disclosure to third parties of material facts when necessary to avoid assisting a criminal or fraudulent act by a client subservient to the disclosure prohibition of Rule 1.6.185 Under these circumstances, adoption of these rules was widely regarded as a vindication by the organized bar of Singer, Hutner's conduct in the O.P.M. scandal.186

Even as late as 2001, the ABA House of Delegates rejected an amendment proposed as part of the "Ethics 2000" revision of the Model Rules that would have restored some of the Kutak Commission's original formulation187 and expanded the categories of permissible disclosure under Rule 1.6 to include prevention and rectification of substantial financial injury resulting from a client's abuse of the lawyer's services.188 Nevertheless, amended commentary to Rule 4.1, added not as a sop to propriety but to enable attorney vindication of self-interest when faced with allegations of wrongdoing, permits, "in extreme cases," disclosure when required by substantive law "to avoid being deemed to have assisted the client's crime or fraud."189 After sustaining considerable criticism for its

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185. MODEL RULES OF PROF'L CONDUCT R. 4.1 (1983). The Commentary to Rule 1.6 subsequently ratified by the ABA did permit discretionary noisy withdrawal—i.e., disaffirmance or withdrawal of documents or legal opinions issued by the lawyer on behalf of the client—except in cases where the lawyer withdrew from the representation (and such withdrawal was clearly not mandatory). Id. at R. 1.6 cmt. (1984).

186. See, e.g., Hazard, supra note 118, at 306 (relating calls to lawyers at Singer, Hutner to this effect after the Kutak Commission's recommendation of discretionary disclosure of client fraud was defeated in the House of Delegates).

187. Nor was the rejection of the Ethics 2000 Commission's recommendation the first time that such proposals had met with a similar fate. In the wake of the S&L crisis, in 1991, the House of Delegates rejected such a proposed amendment to Model Rule 1.6. HAZARD ET AL., supra note 120, at 287.


stance on Rule 1.6 in the wake of Enron and other corporate scandals, and on the recommendation of the ABA Task Force on Corporate Responsibility, in August 2003, the ABA House of Delegates relented and amended the rule along the lines originally proposed by the Ethics 2000 Commission.

D. The S&L Crisis

1. The Ethical Problems—The S&L crisis of the 1970's–1980's, which gave rise to so many abuses, had many origins. Long a government-created and government-encouraged cartel subsidized by customers receiving less interest on their deposits (because of federal deposit insurance and federally imposed interest rate ceilings) than free market competition would have provided, the S&L industry was essentially a captive tool of Congress' national housing policy. With the increased inflation and soaring interest rates of the late 1970's, thrift institutions, which traditionally had been statutorily circumscribed to residential mortgages and related lending funded by insured deposits subject to interest rate regulation, suffered from severe asset-liability mismatches and massive disintermediation as retail depositors defected in droves to the money market funds, which were not subject to interest rate regulation. Congress responded with significant, though ill-considered, deregulation of the thrift industry in 1980 and 1982, which allowed those institutions to offer interest-bearing transaction accounts at market rates (including NOW accounts and money market deposit accounts) and to diversify into commercial lending and significant real estate development activities.

190. This Task Force was chaired by former ABA Business Law Section Chair James Cheek and was formed to consider primarily corporate governance issues in the wake of the many corporate scandals. Its final report was published last spring. See A.B.A. TASK FORCE ON CORPORATE RESPONSIBILITY, FINAL REPORT (Mar. 31, 2003), available at http://www.abanet.org/buslaw/corporateresponsibility/home.html (on file with the University of Michigan Journal of Law Reform).


192. Similar cartelization through governmental controls characterized commercial banking during the same period.

The demise of traditional barriers and the consequent cutthroat competition—not merely among depository institutions *inter se*, but also between depositories and nondepository competitors (e.g., mutual funds, brokerage houses, insurance companies), created a brave new world for which the sleepy thrift industry was ill-prepared. The overall effect was similar to taking a domesticated animal that had been raised all its life never wanting for food, secure in the gilded cage of government regulation, and suddenly turning it loose to fend for itself in a world of predators raised in the wild. If the analogy were perfect, such a regulatory sea change would have been harsh, but at least everyone would have played by the same rules—survival of the fittest. Unfortunately, the domesticated S&L animal remained tethered, albeit on a very long string, to the government via the deposit insurance subsidy and an antiquated regulatory and supervisory system.

The end result was that Congress effectively opened the Treasury's coffers to any reckless or unscrupulous S&L operator willing to pay a premium (now that interest rate ceilings had been eliminated) to attract insured deposits, thereby allowing any institution—no matter how undercapitalized and poorly (or criminally) managed—to compete for insured deposits, aided and abetted by equally greedy deposit brokers who collected large fees steering depositors from all over the country toward whichever institution was offering the highest rate, without regard to whether the institution was sound. These marginal institutions would then aggressively hunt for places to lend or invest that money, and the need for high returns to compensate for the higher cost of funds, along with the phenomenon of too many desperate, would-be lenders pursuing too few creditworthy borrowers, led to ever-riskier deals. Thus was born the savings and loan debacle.

194. Some of those predators were wild indeed, including a variety of con artists, swindlers, money launderers, and individuals found to have been connected with organized crime. *See generally Stephen Pizzo et al., Inside Job: The Looting of America's Savings and Loans* (1989).

195. Even with legitimate operators, the resulting feeding frenzy was a recipe for disaster:

A real estate developer explained ... how it worked. The year was 1982, and an energy-led building boom was in full swing in Texas. He and his partner approached one of the aggressive savings and loans with plans to build a $15-million building. "Why not build a $25-million building?" they were asked. "All we need from you is an upfront commitment fee of 4 percent of the loan commitment so that we can book the fee immediately as a profit. That way we will have the capital we need for regulatory purposes so we can raise the deposits to make you the loan. Of course, we will loan you the money for the commitment fee and we will want to build into the loan..."
Instances of S&L fraud and mismanagement were, naturally, many and varied, but certain patterns or templates seem to be characteristic of some of the most egregious cases. Bad loans were carried as sound ones. Real estate was carried on the books at grossly inflated values. Inordinately risky loans were made almost heedless of the prospects for repayment, so long as the loans were large enough\(^{196}\) that the S&L received a large origination fee (e.g., 5\%) up front (bookable immediately as profit) and could set aside funds for an interest reserve that would cover payments for a period of time (e.g., one to five years) so that the loans would not

the interest payments needed to keep the loan current for five years, just in case you have difficulty leasing the building up. We can also give you the name of a good appraiser for your property. And we will not require you to personally guarantee the loan. Your building will be our sole collateral.


Dr. Duayne Christensen, a Southern California dentist-turned-real-estate speculator, got tired of begging for loans from straitlaced thrift officers and in January 1983 he opened North American Savings and Loan in Santa Ana, California. A married man with teenage children, Christensen had undergone a midlife crisis of some sort and had taken up with a flashy real estate lady from Oak Grove, California, Janet F. McKenzie . . . . In short order, according to an FSLIC lawsuit, the two began to wheel and deal with North American’s deposits, investing them in grossly overappraised real estate projects in which they held a secret interest. One project alone (a twenty-unit condominium project in Lake Tahoe, Nevada), which they acquired for less than $4 million, they sold back and forth to artificially increase its value to $40 million . . . . Reno mortgage broker John Masegian helped put together loans for the condominium deal. The next month, February 1983, while he was attending a savings and loan convention in Miami, he was garroted in the stairwell of the Fountainebleau Hilton. The murderers tried to stuff his body down the trash disposal chute but it wouldn’t fit. No one was charged with his murder. A security guard claimed that a few months later Christensen tried to hire him to kill a business partner who lived in Arkansas, but later Christensen changed his mind.

North American collapsed in June 1988 and cost the FSLIC $209 million. The day before North American was seized by federal regulators, Christensen was killed in a mysterious single-car accident when his Jaguar slammed head-on into a freeway abutment at six o’clock in the morning, leaving a $10 million life insurance policy that named McKenzie as his sole heir . . . .


196. If the principal amount exceeded the institution’s regulatory limit on loans to one borrower, the loan could be participated to other willing S&Ls, but in practice straw borrowers would often be used.
appear delinquent to examiners. There were high-risk, often ostentatiously so, investments (e.g., casinos or gaudy resort hotels) and expensive office space, ornately furnished and decorated (often with millions of depositors’ dollars worth of objets d’art). Loans and investments were funded through high volume, high-cost brokered deposits. The CEOs and their families had high-roller lifestyles. Bad loans were swapped with other, like-minded institutions when the examiners were coming, subject to an obligation to repurchase them once the examination was completed. Finally, there were a variety of shenanigans, such as post hoc alterations of the minutes of board meetings, falsified or made-to-order real estate appraisals, falsified financial statements for certain borrowers, and a variety of documents concocted to mimic compliance with regulations, supervisory agreements, and the like.

This is by no means an imaginary scenario. It is a reasonable, though by no means complete, summary of what went on at notorious S&Ls such as Don Dixon’s Vernon Savings & Loan (nominally headquartered in tiny Vernon, Texas, but with high-rent corporate headquarters in Dallas to facilitate all the wheeling and dealing) and Charles Keating’s Lincoln Savings & Loan of Irvine, California.

None of this could have been accomplished without the cooperation of unusually inept (and occasionally corrupt) regulators.

197. See supra note 195. When the funds in the interest reserve were depleted, the S&L would roll over the loan, establishing a new interest rate reserve to keep payments current for another period of time, and pocket another upfront fee for the loan renewal that would show as immediate profit eligible for new loans or investments (thereby giving the appearance of both profitability and growth) or for dividends to insiders or a parent holding company (often indistinguishable from the insiders). The renewals, of course, necessitated advancing additional funds to the borrowers (usually from brokered deposits), thereby widening and deepening the hole the S&L was digging for itself.

198. For popular accounts of the abuse and looting of these institutions, see Stephen Pizzo et al., supra note 194, at 249–73, 277–79, 290–302 (Don Dixon and Vernon), 350–53, 388–92, 396–403, 409–33 (Charles Keating and Lincoln); Mayer, supra note 92, at 9–13, 287–99 (Don Dixon and Vernon), 165–225 (Charles Keating and Lincoln).

199. For example, the Federal Home Loan Bank Board (FHLBB), then the federal regulator of the S&L industry (it was succeeded by the OTS in 1989), apparently never met a violator of the Bank Secrecy Act that it did not like. In connection with congressional hearings about a 1980s federal money laundering investigation, Operation Greenback, it came out that senior FHLBB officials actually altered examination reports that would have revealed potential currency reporting violations at a thrift in Puerto Rico, whose president was also vice-chair of the Federal Home Loan Bank of New York. Delaware Senator William Roth, chair of the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, contrasted large percentages of banks examined by the FDIC (including ten out of eleven banks in Puerto Rico) found to have committed such violations, while the FHLBB found only two violations out of 2,185 thrifts examined. See Stephen Pizzo et al., supra note 194, at 171.
Likewise, none of this—the loan documentation, the participations, the repurchase agreements, the real estate investments, and so forth—could have been accomplished without the assistance of many lawyers.

Indeed, amidst this bizarre world of incompetents and knaves operating thrift institutions, one finds a variety of lawyers, some of whom were just as marginal or as crooked as the S&Ls they represented. The concern is not so much with them, however, as with the number of prominent law firms—Jenkins & Gilchrist in Dallas; O'Melveny & Myers in Los Angeles; Jones, Day, Reavis & Pogue in Cleveland and Washington, D.C.; Blank, Rome, Comiskey & McCauley in Philadelphia; Sherman & Howard in Denver; Kaye, Scholer, Fierman, Hays & Handler in New York; Sidley & Austin in Chicago and Washington, D.C.; Kirkpatrick & Lockhart in Pittsburgh and Washington, D.C.; Paul, Weiss, Rifkin, Wharton & Garrison in New York, to name but a few, that were publicly humiliated for their participation in a variety of schemes and scams, and, occasionally, were required to pay large sums in damages, civil penalties, and settlements of third-party claims. Nothing could serve better to illustrate the depredations that gave rise to these claims than some excerpts from the Charles Keating/Lincoln Savings and Loan saga.

Keating, himself a lawyer whose scarcely unblemished past should have disqualified him from owning an S&L, was nothing if not creative, both in the schemes he used to loot the federally insured gravy train and in his use of lawyers. He used all the techniques in the above-described template and then added some innovations of his own. One of these involved selling bonds in Lincoln Savings' holding company, American Continental Corporation (ACC), to the public. These securities could not be marketed except in conjunction with requisite disclosure documents, which were replete with false and misleading disclosures (financial statements of ACC's subsidiary thrift were wildly inflated with bad loans and poor investments carried on the books at face

200. Perhaps a more accurate statement would be that, in general, it was not the partners of the firms themselves but their malpractice insurers who were required to pay because most settlements stayed (deliberately) within the limits of malpractice coverage. That means, of course, that the entire legal profession (not just those responsible) ended up paying for the misdeeds of the malefactors through higher insurance premiums, and that cost undoubtedly was passed down the food chain to the client population, and thence to the economy at large.

201. See supra notes 141–46.
value). Furthermore, the manner in which these bonds were marketed (out of the thrift’s retail branch offices) to depositors misled them into believing the investments were federally insured obligations.\(^{202}\) Lawyers familiar with offerings of these securities understand the disclosure obligations of the issuer’s counsel and the due diligence obligations of the underwriter’s counsel. They also know how carefully sales practices with any connection to a federally insured depository are scripted. The fugue subject returns, recognizable even though in a different key: What could these lawyers have been thinking when they furnished the legal services to facilitate these transactions?

Another bizarre twist in the Keating saga involved a pledge by Lincoln of $15 million of its assets to guarantee the debt of ACC’s ESOP. The ESOP borrowed money from unaffiliated lenders in order to finance its purchase of ACC stock, the proceeds of which (apart from close to $1 million in legal fees) went to bail Keating’s pal Michael Milken and Drexel Burnham Lambert out of its ACC stock holdings\(^{203}\) with the remainder (approximately $8 million) to the Keating family.\(^{204}\) Keating hired James Fleischer, a partner in a tiny, Washington, D.C. thrift boutique that Keating knew would be hungry for the business of so large a client, to provide a legal opinion that this pledge would not violate an FHLBB regulation prohibiting a thrift from guaranteeing the debt of an affiliate. Clearly, ACC, the parent holding company, was an affiliate, but, according to OTS, Fleischer assumed—contrary to the clear lan-

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\(^{202}\) Mayer explains:

The sales were made by employees of Lincoln Savings (though both state and federal regulators had been assured that couldn’t and didn’t happen). ACC and Lincoln used the same A-shaped logo and print styles in their advertising.

The ACC notes, sold in $1,000 denominations, paid higher interest than insured deposits. Their purchasers were mostly elderly, because special efforts were directed at the retirement colonies and because the old folks really loved the idea of the higher interest. The selling technique was often bait-and-switch. Customers would answer ads offering high-rate insured CDs in the S&L, and their interlocutor would switch them to the note from the holding company, which paid even higher interest. And it had to be better, didn’t it, because it was the owner of the S&L who stood behind it—a Fortune 500 company. Employees at the branches got bonuses for selling the notes.


\(^{203}\) See JAMES B. STEWART, \textit{DEN OF THIEVES} (1991), for an absorbing account of junk bond financing and the S&L industry, including Keating’s dealings with Michael Milken.

\(^{204}\) Mayer, \textit{supra} note 92, at 203–04.
language of the absolute bar in the regulation—that the prohibition would not apply if the ESOP's trustee were independent of ACC (apparently on the theory that, under those circumstances, the ESOP would not be an affiliate and the pledge could be made). Fleischer rendered an unqualified opinion, according to the allegations of an enforcement action later brought by OTS. Fleischer—who had uncritically accepted a certificate from a Lincoln officer that the ESOP trustee was “independent” “assumed the relevant legal conclusion that the ESOP was not controlled by ACC or Lincoln” even though he “knew or should have known that because of the language of the regulations the ESOP would be deemed to be under the control of Lincoln’s holding company and, therefore, not independent of Lincoln.” Due either to a lack of competence or to vulnerability to the competitive pressures of business development, Fleischer gave Keating precisely what he needed to milk the federally-insured Lincoln cow further.

One of the most astonishing aspects of the S&L scandal was the willingness of members of Congress to use their offices to influence and intimidate the FHLBB when it belatedly sought to rein in (and, ultimately, shut down) the worst S&L offenders. Don Dixon had gotten two Democratic Congressmen to intervene with the FHLBB on Vernon’s behalf, but Keating succeeded in getting no less than five United States Senators, to whom he gave substantial campaign contributions, to intervene in federal regulators’

205. In point of fact, the ESOP would be under ACC’s control if ACC had the power to appoint or remove the ESOP trustee, and, according to OTS, it was almost universally true that ESOP sponsors had such powers.

206. The ESOP’s lender, Bankers Trust Company, required the opinion as a condition of closing the loan.

207. In short, Fleischer accepted a layperson’s conclusion of law as ipse dixit, without making any inquiry whatsoever into the existence of facts supporting the officer’s certification.


209. The two were Tony Coelho (D-Cal.) and Jim Wright (D-Tex.), the latter both before and after he became Speaker of the House. Both men’s political careers were ended by the subsequent scandal. Coelho did not bother to seek reelection, and Wright was ultimately brought down by a House ethics inquiry.

210. Keating frankly acknowledged that he sought to buy influence with the political contributions. Brooks Jackson, New Disclosures of Riegle’s Lincoln Role Suggest He Was More Than a Bystander, WALL ST. J., Nov. 15, 1989, at A28 (stating that Keating “arranged $1.4 million in political donations for the five senators”). Indeed, when asked by reporters whether his financial contributions influenced support for his cause, Keating replied, “I want to say this in the most forceful way I can. I certainly hope so.” STEPHEN PIZZO ET AL., supra note 194, at 295 (emphasis added).
investigation of Lincoln Savings and Keating.\textsuperscript{211} Pressure from the Keating Five ultimately got the FHLBB to drop an investigation into Keating's and Lincoln's affairs being conducted by the Federal Home Loan Bank of San Francisco.\textsuperscript{212} Following a changing of the guard at the FHLBB and the replacement of Chairman Edwin Gray with M. Danny Wall (who had been an administrative aide to former chair of the Senate Banking Committee Jake Garn), further political pressure was brought to bear, resulting in the unprecedented step of stripping the Federal Home Loan Bank of its supervisory jurisdiction over Lincoln and ACC,\textsuperscript{213} transferring all Lincoln-related matters to Washington, and starting from scratch.

Lawyers had a hand in this maneuver as well. A Sidley & Austin partner had endeavored to cut certain key regulators from the San Francisco Federal Home Loan Bank who were familiar with the Lincoln investigation out of a key meeting in Washington with Chairman Wall. Her subsequent letter to Keating crowing about her success caused severe embarrassment to the firm when it was made public by the House Banking Committee's investigation of Keating and Lincoln and picked up by the national media:

> You have the [FHLBB] right where you want them... As you know, I have put pressure on Wall to work toward meeting your demands and he has so instructed his staff. They all know the Wednesday meeting is crucial to their future... .


\textsuperscript{213} When William Robertson, chief of regulation and supervision at the San Francisco Federal Home Loan Bank's Office of Enforcement, recommended to Wall that Lincoln Savings be placed into receivership in 1987, Wall told Robertson that he would be replaced. Brooks Jackson, \textit{Sleeping Watchdog: How Regulatory Error Led to Disaster at Lincoln Savings}, \textit{Wall St. J.}, Nov. 20, 1989, at A12. Wall then stripped the San Francisco regulators of power to act over the case. \textit{Id.}
San Francisco is finished. There is no going back to San Francisco and nothing can be done to follow up their exam.... Nothing will be done in the exam that you are not aware of in advance.... The staff will not be able to enforce any violation of the agreement without going to the Board first and seeking approval....

Again, our fugue subject returns: What could the lawyer who wrote such a letter have been thinking? It is all well and good to protect the downtrodden from oppression, but how can a lawyer justify acting on behalf of an S&L kingpin (himself a wealthy and experienced lawyer, much as the bar would like to disown him, with enough political and financial clout to “buy” the assistance of five Senators), to derail a legitimate regulatory function (to wit: a financial institution examination and subsequent investigation into questionable transactions uncovered by the examiners) critical to the safety and soundness of our financial system, eviscerate the fruits of that investigation, and hamstring subsequent investigatory efforts, when all of those results are incontrovertibly inimical to the legal system and the interests of justice?

Perhaps the best known of the Lincoln Savings lawyer scandals involved the forged and backdated corporate minutes and ongoing efforts to conceal these and other deficiencies (e.g., absence of policies and procedures for safe and sound operations, inadequate loan underwriting, improper transactions with affiliates). These were concealed from regulators through the one-two punch of Kaye, Scholer’s alleged stonewalling of examiners’ access to Lincoln’s staff and records and Jones, Day’s preparation of backdated documents. In addition, both firms failed to notify Lincoln’s board of directors of the raft of illegal and irregular activities by


216. Best known, that is, because of the detailed public allegations in high-profile matters such as the ACC Securities Litigation and the OTS proceeding against Kaye, Scholer.

217. Admittedly, this was not mandatory under then-prevailing rules, but would have seemed only prudent if either firm had taken the entity theory seriously, as opposed to acquiescing in whatever Keating wanted.
management and both were complicit in drafting and filing false and misleading documents with the FHLBB. 218

2. The Regulatory Response—A great deal of ink (black ink, in contrast to the S&L industry's balance sheets) has been spilled on Lincoln Savings 219 and the Kaye, Scholer matter. 220 The level of attention devoted to the OTS proceeding against that firm was occasioned not so much because the facts (or, more properly, the OTS's allegations) were unique—which they were 221—but because of the draconian nature of the government action in freezing the assets of the entire firm and its partners.

Several years ago, William Simon wrote an article condemning the response of the organized bar to the Kaye, Scholer matter as irresponsibly "evasive" and "apologetic" because of the failure to come to grips with what Kaye, Scholer was alleged to have done. 222 Unfortunately, Simon was off the mark about the specifics of the Kaye, Scholer case. First, the unproved allegations were so unusual (interference with an examination, the OTS's alter ego theory, etc.) and so unlikely to be repeated (even more unlikely after what happened to Kaye, Scholer!) that detailed study was not likely to


220. See supra note 47.

221. First, Kaye, Scholer had no expertise in banking or S&L regulation when it accepted the engagement to represent Keating and Lincoln, which was already ethically questionable given the competence requirements of the Rules of Professional Conduct. Indeed, it was probably for this reason that Keating (himself an experienced securities and business lawyer prior to becoming an S&L kingpin) hired the firm. That way, he could avail himself of lawyers too unsophisticated in regulatory matters to ask embarrassing questions of their client, but all too skilled in what could be called "junkyard dog" or "take no prisoners" midtown Manhattan litigation tactics. Second, and consistent with this lack of knowledge and expertise, Kaye, Scholer took the unprecedented step of interposing itself between the thrift and the government during the examination process insisting that all requests by the examiners for information be funneled through the law firm, even though, by law, examiners are to have unfettered access to the institution's books, records, premises, and employees.

222. Simon, supra note 47.
have been a particularly fruitful expenditure of time and resources. Second, the OTS's Notice of Charges alleged violations of widely accepted and well-understood professional obligations and, if proved, would have been unexceptionable. Third, the focus of the bar's concern, while also unique, was decidedly capable of repetition and potentially quite toxic to lawyer's abilities to stand up (in an appropriate way, of course, not the way Kaye, Scholer did) to governmental overreaching—namely, the assertion by an agency of the United States government of novel and dubious professional duties\(^{223}\) and the unprecedented freeze of an entire law firm's assets (including assets of partners completely innocent of any wrongdoing)\(^{224}\) that arguably compelled the firm to capitulate without an opportunity to defend itself against the allegations.\(^{225}\) Excoriating the bar's jumping to Kaye, Scholer's defense was thus not totally fair\(^{226}\) and was even, as Jonathan Macey put it, "charmingly naive," in view of the bar's self-interested, protectionist penchant in these matters.\(^{227}\)


\(^{224}\). The freeze order was couched as a "temporary cease and desist" order under the authority of Section 8(c)(1) of the Federal Deposit Insurance Act, 12 U.S.C. § 1813(c)(1) (2002), was issued ex parte, and was effective immediately upon service, rather like a temporary restraining order, except for the absence of a neutral and detached judge. The order prohibited Kaye, Scholer from making capital expenditures in excess of $50,000, prohibited the three partners individually named (along with the firm) as respondents from transferring assets in excess of $5,000 without written notice to the OTS (and required them to escrow significant percentages of their earnings), and prohibited all partners, the three named respondents, and the rest of the partnership (other than those who joined the firm after the events set forth in the Notice of Charges) from leaving the firm without posting security or (along with their families) from disposing of assets except under circumscribed conditions. Temporary Order to Cease and Desist, *In re Fishbein*, OTS AP-92-20 (Mar. 1, 1992). See generally Stephen Labaton, *U.S. Moves to Freeze Assets of Law Firm for S&L Role*, N.Y. TIMES, Mar. 3, 1992, at A1.

\(^{225}\). As Miller explains:

[I]t is quite understandable that the matter of most pressing interest to the bar was the asset freeze. The fact that Kaye Scholer may (or may not) have behaved unethically was hardly surprising. Firms, like people, do behave unethically from time to time. What was surprising—what was "news"—was the unprecedented relief that OTS sought—relief that in the view of many observers effectively precluded Kaye Scholer from any realistic chance of obtaining a hearing on the charges leveled against it.

Miller, *Original Sin*, supra note 47, at 311.

\(^{226}\). The author thus adheres to the views expressed in his rejoinder to Professor Simon's article, even though he has reconsidered the efficacy of lawyer self-regulation in general. See Fisher, *Neither Evaders nor Apologists*, supra note 47.

\(^{227}\). Macey, supra note 47, at 324.
Had Simon only changed his thesis a little, however, he would have been dead on. The bar, or at least the highly politicized segment of the bar that constitutes the leadership of ABA sections and the ABA as a whole, was being evasive, but in a different way. By focusing attention on the travails of Kaye, Scholer and the comparatively easy target of government overreaching that is OTS's specialty, the bar hierarchy was able partially to deflect public attention from—or at a minimum avoid having to focus its own attention on—the ethical defalcations of the many other elite law firms that were found by the government to have been complicit in the S&L debacle. In fact, relatively little attention was devoted by the ABA to Keating’s other law firms, the lawyers for Vernon, the lawyers for Silverado, or the lawyers for Centrust (to name only the most notorious of the corrupt S&Ls).

To be sure, a great many lawyers counseled their S&L clients to stretch the law to the limit, and there is certainly a respectable argument to be made (and one that was made, repeatedly, by law firms, by bar groups, and by the author) that counseling a client to do things on the cutting edge of legality are part of what a lawyer is “supposed” to do for clients. There is a vast difference, however, between the fundamentally interpretive exercise inherent in representing clients on the “cutting edge” and doing whatever

228. The freeze order and the OTS Chief Counsel’s novel theories of attorney liability provided ample ammunition, but OTS has gone much further and has subsequently earned the ire of courts on judicial review. See infra note 430 and accompanying text.

229. See, e.g., Fisher, Nibbling on the Chancellor’s Toesies, supra note 47, at 63 (summarizing instances of creative lawyering that exploited “loopholes” in federal banking law); Brief Amici Curiae of Banking and Business Lawyers In Support of Petitioner at 23–24, O’Melveny & Myers v. FDIC, 512 U.S. 79 (1994) (No. 93-489) (The author wrote this brief and was Counsel of Record.). Typical of such efforts have been the use of both federal and state law to permit banking organizations to engage in various aspects of the insurance business via creative construction of statutory language and functional equivalence analysis. See, e.g., Nations Bank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995); Indep. Ins. Agents of Am., Inc. v. Bd. of Governors, 890 F.2d 1275 (2d Cir. 1989), cert. denied, 498 U.S. 810 (1990); Am. Ins. Ass’n v. Clarke, 656 F.Supp. 404 (D.D.C. 1989), aff’d in relevant part, 854 E2d 1405, 1409-11 (D.C. Cir. 1988). Typical also is the creation of bank securities affiliates engaging in underwriting and dealing in all manners of securities by exploiting a loophole in the Glass-Steagall Act. See, e.g., Sec. Indus. Ass’n v. Bd. of Governors, 839 F.2d 47 (D.C. Cir. 1988), cert. denied, 486 U.S. 1059 (1988); Sec. Indus. Ass’n v. Bd. of Governors, 900 F.2d 360 (D.C. Cir. 1990). See generally Keith R. Fisher, Orphan of Invention: Why the Gramm-Leach-Bliley Act Was Unnecessary, 80 OR. L. REV. 1301, 1350–60, 1386–87 (2001). These sorts of examples are, on the whole, instructive because what they exemplify is not lawyers assisting clients in the furtherance of schemes that will defraud or injure third parties, but rather assisting them in navigating through the gray areas of open-textured regulatory regimes to achieve legitimate business goals. These goals were often procompetitive and helped break down outmoded, inefficient, and artificial barriers segmenting the financial services industries.
the client wants. In representing clients on the "cutting edge," the lawyer uses independent judgment and consummate skill, fully consistent with intellectual and moral integrity and in the highest traditions of the bar, to determine whether (and if so, how, and to what extent) the bounds of the law can be broadened in the client's interest, while remaining within the bounds of prudence and caution. At the opposite end is the intellectually and morally bankrupt mindset that, come what may, the lawyer must do everything the client wants done, without the interpolation of that independence of mind that separates the professional from other service providers.

The oft-heard justification, a counter-subject to the recurrent fugue subject of "what were these lawyers thinking?", is that the client is entitled to undivided loyalty and zealous representation. That argument, of course, fallaciously conflates the duties of a trial lawyer, operating in a system of procedural checks and balances that offset zealous advocacy, with those of a business lawyer providing services to clients that desperately need sound, dispassionate, and, above all, independent advice and counsel. From that conflation, the path leads down the slippery slope to O.P.M. and beyond—to Lincoln Savings and other S&L excesses, all the way

230. Justice Brandeis once testified, in response to businessmen's complaints about the uncertain outer boundaries of antitrust laws:

[Y]our lawyers . . . can tell you where a fairly safe course lies. If you are walking along a precipice no human being can tell you how near you can go to that precipice without falling over, because you may stumble on a loose stone . . . but anybody can tell you where you can walk perfectly safe within convenient distance of the precipice."

The difficulty which men have felt . . . has been rather that they wanted to go to the limit rather than they wanted to go safely.


231. As a matter of fact, it is not strictly accurate, even when limited to trial lawyers. Manifold provisions of the Model Rules themselves unambiguously dilute, if not abate entirely, that so-called "undivided" duty of loyalty. An obvious example is multiple representation, which is permissible with the clients' consent, not merely if their interests are potentially conflicting (Rule 1.7(b)), but even where they are actually conflicting so long as there is a reasonable possibility that the lawyer can assist them in resolving those differences (Rule 2.2). Other examples abound as a result of trial lawyers' duties to the court (as "officers of the court") and to the legal system, e.g., duties not to make frivolous claims (Rule 3.1), not to put on perjured testimony (Rule 3.3(a)(4)), not to engage in improper communications with court personnel or jurors (Rule 3.5), and not to make misrepresentations to third parties (Rule 4.1), etc. For more on this topic, see generally Nathan M. Crystal, Limitations on Zealous Representation in an Adversarial System, 32 Wake Forest L. Rev. 671 (1997).
down to Enron, Tyco, WorldCom, and whatever scandal is the flavor of the month.\textsuperscript{232}

E. B.C.C.I.

1. The Ethical Problems—In October 1988, Bank of Credit and Commerce International (BCCI) and eight of its employees were indicted in Tampa, Florida, on charges of laundering millions of dollars for the Medellin drug cartel.\textsuperscript{238} The charges had been the adventitious result of an unrelated, undercover investigation by U.S. Customs agents, who had literally stumbled upon the bank’s involvement. The ensuing indictments and convictions, and even the bank’s guilty plea and payment of a then record $15 million fine,\textsuperscript{294} turned out to be the first step in the unmasking of a global bank that thrived on secrecy and operated in a financial underworld where billions of dollars in “hot money”\textsuperscript{235} flowed effortlessly across borders in streams of electrons.
Flotsam from all of these streams of dirty money flowed to BCCI’s coffers because the “value added” service it provided—indeed, the bank’s raison d’être—was to make the flow of funds invisible to, or at a minimum beyond the reach of, law enforcement. Founded by Pakistanis and financed by wealthy Arab potentates, BCCI had billed itself as a Third World bank, as the financial tool that would help developing countries pull themselves out of poverty and starvation. The bank came into existence in perfect time to take advantage of the untold wealth then beginning to flow into oil-producing countries in the early 1970s in the form of petrodollars. This level of wealth only multiplied with the creation of the Organization of Petroleum Exporting Countries, the oil embargo, and the transmogrification of the Persian Gulf region into a middle-eastern boom town. Trading on its Islamic origins in Pakistan, BCCI opened offices in four Persian Gulf states and in London, the latter office intended to cater to the large Pakistani and Asian populations in that metropolis.

Yet BCCI was neither organized nor regulated in any of those jurisdictions. Bank of Credit and Commerce International SA was registered in the Cayman Islands in 1975 as the principal banking subsidiary of BCCI Holdings SA, which had been established in Luxembourg in 1972. Beneath these two umbrella groups, the bank’s founder, a reclusive Pakistani named Agha Hassan Abedi, had organized a bewildering labyrinth of additional companies and banking entities. The method behind this seeming madness was to create a hydra-like institution that operated across borders with impunity because no single regulatory authority could (even if so inclined, unlike Luxembourg and the Caymans) see the entire picture. In short, the goal was to make BCCI “offshore” everywhere in the world!

It had disguised itself through numerous charitable operations and had hired influence peddlers and respected politicians worldwide to embellish that image. Among them were former U.S. Marcos, François and Jean-Claude (“Papa Doc” and “Baby Doc”) Duvalier, Manuel Noriega, and Saadam Hussein plundered the meager wealth of their people.

236. Both Luxembourg and the Cayman Islands were long-time bank secrecy havens, part of a small fraternity of nations known as “OFCs”—“Offshore Centers”—that lure financial institutions of all stripes with the promise that their books would be closed to nosy outside regulators and law-enforcement officials. Of late, however, as part of a trend toward tougher international law enforcement efforts against narcotics trafficking and money laundering, these two jurisdictions have begun to strengthen their domestic laws. See generally Keith R. Fisher, In Rem Alternatives to Extradition for Money Laundering, 25 LOY. L.A. INT’L & COMP. L. REV. 409 (2003).
President Jimmy Carter, who had over several years accompanied Abedi on trips to China and other developing countries and provided the banker with invaluable access and respectability, and attorney Clark Clifford, a former presidential adviser and elder statesman of the Democratic party, whose reputation and influence helped Abedi to realize his crowning ambition: to acquire secret control of a significant banking organization in the United States.

For approximately twelve years, beginning with BCCI’s earliest attempts to gain entry into the U.S. banking market, continuing through the successful and surreptitious acquisition of control of Financial General Bancshares (FGB) and the formation of the successor holding company system under the name First American, and ending with their forced resignation as Chairman and President, respectively, of the First American organization, Clark Clifford—former counsel to President Truman, former Secretary of Defense under President Johnson, and éminence grise to Democratic Presidents and power brokers for forty years—and his protégé and law partner, Robert Altman, were integrally involved in BCCI’s U.S. machinations. Among these, first, were representing former OMB Director Bert Lance in selling control of the National Bank of Georgia to a BCCI nominee, Ghaith Pharaon. Second, they represented Lance, BCCI, and a variety of Arab shareholders in an initial, abortive takeover of a U.S. bank and subsequently, with the additional representation of Commerce and Credit American Holdings (CCAH) and various subsidiary holding companies, in the successful takeover of FGB. Third, they served as the senior executives and as directors of the First American organization. Fourth, they handled, through their law firm (Clifford & Warnke), a variety of legal matters for First American—including its acquisition from straw purchaser Pharaon of the National Bank of Georgia—and parceling out other legal work to counsel of their own choosing. Fifth, they became multi-millionaires by acquiring substantial share ownership in First American with undisclosed (indeed, actively concealed from U.S. regulators in flagrant violation of federal banking laws) funding from BCCI. Sixth, they represented BCCI in connection with a congressional investigation. Seventh, they coordinated the defense of BCCI and its officers in connection with the money laundering prosecution that

237. The Federal Reserve’s approval of this takeover relied heavily upon Clifford’s sterling reputation and his personal assurances that he was acquainted with the individual Arab purchasers (all straw men for BCCI) who were acquiring control positions in the holding company, as well as his representation that BCCI was not in any way involved in the acquisition, other than having acted as financial adviser to some of the Arab purchasers.
arose from a Customs Department sting operation that stumbled upon irregularities in BCCI's Tampa, Florida office (and that ultimately led to the unraveling of the concealed skein of relationships by means of which BCCI had unlawfully acquired control of FGB/First American). Eighth, they withheld from regulators critical information in their possession about BCCI's ownership of First American and deceived both regulators and Congress about their own knowledge of, and personal involvement in, BCCI's illegal activities in the United States. The congressional investigation found that, throughout their tenure at the helm of First American, Clifford and Altman made business decisions regarding acquisitions that were unrelated to any legitimate business needs of First American, but were instead motivated by BCCI's sinister agenda. Furthermore, they represented to federal regulators that these decisions were their own, when in fact they had been made by Agha Hassan Abedi and other senior officials at BCCI and sent as directives to Clifford and Altman, who then caused those decisions to be implemented and ratified, as necessary, by the appropriate boards of the various First American banks (some of which were not wholly-owned and had substantial minority shareholder interests\(^\text{238}\)) and holding companies.

Throughout this 12-year period, and the comprehensive congressional investigation, Clifford and Altman maintained not only that they were innocent of any wrongdoing but that they had no knowledge of what BCCI was up to.\(^\text{239}\) Given the level and duration of their activities, this is extremely difficult to credit, but, if true, bespeaks at best a level of ostrich-like behavior that demands inclusion in the Guinness Book of World Records—this on the part of two clever, experienced, and sophisticated lawyers, who amassed enormous personal fortunes, far in excess of anything they could

\(^{238}\) These shareholders were also bilked by First American's machinations in connection with a freezeout merger as to which a jury subsequently found knowing violations of the securities laws by the directors and where evidence was adduced of undisclosed ownership interests in the holding company by Clifford. See Sandberg v. Virginia Bankshares, Inc., 979 F.2d 332 (4th Cir. 1992).

\(^{239}\) See, e.g., Hearings Before the House Comm. on Banking, Finance and Urban Affairs, 102d Cong., 1st Sess. 36 (1991) (testimony of Clark M. Clifford) ("In all these years, we didn't encounter a single suspicious circumstance. . . . Were we deceived? Apparently, we were deceived.") (emphasis added); Hearings Before the Subcomm. on Terrorism, Narcotics and Int'l Operations of the Sen. Comm. on Foreign Relations, 102d Cong., 1st Sess. (pt. 5) 63 (1991) (testimony of Clark M. Clifford) [hereinafter BCCI Senate Hearings] ("We have not violated any law. We have not been guilty of any impropriety . . . . If all that we read about, this poisonous constant stream of misconduct, if that is a true statement of what this bank did, then we have been grossly deceived.").
have earned in legitimate legal fees, on the basis of their admitted dealings (i.e., the financings on unbelievably favorable terms of their equity holdings in First American) with BCCI.

It is time once again for the return of the fugue subject: What, one wonders, could these lawyers have been thinking? Could any lawyer—much less one with the experience and sophistication of a Clark Clifford—be that naive?

In point of fact, the congressional investigation found that their statements and sworn testimony lacked credibility, standing as they did in sharp contrast with facts contained in contemporaneous documents and with the testimony of other witnesses, including a variety of BCCI officials who testified before Congress, such as the former head of BCCI's operations in Miami, Abdur Sakhia.

[In any management discussions ... on our future in the United States, we would think of three entities—BCCI, National Bank of Georgia, and First American—in the same breath. Who would be going where, who would work in which entity, what area of entity will be handled by which entity, allocation of businesses, markets, geographic territories, all took place as if this was one entity ... [I]t is very hard to believe that Clifford and Altman did not know [about BCCI's ownership of First American].

2. The Regulatory Response—The behavior of the lawyers in the BCCI scandal—without which BCCI would never have been able to effect its surreptitious and grossly illegal acquisition of control of one of only a very few (at the time) multi-state banking organizations, and the only one with banking operations in both the nation's political capital (Washington, D.C.) and its financial capi-


241. Clifford himself reportedly conceded that his involvement virtually compels an outside observer to conclude that he was either stupid or venal. See David E. Rosenbaum, A Charm for Plebeian and Patrician, N.Y. TIMES, July 30, 1992, at C5. It would indeed be a rare case of stupidity that could attain what Clark Clifford accomplished professionally.

242. BCCI Senate Hearings, supra note 239 (pt. 2), at 505, 518.
tal (New York City)—received little more attention than a footnote in history. No disciplinary action seems to have been taken against either Clifford or Altman.\(^\text{243}\) No lawyer regulation response whatsoever was forthcoming from either the bar or the federal government, though the latter devoted considerable attention to increasing regulation and supervision over entry requirements for foreign banks wishing to do business in the United States and the permissible activities and activity structures of such foreign banks, as well as additional anti-money laundering legislation.\(^\text{244}\)

**F. Enron and Other Contemporary Corporate Scandals**

1. **The Ethical Problems**—Famed film director George Lucas must cringe whenever he hears about details of the scandal involving Enron Corp. (Enron) because many of the special purpose entities (SPEs) were named after aspects of the Star Wars® movies. These included such SPEs as "JEDI" (named, cynically, after the order of mystic knights dedicated to preserving freedom and combating tyranny and evil) and Chewco Investments L.P. ("Chewco," named after Chewbacca, that rather tall, hirsute companion of Han Solo in the first three films of the series).

The Enron debacle is clearly the most highly publicized of the recent spate of corporate scandals. The facts are voluminous and complex, and, as a detailed recitation thereof is unnecessary to this discussion, a synopsis of key points necessary to an appreciation of

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the malfeasance of lawyers (as opposed to corporate executives, banks, accountants, etc.) should suffice.245

As is well known, on October 26, 2001, Enron, a Texas-based international energy and communications conglomerate, announced that it was taking a $544 million after-tax charge against earnings related to transactions with LJM2 Co-Investment, L.P. ("LJM2"), a partnership created and managed by Enron's Executive Vice President and Chief Financial Officer Andrew S. Fastow. Also announced at the same time was a reduction of shareholders' equity of $1.2 billion related to transactions with LJM2.


Enron's management used the two LJM partnerships and Chewco to effect transactions that would not have been done on an arm's length basis with unaffiliated entities. It all started when JEDI lost its outside investors. Originally, JEDI had an independent, outside investor with a 50% equity interest, which permitted Enron, under prevailing accounting rules, to report JEDI's profits on its books but not JEDI's indebtedness.247 When, late in 1997, the outside investor wished to unload its stake in JEDI, Enron was faced with the prospect of having to consolidate all of JEDI (including the indebtedness) on Enron's balance sheet, which would

245. The following facts are distilled principally from two sources. The first is the derivative litigation filed against Enron. See In re Enron Corp., Derivative & ERISA Litig., 235 F.Supp. 2d 549 (S.D. Tex. 2002) [hereinafter In re Enron]. The second is the Report of the Special Investigative Committee of the Board of Directors of Enron Corp. (2002), available at http://news.findlaw.com/hdocs/docs/enron/sicreport (on file with the University of Michigan Journal of Law Reform). The Special Investigative Committee comprised three individuals: Dean William C. Powers, Jr. of the University of Texas School of Law, Herbert S. Winokur, Jr., a longstanding member of Enron's Board and Chairman of its Finance Committee, and Raymond S. Troubh.


not merely have deprived Enron in the future of the significant, if artificial, profits it had been booking on its financial statements as a result of JEDI's operations, but would also, in fact, have wiped out that profit for 1997. Unsuccessful in finding a replacement outside investor to avert this financial calamity, Enron created Chewco, arranged for Barclays Bank to lend Chewco the funds to purchase the requisite (only 3%) equity stake in JEDI to avoid consolidation, and further arranged for Barclays to lend straw parties enough to fund an equity stake in Chewco sufficient to dissociate (for accounting purposes) Chewco from being consolidated with Enron.\(^{248}\) Apart from the consolidation issue, Enron, as a public company, also had to avoid having to make disclosure that any of its senior management controlled Chewco, and this was done through the subterfuge of putting one of Fastow's henchmen in charge of Chewco.\(^{249}\)

Thus began a long and convoluted sequence of schemes concocted to preserve Enron's fictitious profitability. The subterfuges succeeded in that aim for another three years.

Many of the most significant transactions apparently were designed to accomplish favorable financial statement results, not to achieve bona fide economic objectives or to transfer risk. Some transactions were designed so that, had they followed applicable accounting rules, Enron could have kept assets and liabilities (especially debt) off of its balance sheet; but the transactions did not follow those rules. . . .

Other transactions were implemented—improperly, we are informed by our accounting advisors—to offset losses. They allowed Enron to conceal from the market very large losses resulting from Enron's merchant investments by creating an appearance that those investments were hedged—that is, that a third party was obligated to pay Enron the amount of those losses—when in fact that third party was simply an entity in which only Enron had a substantial economic stake. We believe these transactions resulted in Enron reporting earnings from the third quarter of 2000 through the third quarter of

\(^{248}\) Id. at 615.

\(^{249}\) An Enron Global Finance employee, Michael J. Kopper, who reported to Fastow, apparently managed Chewco. Enron Report, supra note 245, at 50.
2001 that were almost $1 billion higher than should have been reported.\textsuperscript{250}

Not surprisingly, a number of Enron employees involved in these shams and subterfuges improperly received significant financial benefits from the transactions that gave rise to these mammoth losses.\textsuperscript{251}

Ultimately, of course, the house of cards came tumbling down, and, within a month of the second announced restatements of financials, Enron filed for bankruptcy. The financial consequences to investors and pension holders were catastrophic.

From the disclosure point of view, there was an abject dereliction of duty by the professionals involved—"an absence of forceful and effective oversight by Senior Enron Management and in-house counsel, and objective and critical professional advice by outside counsel at Vinson & Elkins,\textsuperscript{252} or auditors at Andersen."\textsuperscript{253} But the derelictions went far beyond mere disclosure defalcations. The series of complex transactions that concealed, for a time, Enron's true financial condition could not have been effected without professional assistance. Much of that was done through improper accounting, for which responsibility has been laid at the doorstep of Arthur Andersen & Co., which billed Enron $5.7 million in connection with work performed specifically on the LJM and Chewco transactions during the period 1997–2001, over and above Andersen's normal audit fees.\textsuperscript{254} The Houston-based law firm Vin-

\textsuperscript{250} Id. at 4.

\textsuperscript{251} At the time of these announcements, it was revealed that Fastow had personally pocketed more than $30 million from LJM1 and LJM2, Kopper at least $10 million, two other employees $1 million each, and still two more by amounts believed to have been at least in six figures. Id. at 4. Furthermore, Kristina Mordaunt, an in-house lawyer at Enron, is said to have accepted interests in one of the related-party investments that enriched Fastow, Southampton Place, without obtaining the consent of Enron's Chairman and Chief Executive Officer, which represented, at minimum, a violation of Enron's internal corporate code of conduct. Id. at 27.

\textsuperscript{252} For example, the lawyers obligingly approved non-disclosure of the tens of millions of dollars in SPE-related compensation paid to Fastow (who obviously preferred it that way), notwithstanding SEC Regulation S-K requiring such disclosure, apparently on the theory that, because it was still uncertain how much Fastow would eventually earn from all the transactions, Enron did not have to disclose even what he had earned thus far. See id. at 187; 17 C.F.R. § 229.404 (2002). See generally, Enron Report, supra note 245, at 178–208. The SEC disclosures did aver that these "related-party" transactions had been negotiated at "arm's-length" and on terms "comparable" to those in deals with non-related parties, notwithstanding the lack of any factual foundation whatsoever for such assertions and apparently heedless of the facially suspect nature of these transactions. Id. at 198.

\textsuperscript{253} Enron Report, supra note 245, at 17.

\textsuperscript{254} Id. at 5.
son & Elkins (V&E) was Enron's longstanding outside counsel, and the Chicago-based law firm Kirkland & Ellis (K&E) represented Chewco and JEDI (itself a concurrent representation that was questionable under the Model Rules, given the importance of reifying, via the spurious third party equity investments, 255 the "independence" of Chewco from JEDI and JEDI from Enron)256 and other Enron-related partnerships and SPEs as well. Both firms provided key legal advice and transactional assistance (including documentation and indispensable legal opinions) in connection with many of the transactions discussed in the Enron Report and also assisted Enron with the preparation of what turned out to be wholly inadequate, if not false and misleading, disclosures of related-party transactions in proxy statements and the footnotes to the financial statements in Enron's periodic securities filings.257

Perhaps it would not be condign to assign any blame to V&E with respect to its failure to detect or comment upon the impropriety of various accounting treatments, though the extent of the firm's involvement in Enron's affairs and the proliferation of SPE transactions that were, at best, of marginal legality, should have raised plenty of red flags.258 Clearly, V&E "should have brought a stronger, more objective and more critical voice to the disclosure process."259 Furthermore, it was obvious that Enron's management

255. One wonders how the lawyers could possibly have been duped if they were privy to, or worse yet participated in documenting, the loans from Barclays to these "investors."

256. In fact, the allegations in the Enron derivative litigation suggest that K&E treated Enron and its senior management as the law firm's de facto clients (another, all too common multiple representation of dubious propriety, discouraged by the entity-representation standard of Model Rule 1.13), at the expense of the interests of the sham clients they were theoretically engaged to represent. Adding insult to injury, K&E is also alleged to have represented Fastow. See generally In re Enron, 235 F.Supp. 2d 549, 669-73 (S.D. Tex. 2002).

257. Both firms are also alleged to have advised Kopper that all of his actions were proper when he expressed concern about the propriety of his simultaneously managing Chewco, serving as the "owner of [its] general partner," having an equity interest in its limited partner, and serving as an Enron employee. Id. at 671. Kopper ultimately pleaded guilty to money laundering and wire fraud charges, arising from allegations of a conspiracy, spanning the period 1997-2001, with Fastow and others to concoct a series of transactions with Enron-related partnerships for the purpose of concealing debt, falsifying Enron's financial statements, and enriching the conspirators. See Jonathan Weil et al., Guilty Plea by Enron's Kopper Increases Scrutiny of Ex-CFO; Admission of Two Felonies by Former Finance Aide Seen as Watershed in Case, WALL ST. J., Aug. 22, 2002, at A1.


and its Board "relied heavily on the perceived approval by Vinson & Elkins of the structure and disclosure of the transactions."  

For its part, K&E is alleged to have known that Enron's stock was propping up the SPEs (including subsequent generation enterprises known as the Raptor SPEs) and that, if the stock price should decline, the SPEs would fail, eliminating the illusory profits they were contributing to Enron's financial statements.  

When that vicious cycle seemed imminent in late 2000 and in subsequent years, the derivative action plaintiffs allege, K&E "helped restructure and capitalize the Raptor SPEs . . . by transferring even more shares of Enron stock to them." These are the same Raptor SPE financings that feature so prominently in the alarm-ringing memorandum of whistleblower Sherron Watkins.  

Sadly, the saga does not end here. Once Enron's true financial condition became known, V&E was engaged to conduct a "preliminary" internal investigation of Sherron Watkins's allegations of various accounting improprieties. If "preliminary" is synonymous with "cursory," then V&E's efforts were right on target, and, predictably, the result was a recommendation to management that nothing further be done to follow up on Watkins's allegations. No great surprise there: V&E was conducting an investigation that, if scrupulously and professionally performed, would call into ques-

260. Id.  
262. Id. at 672.  
263. Id. at 657 n.92.  
264. The ostensible reason for Enron's management choosing V&E was its familiarity with Enron and its businesses, thereby facilitating a quick investigation. See Roger C. Cramton, Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues, 58 Bus. Law. 143, 162-63 (2002).  
265. The entire text of Sherron Watkins's memorandum to Enron Chairman Kenneth Lay was reprinted in the New York Times. See Text of Letter to Enron's Chairman After Departure of Chief Executive, N.Y. Times, Jan. 16, 2002, at C6. In fact, Watkins advised Lay not to engage V&E but to hire an independent, outside law firm to investigate—one that was not Enron's regular law firm, had not signed off on some of the questionable SPE deals, and did not have a conflict of interest. Id. Contrary to her advice, Lay engaged V&E to review the transactions, but the engagement was limited so that V&E would not "second guess" Andersen's accounting treatment thereof.  
266. The distinguished New York firm Simpson, Thacher & Bartlett reportedly performed an even more cursory investigation for its client, Global Crossing. Asked to investigate allegations of wrongdoing made by a manager in a manner strikingly similar to Sherron Watkins' communications to Enron Chairman Lay, Simpson, Thacher conducted a perfunctory inquiry in which it interviewed neither Global Crossing's outside auditors nor the whistleblowing manager, and then advised the corporate client that no further investigation or action was necessary. See Joseph Menn, Global Crossing Case Figure Not Questioned, L.A. Times, Feb. 22, 2002, at C1.  
tion the very transactions that V&E itself had participated in structuring, counseling, documenting, and facilitating with the preparation of requisite opinions of counsel and securities disclosure documents.\textsuperscript{268}

Once again, one must wonder what these lawyers could possibly have been thinking.\textsuperscript{269} How could V&E ethically have undertaken an investigation in which the adequacy of its own prior legal work would inevitably be in issue? In the first place, such an engagement creates an obvious conflict between the client's presumptive need for a credible, punctilious, and impartial investigation and the law firm's interest in legitimating (if not exonerating) its prior work for the client. Thus, under prevailing rules, a lawyer may not accept such an engagement if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interest, unless the client gives a fully informed and valid consent.\textsuperscript{270} Such a conflict cannot, under prevailing ethical norms, be cured by disclosure and client waiver

\textsuperscript{268} See Cramton, supra note 264, at 164.

\textsuperscript{269} In that regard, one must wonder about V&E's objectivity and harbor the healthy suspicion that any lawyers asked to conduct an internal corporate investigation must have been so anesthetized by the prospect of additional fees that the firm failed to give even a moment's thought to why Enron's management insisted on having V&E do the investigation, when it would clearly implicate the law firm's own prior work, and what that would tell them about the type of opinion management wanted the firm to provide.

\textsuperscript{270} Presumptive, here, because this specific client, Enron, may actually have preferred a whitewash rather than an objective investigation. Indeed, the limitations on V&E's engagement suggest that may have been the case. Nevertheless, even if the client had \textit{insisted} upon limiting the investigation, as it may well have, acceptance of those restrictions would fatally undermine the law firm's independence, objectivity, and competence to conduct the investigation. Allowing the client to dictate which employees could be interviewed and what areas of inquiry were out of bounds (for example, Andersen's accounting treatment) perforce rendered the investigation perfunctory and inadequate. For example, what law firm exercising independence, objectivity, and professional competence would uncritically accept individuals' self-serving denials of their own wrongdoing at face value, without any further inquiry, or fail to interview a number of employees with arguably relevant information? A comparison of the V&E investigation with the subsequent investigation by the special committee of the Board that produced (with the assistance of a \textit{truly} independent law firm) the Enron Report proves this point dramatically.

\textsuperscript{271} Model Rule 1.7 is unambiguous on this point, both in its original avatar and in its reincarnation as part of the ABA's Ethics 2000 revisions. \textit{Compare} GILLERS \& SIMON, supra note 184, at 79 with id. at 93 (comparing current and prior versions). \textit{See also} Restatement (Third) of the Law Governing Lawyers §§ 121-122 (2000). Here, Enron was V&E's largest client, and the law firm had previously done extensive legal work in structuring and documenting the transactions in question and approving financial disclosures relating to those transactions. It should be clear beyond peradventure that V&E could not undertake the internal corporate investigation without disclosure of the potential conflict and Enron's informed consent.
(even if it could be said to be "fully informed," which, from the entity's point of view, is far from clear) because of the separate and independent requirement that the lawyer must reasonably believe the representation will not be adversely affected by the lawyer's conflict of interest. Even apart from the necessity of second-guessing its own documents and legal advice, V&E should readily have anticipated being named as a party defendant in any shareholder suits against Enron and being used as a scapegoat by Enron insiders seeking to avoid personal liability. (Don't blame us: we reasonably relied on our lawyers, who assured us these transactions were lawful and proper.)

Thus far, this discussion appears to highlight only the rogue behavior of two law firms. Yet, there is a plethora of other legal talent who may appropriately share in the blame, even if we limit ourselves to the Enron saga. Take, for example, the prominent commercial and investment banking organizations whose assistance in providing shady financing designed artificially to inflate Enron's profitability has been the subject of congressional hearings and is by now well documented. Without going into the details of these complex financial manipulations, suffice it to say that they were extensions of credit to Enron that were disguised as commodities sales (e.g., sales of oil or gas) or trading, often involving SPEs established by the banking organizations themselves. No real assets ever changed hands, nor was it ever intended that they would; rather, the intent was for Enron to repay the disguised indebtedness (with interest, of course) and "cancel" the "sales." The point of this rather elaborate scheme was to show as earnings on Enron's books what was really debt and to leave Enron free to bor-

272. The officials purporting to consent on behalf of Enron were its Chairman, Kenneth Lay, and its General Counsel, James V. Derrick, Jr., both of whom were heavily implicated in the misconduct alleged by Sherron Watkins.


275. In re Enron, 235 F.Supp.2d at 627-29, 651, 697. See also First Interim Report of Neal Batson, Court-Appointed Examiner at 7 n.26, In re Enron Corp., No. 01-16034 (AJG) (Bankr. S.D.N.Y. Sept. 21, 2002) (on file with the University of Michigan Journal of Law Reform) [hereinafter Batson Report]. Susan Koniak has also provided a summary description of these transactions, which Batson calls "prepay" transactions, id., and which she characterizes as "money-go-round deals," Koniak, supra note 113, at 1242.
row money on the security of assets without relinquishing any control, or any benefits from the proceeds, of those assets.\textsuperscript{276} At the risk of reiterating the obvious, none of these transactions could have been consummated without the assistance of sophisticated, elite law firms,\textsuperscript{277} which had to render legal opinions known as "true sale" opinions and "nonconsolidation" opinions.\textsuperscript{278}

Then, as the threat of a government investigation into Enron, its SPEs, and the accounting treatment of the various transactions loomed, Enron's outside auditing firm, Arthur Andersen, initiated a concerted effort to sanitize its Enron files, a process that resulted in the destruction of untold numbers of documents. Having previously paid a fine to the SEC and settled a civil action in damages for its conduct relating to insolvency of Waste Management, Andersen had revised its "document retention policy" in an apparent effort to ensure that "smoking gun" work papers would not be available to regulators and plaintiffs' lawyers in the future.\textsuperscript{279} Then, in a variation on what might somewhat uncharitably be described as the "Will no one rid me of this meddlesome priest?" suggestion,\textsuperscript{280} Andersen in-house counsel Nancy Temple repeatedly urged those working on the Enron account to be sure to comply with Andersen's document retention policy. By this point, Andersen had already engaged New York-based Davis, Polk & Wardwell,\textsuperscript{281} and Temple testified that she consulted with Davis, Polk on the subject of document retention.\textsuperscript{282} This almost sounds like a lawyer

\textsuperscript{276} Batson Report, \textit{supra} note 275, at 48.

\textsuperscript{277} It goes without saying that the household names in the financial services industry that participated in these transactions—Morgan, Citi, Merrill, and First Boston—all employ such law firms on a regular basis, as did Barclays before them (in connection with the restructuring of the original SPEs, JEDI and Chewco).


\textsuperscript{280} Henry II's famous cry, pursuant to which some of his minions obligingly assassinated the Archbishop of Canterbury, Thomas à Becket.

\textsuperscript{281} The precise scope of Davis, Polk's engagement by Andersen is uncertain, other than for public statements that the firm was advising Andersen concerning its legal problems relating to the Enron engagement. Perhaps the scope of engagement was defined quite narrowly, but, if it was so narrow that the firm could not properly advise on something as basic as document retention, then acceptance of so restrictive an engagement may actually have prevented the adequate representation required by ethics rules. See, e.g., Model Rules of Prof'l Conduct R. 1.1, 1.1 cmt. 5, 1.2(c) (2003).

joke: How many lawyers does it take to screw in a light bulb in order to be able to see (and hopefully, preclude) the shredding of documents critical to an imminent criminal and civil investigation? What tune, one wonders, were Arthur Andersen’s lawyers (in-house and outside counsel) fiddling while Rome burned?283

Obviously, not just outside counsel, but in-house counsel as well, must share the blame, as all ostensibly operate under the same ethical strictures (though that, too, suppresses context). Nancy Temple and James Derrick are two examples of what not to do that emerge from the preceding discussion, but it must be recognized that serving only a single client and being beholden solely to that client for one’s livelihood create pressures toward, at a minimum, looking the other way when suspicious things are going on. The allocation of ethical responsibilities becomes more complex, of course, when there are interactions with outside counsel, particularly where long-standing and tightly interwoven relationships between a corporate client and its outside law firm create a clubby atmosphere.284 Noteworthy in that regard is that Enron’s General Counsel was a former V&E partner, who continued the company’s tradition of sending the firm a steady stream of business. Enron’s legal department also hired approximately twenty V&E lawyers during the late 1990’s.

"Son of Enron"

The Enron saga, unfortunately, does not stand alone. Consider the strange case of Mark A. Belnick, a lawyer who years ago helped Congress track down missing millions in the Iran-Contra affair and was formerly a partner at the New York firm of Paul, Weiss, Wharton, Rifkind & Garrison. He was lured from private practice to work in-house at Tyco and has been accused of participating in a conspiracy to loot Tyco of hundreds of millions of dollars.285

283. These limited facts suggest three possibilities, none of them good. Andersen’s lawyers were (1) actively encouraging this eradication through none-too-subtle hints; (2) recklessly disregarding the very real possibility that documents might “disappear” as a result of Andersen employees seeking to protect themselves or Andersen; or (3) lackadaisically (and negligently) going about their business with nary a thought for whether or not the Enron files were preserved. Any of these three would have ineluctably exposed Andersen to civil liability to Enron and its shareholders and to potential criminal liability for obstruction of justice. In actuality, these practices did all that and more, leading to worldwide public opprobrium, client exodus, partner defections en masse, and, ultimately, the dissolution of the firm.


285. Jonathan D. Glater, Lawyer Caught in Tyco Tangle Leaves Friends Wondering, N.Y. TIMES, Sept. 24, 2002, at C1. According to allegations in a lawsuit filed by Tyco, as soon as Belnick joined the company in 1998, he received two employment contracts, each dated the
Sadly, this news story appeared on the same day with three other startling stories of corporate greed and malfeasance. In one, the NASD sued former Salomon Smith Barney analyst Jack B. Grubman for allegedly writing misleading research on WinStar Communications, which paid his employer $24 million in investment banking fees during that same period. In another, the founder of cable company Adelphia Communications, John J. Rigas, two of his sons, and two other former Adelphia executives were indicted on securities fraud, wire fraud, bank fraud, and conspiracy counts, alleging a scheme to conceal approximately $2.5 billion in debt and other funds misappropriated by the Rigas family. Finally, the chief Administrative Law Judge of the Federal Energy Regulatory Commission found, in an administrative hearing initiated by the state of California and one of the state’s major utility companies, that El Paso Corporation fraudulently drove up prices for natural gas in California during the state’s power crisis in 2000 and 2001 by manipulating energy supplies to withhold gas from the state, thereby artificially increasing the cost of electricity generated by gas-fired turbines.

same day and signed by flamboyant CEO L. Dennis Koslowski. Only one was approved by the board of directors; the other was kept secret:

Under the first contract, Tyco would pay Mr. Belnick a salary of $700,000 and a first-year bonus of $1.75 million, and provided him with 100,000 restricted company shares and 500,000 options.

The second contract was far more lucrative. It guaranteed that Mr. Belnick’s bonus would be no less than one-third of that received by Mr. Koslowski and entitled Mr. Belnick to participate in the company’s relocation program, the source of $14 million in loans, which he used to pay for homes on Central Park West and in Park City, Utah.

_Id._ at C9. Belnick also allegedly concealed from the board the fact that New York prosecutors had subpoenaed documents related to art purchases by Mr. Koslowski. Although Koslowski allegedly told two members of the board’s governance committee about the subpoena (which ultimately matured into charges against him of avoiding state sales taxes), Belnick, as general counsel, had an obligation to inform the board. _Id._

286. Winstar filed for bankruptcy protection shortly after rosy research reports of its financial condition (at the same time denigrating research from other firms that had been critical of Winstar) had been released. The NASD also fined Salomon $5 million for issuing the research—the third-largest fine ever issued by NASD. See generally Gretchen Morgenson, _NASD Sues Star Analyst Over Research: Salomon Is Told to Pay $5 Million Fine in Case_, N.Y. TIMES, Sept. 24, 2002, at C1.


To find four such stories in a single daily edition of a newspaper is shocking, particularly as any one of them raises issues that are potentially as troubling as those in the Enron situation. Take the El Paso matter, for example. Those who initiated the proceeding are seeking nearly $4 billion in damages, which is only the tip of the iceberg in terms of civil lawsuits that have already been filed and that will be advanced if the ALJ’s ruling is sustained on appeal. Internal El Paso documents unearthed as part of a joint reporting project between The New York Times and the Public Broadcasting System program “Frontline” had earlier revealed, inter alia, a plan to use interaffiliate sales of pipeline capacity to “‘widen’ the difference between what gas could be bought for in Texas and New Mexico and what it could be sold for in California.” Assuming the truth of these allegations, our fugue subject reprises: What could the in-house lawyers and auditors (and/or outside counsel and public accountants) of El Paso have been thinking?

The headlines go on and on. A front-page story in The Wall Street Journal recounts the involvement of a prominent Chicago-based law firm, Mayer, Brown, Rowe & Maw, in the collapse of Commercial Financial Services, Inc. (CFS), a firm engaged in purchasing bad consumer and credit card debt from banks at deep discounts, packaging it, securitizing it, and then making collection efforts. A dispute has been raging between the law firm and the founder of CFS, William Bartmann.

In 1997, CFS’s recently hired CEO, Mitchell Vernick, abruptly and unexpectedly announced his resignation because he had “concluded the company’s program for collecting delinquent debt would never match the projections it was giving to bond buyers. He noted that CFS was making up the shortfalls by selling off some loans on which it managed to collect, but he said this practice dug the company into an ever-deeper hole, by depriving it of future

289. Id. at C2.
290. Id. The FERC proceeding was initiated by the California Public Utilities Commission, which was “joined by the Southern California Edison unit of Edison International and the Pacific Gas and Electric unit of the PG&E Corporation, each of which lost billions of dollars during the power crisis.” Id.
291. To come full circle on this series of scandals, the public now knows that Enron, despite earlier denials by its executives, not only engaged in speculative trading by betting (correctly, on the whole) on the direction of gas and electricity prices during California’s energy crisis ($7 billion of net trading gains during that crisis!) but also endeavored to add a little leverage to its bets by conspiring with its subsidiary, Portland General Electric, to manipulate the price of power on the West coast. See David Barboza, Despite Denial, Enron Papers Show Big Profit on Price Bets, N.Y. Times, Dec. 12, 2002, at A1, C6.
collections. Vernick's draft resignation letter "said he was 'no longer comfortable representing to investors . . . that I have a high confidence that they will be repaid in full'" and that, "[i]f it were his company, he would stop selling new bond issues immediately. . . ." Prior to his resignation, Vernick was "debriefed" in two meetings with Mayer, Brown lawyers, who then either drafted or signed off on (depending on whether one believes the law firm's or the company's version of events) disclosure language concerning the CEO's "tumultuous departure." This language, which was critical to CFS's ability to keep selling bonds,

said both Mr. Bartmann and Mr. Vernick considered the CEO's resignation "appropriate in light of their different perspectives and opinions related to a variety of issues concerning the business of CFS, including, among other matters, the management of the collection process, its capital market strategy and the value of the asset serviced by it."

The wording didn't spook rating agencies or investors. Over the next 13 months, CFS sold additional bonds valued at $1.2 billion.

For outsiders, the first whiff of serious problems at CFS didn't come until the end of those 13 months. On Sept. 30, 1998, bond-rating agencies received an anonymous letter about CFS. "Around 20% of all collections on the securitizations are coming from assets sales," the letter said, not payments from borrowers. "In the last year, nearly all of them have been to a company called Dimat Inc. located in Shawnee, Okla. . . . Why has no one in this industry ever heard of Dimat."

Ultimately, the company defaulted on more than $1.6 billion in bonds and filed for bankruptcy protection.

In the proceedings that followed, it emerged that Barmann's partner, Jay L. Jones, had established Dimat as a "sham corporation" to facilitate "fraudulent purchases of CFS's most troubled

293. Id. at A16.
294. Id.
295. Id.
296. Id.
loans" as "a way of inflating CFS's debt-collection results and making them appear sufficient to cover bond repayments."\textsuperscript{297}

In the litigation that has arisen following these events, questions have been raised about the extent to which Mayer, Brown, which earned substantial fees from these bond offerings, knew that CFS was meeting its collection targets by selling off loans in sham transactions to Dimat. "The law firm faces allegations of malpractice and 'negligent representation' by CFS" and of securities fraud from bondholders, who allege that the firm "knew CFS was 'a house of cards about to fall down' but helped conceal this fragility from investors so that bond sales could continue."\textsuperscript{298} The plaintiffs also cite to the firm's opinion letters containing standard language to the effect that it "knew of no facts that led it to believe the offering documents contained an untrue statement or omitted a material fact."\textsuperscript{299}

Without regard to what Mayer, Brown "knew" about the ongoing securities fraud, what virtually leaps off the page when reading this information is the inadequate and arguably deceptive nature of the disclosure relating to Vernick's resignation. While not explicating—at least according to the article's account\textsuperscript{300}—the details about Dimat and its insider ownership, even the abbreviated version of the reasons for the former CEO's resignation should have been more than adequate to put a reasonable lawyer representing the company (to say nothing of responsibility for securities disclosures) on notice that something was amiss. Assuming, again, the accuracy of the press account, the fugue subject makes its doleful return: What could the Mayer, Brown lawyers have been thinking when their only reaction to this information was, apparently, to craft remarkably opaque language of which the only conceivable purpose was to obnubilate the reasons for Vernick's resignation and confound public investors?

\textsuperscript{297} Id.\textsuperscript{298} Id.\textsuperscript{299} Id.\textsuperscript{300} What Vernick actually told the two Mayer, Brown partners when they "debriefed" him at the time of his resignation was not known to the authors of the\textit{Wall Street Journal} article and, because of considerations of privilege, may never come to light (unless waived by CFS or needed by Mayer, Brown to serve its own interests in defending lawsuits, of course).
2. *The Regulatory Response*—Notwithstanding wave after wave of scandal, the puissance of the bar's campaigns lingered. When a letter from a group of law professors urged SEC Chairman Harvey Pitt to amend the agency's rules of practice the better to define what constitutes proper representation of public companies, what came back was a reply from SEC General Counsel David Becker disclaiming any enthusiasm—at least since 1982—to bring "Rule 102(e) proceedings against lawyers based on allegations or improper professional conduct, or otherwise use [...] the Rule to establish professional responsibilities of lawyers." The extent of regulatory capture of the SEC is clearly reflected elsewhere in Becker's letter:

There has been a strong view among the bar that these matters are more appropriately addressed by state bar rules, which historically have been the source of professional responsibility requirements for lawyers, and have been overseen by state courts. [...] There are also good reasons why consideration of such a significant change in established practice should be undertaken in the context of Congressional legislation, as opposed to agency rulemaking.

Such legislation was not considered likely, but, then, to the surprise of virtually everyone, an eleventh hour amendment to the bill that became SOXA produced § 307, requiring the SEC to impose an "up the ladder" regime and also to establish "minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers. [...] Consistent with the mandate to prescribe such

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302. See supra note 153 and accompanying text.


304. Id.

305. SOXA § 307 provides:

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
minimal standards, the SEC’s proposed rule added a “noisy withdrawal” requirement to the “up the ladder” provisions. Although “noisy withdrawal” was already a recognized part of lawyers’ ethical obligations, even as recognized by the ABA, the SEC’s proposal met with howls of indignation, pointed criticism of the “noisy withdrawal” requirement, and a concerted campaign 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 directors not employed directly or indirectly by the issuer, or to the board of directors.


306. “Noisy withdrawal” is a term used to describe a process whereby the attorney not only withdraws from representing the client but also disavows (or, in legal ethics parlance, “disaffirms”) work product in order to prevent its being used in the client’s intended or future fraud.

307. See Implementation of Standards of Prof’l Conduct for Attorneys, Sec. Act Release No. 33-8150, 67 Fed. Reg. 71,670 (Dec. 2, 2002). Anticipating the firestorm, the SEC specifically solicited comments on the “noisy withdrawal” and “reporting up” proposals. As to the latter, the “reporting up” requirement was limited to “evidence of a material violation,” which the proposal defined as “information that would lead an attorney reasonably to believe that a material violation has occurred, is occurring, or is about to occur.” Id. at 71,670, 71,704. Professor Coffee has expressed the view that the proposed rule was too solicitous of the bar and did not go far enough. See John C. Coffee, Jr., The Latest Sarbanes-Oxley Controversy: Section 307, N.Y.I.J., Nov. 21, 2002, at 5.

308. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 92-366 (1992), requires withdrawal in the case of ongoing fraud by the client where the attorney’s services would assist the fraud and permits (but does not require) noisy withdrawal in appropriate circumstances.

to scuttle everything but the legislatively required "up the ladder" requirement.  

Predictably, given the degree of regulatory capture previously discussed, that campaign was successful. The SEC adopted a modified version of the rule and deferred for further consideration the controversial noisy withdrawal proposal.  

Deference to the concerns of the organized bar are manifest even in the pared down rule. Its formulation, for example, is quite odd. Attorneys appearing and practicing before the Commission must report up the ladder when they "become[] aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer." The italicized language is then defined in a peculiar double negative format to mean "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely


This encompasses lawyers who transact business with the SEC, who represent issuers in connection with SEC proceedings, or who give advice with regard to U.S. securities issues relating to documents filed with the Commission or to exemptions from filing or other regulatory requirements. 17 C.F.R. § 205.2(a)(1)–(iv) (2004).

Id. § 205.3(b)(1), (c)(1) (emphasis added). The duplication in two separate paragraphs refers to two situations: one for issuers that have not established a Qualified Legal Compliance Committee (QLCC) and the other for issuers that have.
that a material violation has occurred, is ongoing, or is about to occur.”

Regulatory capture has thus produced a singularly unenforceable standard. When one tries to parse that language, one realizes that a showing that it would be “unreasonable, under the circumstances, for a prudent and competent lawyer not to have concluded” something is perilously close to a “knew or should have known” standard of proof—in other words, scienter. Indeed, for an enforcement lawyer to prove this double negative standard was violated would require establishing that no reasonable lawyer could have concluded anything else but that the law had been, was being, or was about to be violated. Securities lawyers thus have little incentive to abandon an ostrich-like or “ignorance is bliss” posture.

Assuming, however, that a lawyer possessed of superb semasiological skills were able to navigate that linguistic labyrinth, he must report the evidence to the CEO or chief legal officer (CLO), and the latter must conduct an investigation and apprise the reporting attorney of his determination, whether or not a material violation is present, and, if so, that the issuer is taking an “appropriate response.” If the reporting attorney is satisfied that he has received an “appropriate response,” he need do nothing further; if not, he must explain the reasons for his dissatisfaction to the CLO and on up the ladder. Alternatively, in the event that the issuer has previously established a QLCC, the attorney may

314. Id. § 205.2(e).
315. Cf. John C. Coffee, Jr., Corporate Securities, Myth & Reality: SEC’s Proposed Attorney Standards, N.Y.L.J., Jan. 16, 2003, at 5. Coffee argues that the SEC would have done better to adhere to a familiar materiality formulation such as that in Basic, Inc. v. Levinson, 485 U.S. 224 (1988). Id. “Absent such a definition, the SEC has not just pulled its punch; it has made ignorance bliss.” Id. at 7.
316. 17 C.F.R. § 205.3(b)(1) (2002). If he is a subordinate attorney, however, he may content himself with reporting to his supervisor and need take no further action. Id. § 205.5(c). This is even less onerous than obligations under Model Rule 5.2(b), where the subordinate attorney is in compliance only if the supervisory lawyer’s resolution of an “arguable” question of professional duty is “reasonable” and the subordinate acts in accordance with that resolution. Model Rules of Prof’l Conduct R. 5.2(b) (2003).
317. 17 C.F.R. § 205.3(b)(2) (2002). If the issuer has established a QLCC, the CLO may turn the matter over to that committee in lieu of doing his own investigation. Id.
318. See infra notes 324-28 and accompanying text.
320. Id. § 205.5(b) (9).
321. The requirements for a QLCC are set forth in 17 C.F.R. § 205.2(k) (2002). The issuer cannot establish a QLCC de novo after the matter giving rise to the reporting obligation has already arisen. Id. § 205.3(c)(2).
322. The reporting attorney can, if he so chooses, report to the CLO just as he would in the absence of a QLCC. Given the lesser burden of QLCC reporting, however, it is difficult to imagine anyone making such an election.
satisfy his reporting obligation by reporting directly to the QLCC, after which he need take no further action.\footnote{325}

The Achilles heel of this scheme is the nature of the issuer's "appropriate response." Obviously, one such response is the CLO's conclusion that no material violation is present;\footnote{324} another is that, after a contrary conclusion, the issuer is taking appropriate measures to stop any ongoing violation, remedy a past violation, and prevent any future violation.\footnote{325} These are unremarkable. More problematic is the third alternative, whereby the issuer may engage counsel to investigate and such counsel advises that the issuer has a "colorable defense" that can be asserted "in any investigation or judicial or administrative proceeding relating to the reported evidence of a 'violation.'"\footnote{326} The glaring deficiencies of this approach include the lack of indicia of independence of that counsel, who need not even be outside counsel,\footnote{327} and the ramshackle nature of the "colorable defense" standard, under which even Enron's fraud could have continued unreported—to say nothing of the monumental failure of such a standard to fulfill the SEC's primary goal, which is the protection of investors.\footnote{328}

III. SOME INSIGHTS FROM PUBLIC CHOICE THEORY: REGULATORY CAPTURE

The various embarrassing episodes of lawyer misconduct, while raising large amounts of public ire, drawing a considerable amount of negative commentary in the media, and even pushing Congress

\footnote{323. Id. § 205.3(c)(2).}

\footnote{324. Id. § 205.3(b)(2).}

\footnote{325. Id.}

\footnote{326. Id. § 205.3(b)(3)(ii). Such other counsel may, instead, recommend certain remedial measures that the issuer goes on to implement, but that is uncontroversial.}

\footnote{327. The author is indebted to Nathan Crystal for pointing out this shortcoming.}

\footnote{328. As Koniak explains:}

\[\text{[I]}t\text{ makes no sense to say that an appropriate response for a company given a report of evidence of corporate wrongdoing \ldots is to have the board find another lawyer who has a colorable defense to the violation that he 'may' assert. If shareholders are buying shares today or tomorrow based on bogus financial statements, the fact that a lawyer can imagine a colorable defense that might be made, if the fraud is ever discovered, is no excuse for the company leaving that information outstanding.}\]

Koniak, supra note 113, at 1277.
to enact the odd federal statute affecting lawyer liability,\textsuperscript{329} have not resulted in any truly significant changes to the way in which the legal profession is regulated. Insights into the reasons for the profession's seeming imperviousness to these public outcries come from scholarship on collective action and public choice theory.\textsuperscript{330}

Favorable regulation is frequently viewed as being for sale to the highest bidder, but the high transaction costs of such behavior constitute a worthwhile investment only for certain individuals or self-interested groups\textsuperscript{331} that can successfully pursue a wealth-maximizing strategy with the regulatory treatment so "purchased."\textsuperscript{332} Collective action theory, pioneered by scholars such as


\textsuperscript{330} Public choice theory is a pluralistic political interpretation that endeavors to explain statutory and regulatory provisions as outcomes of an equilibrium among the pressures brought to bear by the various interest groups with sufficient influence to affect the process. See generally Daniel A. Farber & Philip P. Friskey, Law and Public Choice: A Critical Introduction (1991). The theory presumes that all that participate in the political process do so for selfish reasons. See Douglas T. Kendall & Eric Sorkin, Nothing for Free: How Private Judicial Seminars Are Undermining Environmental Protections and Breaking the Public's Trust, 25 Harv. Envtl. L. Rev. 405, 427–28 (2001). See also Steven P. Crole, Theories of Regulation: Incorporating the Administrative Process, 98 Colum. L. Rev. 1, 5 (1998). This theory, in some ways, challenges the legitimacy of regulatory regimes. See id. at 15–16 n.14; Stephen G. Breyer et al., Administrative Law and Regulatory Policy 28 (5th ed. 2002) (noting that the criticism of regulatory programs as being "created and administered for the benefit of strategically placed and well-organized interests at the expense of the general public" suggests that such programs "are inefficient and involve a serious welfare loss for the society as a whole"). Some scholars discussing this approach use the term "interest group theory." See, e.g., Einer R. Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review?, 101 Yale L.J. 31, 35 (1991) ("The defining theme of the interest group theory of lawmakers is its rejection of the presumption that the government endeavors to further the public interest. Rather, under interest group theory, all the participants in the political process act to further their self-interest.").

\textsuperscript{331} In seeking legislation or regulation advantageous to their position, groups can deflect the ultimate outcome away from the public good, in a way one commentator has analogized to a form of "'legislative auction' where the special interest group with the highest 'bid' wins . . . ." Dorothy A. Brown, The Invisibility Factor: The Limits of Public Choice Theory and Public Institutions, 74 Wash. U. L.Q. 179, 182 (1996). The interest groups "with the most at stake in a regulatory decision will work most aggressively to influence that decision and are likely to succeed in doing so." Andrew Guzman, Choice of Law: New Foundations, 90 Geo. L.J. 883, 902 (2002). Indeed, the theory suggests that self-interest utterly permeates the process: "Citizens act to acquire the biggest piece of the collective resource pie at the lowest cost to themselves; legislators act to acquire reelection; bureaucrats act to acquire more power (bigger budget, wider authority, and so on) while in government and lucrative opportunities via the revolving door when they leave." Cynthia R. Farina, Faith, Hope, and Rationality or Public Choice and the Perils of Occam's Razor, 28 Fla. St. U. L. Rev. 109, 110 (2000).

Mancur Olson and Russell Hardin, explains that public outcry is generally too diffuse, comprising tiny individual stakes, notwithstanding the specter of huge societal costs in the aggregate, to overcome the concerted efforts of a smaller, more concentrated and more effectively organized group with considerably more at stake per capita.

If citizens themselves could overcome the market failures to which much regulation purportedly responds, there would be little need for a regulatory state . . . . Given the familiar obstacles to concerted action, however, they cannot: Citizens cannot build highways, inspect food and drugs, protect the environment, ensure the safety of nuclear plants or the airlines, allocate the airwaves, or provide what are essentially other public goods. To do such things would require vast amounts of coordination and cooperation, even supposing that citizens could afford to give such problems sustained attention in the face of life's many competing demands.

Among these "public goods" that citizens cannot provide is a clear, effective, efficient, and enforceable system of lawyer regulation that maximizes lawyers' ability to provide legal services to the public with integrity while observing a healthy balance between fiduciary duties to the client and to the legal system.

Owing to their superior organizational structure, trade associations and industry groups are expected to be—and are in fact—far more effective in protecting their legislative and regulatory turf against consumer interests. Both the ABA and state bar associa-
tions are well-heeled and well organized, and the interests of their membership in promoting and maintaining a regulatory regime catering to their collective self-interest justifies the high transaction costs of effective political action. Notwithstanding the nonhomogeneity (in Olson's terms)\textsuperscript{340} of these bar associations, they benefit from having some members whose private benefits from a collective good justifies those members' investment in the good, notwithstanding that the rest of the membership will benefit as free riders—in Olson's terms, a "privileged group."\textsuperscript{341}

The PSLRA, theoretically designed to protect investors, issuers, and the capital markets from abusive securities litigation, is arguably an example of public choice theory at work. By the 1990's, securities regulation, which, on the whole, has functioned well since the early 1930's, was being successfully employed by plaintiffs' class action law firms to win large judgments (or settlements) against the usual "suspects" in private securities litigation, namely the issuers, but also those who might aid and abet the issuers in the commission of securities fraud (including, of course, accountants and lawyers). Interest groups acting on behalf of these classes of defendants managed to persuade Congress that the securities laws were being "abused" by unscrupulous class action lawyers. Admittedly, there was some truth to that. Yet, by exalting the interests of these parties over those of investors, the statute seems contradictory to the basic premises of securities regulation. Moreover, the power of those special interests displayed itself yet again when class action plaintiffs, finding the federal courts no longer hospitable, sought refuge in the state court system but soon found that alternative legislatively foreclosed as well.\textsuperscript{342}

Public choice theory, while perhaps not a perfect engine for explaining legislative and regulatory phenomena,\textsuperscript{343} offers useful

\textsuperscript{340} A "homogeneous" group is one in which the members all have the same willingness to contribute toward the group good. Olson, supra note 333, at 44.

\textsuperscript{341} Id. at 49–50. Hardin defines this as a "k group"—a subgroup of any group consisting of members who stand to benefit from providing the collective good themselves, without the need for contributions from other members. Hardin, supra note 334, at 41.


\textsuperscript{343} Croley, supra note 330, at 41–56 (questioning underlying emphases on legislators' electoral goals and legislators' motivations and criticizing inconsistencies of the collective action problem and of deregulatory policy reforms). Professor Croley's extensive research and scholarship on public choice and agency capture, in his 1998 article, heavily influenced the author's thinking when he initially floated the suggestion, during the Salzburg conference mentioned at the outset of this Article, of a separate, independent federal agency dedicated to partial regulation of lawyers. As this Article was in its final stages, a wonderful article, authored by Benjamin Barton and also heavily influenced (or at least apparently so)
insights when it comes to the regulation of lawyers. The unique blend of regulation by state judiciaries adopted, often uncritically, from a template of self-regulatory measures drafted by the organized bar itself has shown itself time and again to be especially susceptible to regulatory capture, as public choice theory would predict. The regulated exert a profound influence on the regulators, who act in a manner designed to serve the interests of the former rather than as a credible check on potential rent-seeking excesses or on misconduct. Such capture is scarcely unique to the regulation of lawyers, but is, in fact, the rational end result of the self-interest of any regulated entity and its interplay with both legislators and administrative agencies tasked with the regulation in question.

by Croley's piece, appeared in print. See Benjamin H. Barton, An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market, 37 Ga. L. Rev. 1167 (2003). Professor Barton covers much of the same territory as is summarized in this Part III, only in much greater detail. He briefly considers federal legislative oversight, but does not consider the administrative solution offered here, perhaps because his subject is the entire, diffuse breadth of lawyer regulation, rather than the narrower set of concerns raised for corporate regulatory practice by the sequence of scandals detailed in Part II supra.

344. As a technical matter, the high court of each state regulates the admission and the conduct of all lawyers admitted to practice in that state. See Section of Legal Educ. & Admissions to the Bar, American Bar Ass'n, Legal Education and Professional Development—An Educational Continuum 116 (1992) ("[T]he highest courts of the several states are the gatekeepers to the profession both as to competency and as to character and fitness."); Wolfram, supra note 37, at 24 (articulating a cradle to grave regulation of practice of law by state supreme courts). See also Center for Prof. Responsibility, American Bar Ass'n, Lawyer Regulation for a New Century: Report on the Commission on Evaluation of Disciplinary Enforcement 2 (1992) [hereinafter McKay Report].


346. Stigler and others have argued that rent-seeking via government regulation is immanent in a political system such as ours. See Richard L. Revesz, Federalism and Environmental Regulation: A Public Choice Analysis, 115 Harv. L. Rev. 553, 559–63 (2001); Stigler, supra note 332, at 3. Rent-seeking refers to obtaining government intervention for one's own benefit—gaining the gains and limiting the losses that invariably flow from governmental acts. It has also been defined as "the attempt to obtain economic rents (payments for the use of an economic asset in excess of the market price) through government intervention in the market." Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223, 224 n.6 (1986). Various economic theorists writing about rent-seeking have elaborated quantitative models predicting legislative and regulatory behavior. See generally Gary S. Becker, A Theory of Competition Among Pressure Groups for Political Influence, 98 Q.J. Econ. 371 (1983); Fred S. McChesney, Rent Extraction and Rent Creation in the Economic Theory of Regulation, 16 J. Legal Stud. 101 (1987); Sam Peltzman, Toward A More General Theory of Regulation, 19 J.L. & Econ. 211 (1976).

347. George Stigler's pathbreaking work has engendered additional scholarship and insights, some supportive of public choice theory, some critical. See, e.g., Croley, supra note
The regulatory capture phenomenon exacerbates another, inherent problem of regulation of the bar by the judiciary, namely that courts are institutionally ill-suited to performance of such a quintessentially legislative task. The legislative and adjudicatory processes may each, in its own way, be characterized as adversarial, but there the similarity ends. Unlike adjudication, is always multilateral, has no prudential or constitutional requirements (case or controversy, standing, mootness, ripeness, etc.) that limit the number of participants in the process, has no rules limiting the manner in which they participate, and is not dependent upon strict legal analysis or reliance upon precedent. In short, it is a game played as a “free-for-all” rather than a decorous process under the Marquis of Queensbury rules.

Institutional ill-suitedness aside, proponents of judicial control of lawyer regulation emphasize the expertise of the judiciary vis-à-vis the legislative and executive branches of government, as well as the judiciary's interest in preserving the integrity of its procedures and in the need for judicial independence from overtly “political” influences. The third of these justifications seems rather a make-weight, at least when divorced from the second; as long as the judiciary retains inherent power over the conduct of attorneys practicing before it, its independence is scarcely dependent upon


351. Adjudication is normally a bilateral process, the paradigmatic resolution of a conflict between parties A and B. Occasionally, litigation can be multilateral, as in more complex litigative situations involving third-party defendants and fourth-party defendants, counterclaims, cross-claims, or criminal prosecutions with multiple defendants, though, even in those situations, the actual adjudication is not itself multilateral, but instead can be reduced simply to a sequence of bilateral conflicts (A v. B, B v. C, C v. D, D v. B, etc.).

352. See William N. Eskridge, Jr., et al., Legislation and Statutory Interpretation 3 (2000) (contrasting the “often-chaotic process” of legislation with the “highly proceduralized adversary system of argument...culminating in a discursive opinion”).

its role in regulating the practice of law outside of that context. The first justification, expertise, is a sound point, though the judiciary does not have a monopoly on that expertise, nor is it clearly superior in that regard to other segments of the legal profession, particularly since much, if not most, of lawyer regulation arises in contexts other than the operation of the court system and the filing and conducting of lawsuits. Moreover, even assuming, arguendo, that such superior expertise resides with the judiciary, the advantage is dissipated by the courts' delegation of that authority back to the bar. Given the absence, then, of any truly unique institutional advantage enjoyed by the judiciary in terms of lawyer regulation generally—and especially in contexts far removed from the courthouse—the issue becomes one of weighing the non-unique advantages against institutional shortcomings.

State high court judges are invariably lawyers and were likely to have been, prior to ascending to the bench, successful practitioners active either in bar association activities, or politics, or both. As such, they have many social and political ties (and the even more subtle psychological ties of loyalty) to their confreres in the practicing bar, to some of whom they may owe their appointments (for those

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355. See, e.g., Christopher D. Kratovil, Note, Separating Disability from Discipline: The ADA and Bar Discipline, 78 Tex. L. Rev. 993, 995–96 (2000) (explaining that state high courts have delegated enforcement responsibilities to state bar associations); McKay Report, supra note 353, at 28; Charles W. Wolfram, Expanding State Jurisdiction to Regulate Out-of-State Lawyers, 30 Hofstra L. Rev. 1015, 1047 (2002). Problems, including discriminatory enforcement against solo practitioners and others not well represented in the bar by prosecutorial authorities deputized largely from the ranks of elite firms by state courts, led to ABA criticism and subsequent adoption by the ABA of model disciplinary rules, since adopted by many states. See American Bar Ass'n, Model Rules for Lawyer Disciplinary Enforcement (2001).

356. New Hampshire and Massachusetts are the only two states that do not require their high court judges to be lawyers. See 33 Council of State Gov'ts, The Book of the States 135 (2000) [hereinafter States' Data Book]. In fact, however, as a visit to their websites demonstrates, both the Massachusetts Supreme Judicial Court and the New Hampshire Supreme Court are populated solely by lawyers. See Supreme Judicial Court of Massachusetts, Justices, available at http://www.state.ma.us/courts/courtsandjudges/courts/supremejudicialcourt/justices.html (on file with the University of Michigan Journal of Law Reform); New Hampshire Supreme Court, Meet the Supreme Court Justices, available at http://www.courts.state.nh.us/supreme/justices.htm (on file with the University of Michigan Journal of Law Reform).

357. See Jonathan R. Macey, Judicial Preferences, Public Choice, and the Rules of Procedure, 23 J. Legal Stud. 627, 631 (1994) (judges' "investment in the legal system is likely to align their preferences with the preferences (and interests) of the legal community as a whole").
who are appointed) or victories (for those who are elected), and upon all of whom they are dependent for the enjoyment of the perquisites of judicial office: power, influence, prestige, and even the ability to enjoy time away from work.

Mention was made earlier of the bar’s self-interest in imposing higher entry standards. Self-interest will also motivate judges to support higher standards because judges are forced to rely upon lawyers for the proper functioning of the court system. Having better qualified and more ethical lawyers in the courtroom means (in theory, at least) “better” filings (i.e., a higher percentage of filings that are better researched and better written), more efficient use of procedures designed for early disposition of cases, and easier and more efficient docket control (and, aspirationally perhaps, halting or even reversing the burdensome effects of ever-burgeoning dockets). All of these improvements would translate into fewer trials and less call for judges devoting their time to administrative or disciplinary matters (e.g., discovery disputes, disqualification motions, motions for sanctions, and the like). Beneath the black robes and often stern demeanors are human beings with human prejudices and proclivities, who value their leisure time at least as much as anyone else, as empirical studies and other commentaries have observed.

358. See, e.g., Thomas W. Merrill, Institutional Choice and Political Faith, 22 LAW & SOC. INQUIRY 959, 974 (1997) (explaining that the institutional motivation of judges includes “seek[ing] to maximize some extrinsic good, such as their prestige”).

359. See supra notes 70–72.

360. This is explicit in some state high court decisions on entry standards. See e.g., In re Integration of Neb. State Bar Ass’n, 275 N.W. 265, 267–68 (Neb. 1937) (“[T]he court has an immediate interest in the character of the bar, for the court’s own sake.”).


362. Indeed, judges would be expected to value their leisure time more strongly than practicing lawyers, inasmuch as longer hours for the former are not compensated with increased income as they are for the latter.


364. See, e.g., Richard A. Posner, OVERCOMING LAW 109–44 (1995); Macey, supra note 357, at 631 (positing that judges may be expected to “further their own self-interest by pursuing nonmonetary interests such as increasing leisure [by] reduction in workload”);
State court judges, in their roles as regulators of lawyers practicing in the jurisdiction, are also extremely susceptible to regulatory capture. Although courts are normally thought to be independent and untainted by the mischief of lobbying, that is truer for the federal judiciary than for the states. This is because the majority of state court judges must run for election, either in the first instance or in retention elections (in both cases on public ballots), or via indirect retention elections (where the decision is made by a politically accountable party, i.e. the legislature or the governor or a delegatee, such as a judicial merit selection panel or commission). Some of these judicial elections are partisan and others are not, but, for practical purposes, any type of political accountability on the part of state court judges makes them far less immune to the lobbying blandishments of the organized bar than might be desired.


368. States adhering to this regime include Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Nebraska, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming. *Id.*

369. Examples include Connecticut, Delaware, Hawaii, Maine, New Jersey, New York, Rhode Island, South Carolina, Vermont, and Virginia. *Id.* at 131–32, 137–39. Several scholars have noted that these merit selection committees are often partisan. See Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. Miami L. Rev. 509, 521 (1978) (explaining that they are filled with partisan gubernatorial appointees). Others note they are controlled by the organized bar or segments thereof. See Kelley Armitage, *Denial Ain’t Just a River in Egypt: A Thorough Review of Judicial Elections, Merit Selection and the Role of State Judges in Society*, 29 Cap. U. L. Rev. 625, 656 (2002) (“History has shown that trial lawyers and their acolytes have controlled merit selection committees.”). *See also* Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. Miami L. Rev. 1, 21–22 (1994) (“[A]ttorney members of nominating commissions are either appointed by the governor, or elected or appointed by the state or local bars.”) (citations omitted).

370. Cf. Charles R. Ashman, *The Finest Judges Money Can Buy* 242 (1973) (“[A]ll that has happened is that the politics of the governor and the bar association have replaced the politics of the county party chairman and the electorate.”).

371. Justices in Massachusetts and New Hampshire are appointed for life and face no retention elections. *Id.*

372. Were that not the case, there would be no need for so many election-related provisions detailing instances of judicial misconduct in the *Model Code of Judicial Conduct*. For example, Canon 5(A) (and its ancestor in the 1972 Code, Canon 7(B)) enjoins individuals
For the most fundamental of personal motivations, then, namely retaining their power, prestige, and jobs, the vast majority of state judges will inevitably seek, at least to the extent legally acceptable, to “curry favor” with local lawyers. Especially important from this perspective is to be in good standing with the relevant bar associations, which not only are called upon to provide evaluations or endorsements for judges subject to initial merit selection (even going so far in some jurisdictions as to engage in “bar polling” with respect to individual judges), but also constitute the


375. Acceptable, that is, within the framework set forth in the Model Code of Judicial Conduct.

richest (and often the only)\textsuperscript{377} vein for mining campaign contributions.\textsuperscript{378} That very dependency on lawyers has occasionally led to abuses, such as where large contributions helped lawyers secure large judgments for their clients or remunerative appointments such as receiverships.\textsuperscript{379}

In fact, apart from the practicing bar, few of the electorate seems even to know anything about the judges for whom they are voting, as shown by various studies.\textsuperscript{380} Such voter ignorance is neither unexpected, nor merely a function of voter ignorance generally. Rather, the likelihood of any judicial candidate's affecting the life of a voter (other than, perhaps, in connection with acquaintance as a result of jury service or in defending against a traffic ticket) is rather slim.\textsuperscript{381}


378. See David Barnhizer, \textit{"On the Make": Campaign Funding and the Corrupting of the American Judiciary}, 50 Cath. U. L. Rev. 361 (2001); Schotland, supra note 375, at 93-94 (explaining that the bulk of elected judges' campaign donations come from lawyers). See also Rocha v. Ahmad, 662 S.W.2d 77, 78 (Tex. App. 1983) (acknowledging that attorneys are the principal source of contributions for judicial elections).

379. See, e.g., Paul D. Carrington, \textit{Judicial Independence and Democratic Accountability in Highest State Courts}, 61 Law & Contemp. Probs. 79, 92 n.86 (1998) (citing examples of Alabama Supreme Court upholding an enormous punitive damages award after each Justice had received sizable contributions from plaintiff's counsel, and $315,000 in contributions by Pennzoil to members of the Texas court that decided its landmark civil judgment against Texaco).


381. See Croley, supra note 372, at 731-32.
Not surprisingly, state high court judges are themselves members of their state bar associations, which return the favor a hundred-fold by lobbying for increased salaries and other benefits for their judges. Many judges are ABA members as well, and the ABA, as is well known, has assiduously recruited members for its Judicial Division laboring long and hard to promote the public image of the judiciary and, like their state bar counterparts, to lobby for higher wages and increased judicial benefits.

The return on the bar associations' "investments" in their judges cannot be measured by dues payments alone. Many state high courts have been most cooperative in mandating (sometimes by court order alone) a unified bar, indispensable in adopting higher entry standards at the urging of the bar, and obligingly protectionist in rooting out the unauthorized practice of law in their jurisdictions—all feathering the rent-seeking nests of the legal profession.

Furthermore, in the majority of states, the high courts have delegated most, if not all, of their oversight of lawyers to unified state bars. Such delegation extends even to the inherent power of

382. Bar membership for state justices is required by law in twenty-seven states. COUNCIL OF STATE GOV'TS, STATE COURT SYSTEMS 6–7 (1978). In addition, it is, of course, automatic in those jurisdictions (thirty-six states and the District of Columbia) with a unified bar. Id.

For criticism of the unified bar model, see generally Schneyer, supra note 353, and Bradley A. Smith, The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession, 22 FLA. ST. U. L. REV. 35 (1994).


384. This dates back to 1912 for the federal judiciary, see 37 A.B.A. REP. 37–37 (1912), and 1931 for state judiciaries, see 56 A.B.A. REP 58–59 (1931).

385. See Dayton McKean, The Integrated Bar 49 (1963). The advantage of "unification" to the guild mentality that gave rise to the organized bar is obvious. Supra notes 67–72. A lawyer in such a jurisdiction must become a member of the state bar association, as membership is requisite to the license to practice law there. Smith, supra note 382, at 36.

386. See, e.g., Richard L. Abel, American Lawyers 47 (1989) (noting ABA's alignment with higher standards of legal education and efforts to persuade state supreme courts (or their designees, the integrated bar associations) to adopt those standards as prerequisites to bar admission).

387. See, e.g., In re Jackman, 761 A.2d 1103 (N.J. 2000); Attorney Grievance Comm'n v. Harris-Smith, 737 A.2d 567 (Md. 1999); Cleveland Bar Ass'n v. Misch, 695 N.E.2d 244 (Ohio 1998); Birbrower, supra note 73; Ferrey, supra note 73.

the court to preserve the dignity and the integrity of its processes by remitting intransigent, unprepared, untruthful, and unethical lawyers to the disciplinary process. This is an area in which one would expect the judiciary as a regulatory institution to shine, given judges' undoubted expertise in such matters and institutional incentives (based, in no small part, on judicial self-interest factors previously identified) to maximize the smooth and efficient operation of the court system. Astonishingly, however, judicial reports of lawyer misconduct are few and far between.

Attorney discipline is, and in fact long has been, the stepchild of the rules of professional conduct—"a scandalous situation that requires the immediate attention of the profession.... [T]he prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically nonexistent in many jurisdictions." Having delegated this function to state bar associations, the judiciary has generally allowed it to languish in underfunded obscurity. That obscurity describes enforcement in general; when it comes to transactional lawyers, particularly those at elite firms, the prospects for disciplinary actions are virtually non-existent.

Proponents of judicial regulation of the practice of law point to the imperviousness of an "independent" judiciary—in sharp

389. See supra notes 356–57 and accompanying text.
392. See Susan P. Koniak & George M. Cohen, Under Cloak of Settlement, 82 Va. L. Rev. 1051, 1121 (1996) (noting lack of resources of disciplinary boards, particularly if called upon "to do battle with wealthy class action lawyers and powerful members of the defense bar"). See also Mckay Report, supra note 344, at xviii (noting that underfunded and understaffed disciplinary agencies "offer little protection against unethical lawyers").
393. See Donald C. Langevoort, Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud, 46 Vand. L. Rev. 75, 80 (1993) (characterizing the likelihood of such disciplinary action as "remote"); Ted Schneyer, Legal Process Scholarship and the Regulation of Lawyers, 65 Fordham L. Rev. 33, 51 (1996) (arguing that the Model Rules disciplinary template is ineffective in preventing corporate lawyers from engaging in conduct harmful to third parties because clients will not complain and a "smokescreen of confidentiality" may conceal lawyer's role from injured third parties).
contrast to the state legislature—to lobbying and other forms of
crass influence peddling by corporations, most trade associations,
and public interest groups (not to mention the general public
itself). This regulatory construct might indeed be workable, if only
the judiciary were equally impervious to lobbying by lawyers and
bar associations. Instead, one-sided access by the profession to its
judicial regulators facilitates an unparalleled degree of regulatory
capture. In general, conditions for regulatory capture are
optimized when the members of a regulated industry constitute
the principal and repeat players appearing before the regulator.
Here the regulated industry (the bar) has access to the regulator
(the judiciary) completely sewn up.

Just go to any gala function of a state or municipal bar associa-
tion, or even of a less official organization of lawyers. There, judges
are lionized like celebrities. On such occasions, it is common for
the master of ceremonies (typically the president of the bar asso-
ciation) to take time to identify each state and federal judge
attending the event by name and to solicit applause from the audi-
ence for all the judicial attendees as a group.\(^{394}\) While such
adulation is part and parcel of the prestige and power that are
perquisites of the job, the potential for increased judicial empathy
for positions taken by leaders and other well-known figures in the
bar association cannot be discounted.

Over the course of their legal careers, judges get to know many
lawyers. Some of whom may have been law partners or colleagues
in some professional endeavor, or even law school classmates, oth-
ers of whom may belong to the same clubs and civic organizations,
and still others who have been active in politics with the judge
prior to his or her ascendance to the bench. A vast gray area exists
along the continuum from professional or personal cordiality to
empathy to predisposition to bias. The restrictions in the Code of
Judicial Conduct are generally directed against potential bias or
the appearance of bias only in connection with pending cases.\(^{395}\)

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394. No criticism of this practice is intended by this description. The point is rather to
illustrate the degree to which the close relationship between bench and bar is institutional-
ized in these professional-cum-social settings.

395. For example, Canon 3E provides, "A judge shall disqualify himself or herself in a
proceeding in which his [or her] impartiality might reasonably be questioned." The Canon
then lists four specific instances where recusal or disqualification is mandated, i.e., whenever

(a) a judge has a personal bias or prejudice concerning a party, or personal knowl-
edge of disputed evidentiary facts concerning the proceeding;
Strikingly, no comparable strictures apply to the judiciary in its capacity as regulator of the bar.

Finally, from the viewpoint of the scandals that gave rise to this article, state court judges (indeed, the judiciary in general), largely drawn from that segment of the practicing bar involved in litigation, usually lack sufficient expertise in the types of business law practice (and the mindset that such practice develops) to appreciate fully the nuances that must inform the crafting of ethical rules specific to the situations business lawyers (as opposed to litigators) face. It is no accident that the "one size fits all" model of legal ethics rules fits well within the litigators' (and, more specifically, the trial lawyers') Weltanschauung.\(^{906}\) This observation is not intended to

\(\text{(b) a judge served as lawyer in the matter in controversy, or a lawyer with whom he or she previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;}
\)

\(\text{(c) a judge knows that he or she, individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;}
\)

\(\text{(d) a judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:}
\)

\(\text{(i) is a party to the proceeding, or an officer, director or trustee of a party;}
\)

\(\text{(ii) is acting as a lawyer in the proceeding;}
\)

\(\text{(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;}
\)

\(\text{(iv) is to the judge's knowledge likely to be a material witness in the proceeding.}
\)

**Model Code of Judicial Conduct Canon 3(E) (1990).** While the provision and the commentary explicate that this enumeration is not intended to be exclusive, the specificity of the black letter language suggests myriad hues of gray. For example, what if a lawyer with whom the judge previously practiced law represents the party *now*, as opposed to "during such association?" What about a lawyer with whom the judge did not practice law but who has been a longstanding personal and professional friend? What if the lawyer is the spouse of such a friend? What if the lawyer is an officer of the bar association and has had occasion, in that capacity, to present awards or other honors to the judge? The complete list of "what if" variations on this theme would obviously be quite long. On the other hand, making allegations of negative appearances is quite easy, so evaluation of these situations will of necessity be quite facts-specific. For a general discussion, see Leslie W. Abramson, *Appearances of Impropriety: Deciding When a Judge's Impartiality 'Might Reasonably Be Questioned',* 14 Geo. J. Legal Ethics 55 (2000).

\(^{906}\) Indeed, the overemphasis of the Model Rules on litigation contexts has led commentators (including one well-known federal district judge and ex-SEC enforcement chief) to call for separate ethical rules for discrete legal specialties. See, *e.g.*, Nancy B. Rapoport,
be in any way pejorative. Rather, it is a recognition of another inherent limitation of a system in which judges (coming from, and having "grown up" in the practice of law with the litigation mindset) are being asked to legislate normative rules for practitioners working in an array of different, usually transactional, often highly regulated, business law disciplines. The former cannot fully appreciate the tasks, training, and mindset that form the universe in which the latter work on a daily basis.\footnote{397}

Given the manifest inadequacy of attorney regulation by state high courts, one is tempted, given the traditional primacy of the states in this area, to look to state legislatures as a natural alternative. Indeed, as an historical matter, state legislatures were the original fountainheads of attorney regulation,\footnote{398} until the aggressive appropriation by the state high courts of hegemony in the late 19th century under the aegis of the so-called "inherent power" of the courts to regulate entry into the legal profession and the conduct of lawyers.\footnote{399} Under the constitutional law of those states where that has transpired, then, legislative regulation of the practice of law is a dead letter.\footnote{400}

Even apart from state constitutional law problems, state legislatures, normally acting in shortened sessions and with limited staff and resources, have shown themselves to be singularly susceptible to regulatory capture by the bar. Examples include the perennial success of trial lawyers in squelching tort law reform\footnote{401} and the suc-

\begin{itemize}
\item \footnote{397} Nor does it help that the judiciary has abdicated responsibility for the legislative process of drafting professional ethics standards primarily to the ABA and secondarily to the state bar associations. These organizations tend to be politically dominated by their litigators, as the rules of professional conduct they have crafted so eloquently demonstrate.
\item \footnote{400} See Wolfram, \textit{supra} note 37, at 21-25; Alpert, \textit{supra} note 398, at 536-51.
\end{itemize}
cessful lobbying by bar associations in various states for state LLP statutes, absolving one partner in a law firm from liability for the acts of another.402

Having exhausted viable options at the state level, then, it seems only prudent to consider the federal alternative. Part IV briefly pays homage to earlier suggestions of federalizing legal ethics and then considers the pitfalls of piecemeal regulation by individual federal agencies with substantive regulatory responsibilities that skewed their positions on attorney conduct.

IV. WEAKNESSES OF PIECENAME FEDERAL REGULATION

"History repeats itself, first as tragedy, second as farce," as Karl Marx observed when discussing Louis Napoleon.403 In the case of mass breakdowns of professional ethical norms, however, it has been rather the converse. The early instances—National Student Marketing, tax shelter opinions, O.P.M., etc.—were somewhat farcical. The later ones—the gargantuan, worldwide fraud conducted by BCCI, the S&L crisis, and now Enron, Tyco, WorldCom, etc.—have become increasingly tragic. Thus, not only is self-regulation ineffective, it is increasingly ineffective.

Pioneering work by Fred Zacharias and others some years ago floated the suggestion that legal ethics might be federalized.404 Professor Zacharias suggested a complete federalization of all rules of legal ethics on grounds of uniformity. He argued that a uniform system of regulation is necessitated by a variety of factors. First, there is the increase in specialization that has led to the proliferation of "national" firms with multi-jurisdictional practices. Second, there is the "splintering" effect of significant differences in ethical rules among the various states (as well as the disparity

402. See, e.g., Walter W. Steele, Jr., How Lawyers Protect the Family Jewels . . . The Invention of Limited Liability Partnerships, 39 S. Tex. L. Rev. 621, 623 (1998) ("[T]o some observers a concept that allows partners to share the economic and professional benefits of a partnership without sharing liability in order to save partners' economic hides is more than a contradiction—it is hypocrisy.").


405. Zacharias, supra note 404, at 345–46.
between state and federal rules of conduct), which leave clients uncertain about what lawyers are permitted to do for them and what is prohibited. Third, there is the decidedly negative impact disparate rules of conduct have on the public’s perception of, and confidence in, the legal profession. Finally, there is the piecemeal intrusion by federal agencies undermining the force of state rules. Balanced against these factors are the concerns militating against federalization: (a) elimination of the possibility of gains through state experimentation; and (b) conversion of general ethics standards allowing for the exercise of individual professional judgment into a fixed code of rules. Ultimately, Zacharias concluded, the imperatives of eliminating the splintering of ethical standards and the apparent inability of the ABA effectively to address the problems occasioned thereby weigh in favor of federalization.

At the time of Zacharias’ pioneering article, Congress’ plenary authority under the Commerce Clause had been unquestioned for nearly sixty years, and congressional authority to regulate the practice of law thereunder was not subject to doubt. Then, however, the Supreme Court in United States v. Lopez and United States v. Morrison held that that authority had limits. Therefore, no pro-

406. Id. at 346-54. One example given by Zacharias foreshadows the need for SOXA’s attorney regulation provision. “When national lawyers represent or sue national corporations, the problems are exacerbated. A firm that has several members representing a corporation may find an issue simultaneously governed by the codes in (1) the state in which the firm’s lawyers communicate with the corporation (e.g., the firm’s headquarters); (2) the home states of the lawyers representing the corporation (e.g., the firm’s headquarters); (3) the home state of the corporation; and (4) the state in which the legal issue arises.” Id. at 352.

407. Id. at 357-65.
408. Id.
409. Id. at 365-70.
410. Id. at 373-75.
411. Id. at 378-79.
412. See id. at 380-81.
413. Indeed, there is already substantive federal regulation of lawyers that preempts state regulation in certain fields, such as the Treasury Department’s standards under Circular 230. See supra notes 161-65 and accompanying text. In addition, patent law has its own exclusive federal bar and its own bar examination, which may not be trammeled by state regulation of the bar. See Sperry v. Fla. ex rel. Fla. Bar, 373 U.S. 379 (1963). Indeed, the Patent and Trademark Office (PTO) has promulgated its own rules of ethics, patterned closely on the Model Code. See 37 C.F.R. §§ 10.25 et seq., 10.130 et seq. (2003). Needless to say, the ABA was not pleased. See Rich Arthurs, New Practice Rules Contain Pitfalls, Say Patent Lawyers, LEGAL TIMES, Feb. 18, 1985, at 1 (noting ABA’s criticism of PTO for failing to adopt the 1983 Model Rules or else deferring to the state of the lawyer’s admission). Moreover, the PTO disciplines practitioners before it pursuant to explicit statutory authorization, 35 U.S.C. § 32, and the Treasury Department enjoys similar authority, 31 U.S.C. § 330.
posal for federalization—even, as here, partial federalization—can proceed without preliminarily considering these decisions to determine whether the proposal passes constitutional muster.

Both *Lopez* and *Morrison* emphasized the non-economic nature of the problems Congress had addressed (guns in school zones, gender-based violence) and their attenuated effect on interstate commerce. One of the doctrinal elements of the constitutional analysis employed by the Court in these cases was the requirement that the activity in question "substantially affect" interstate commerce. Another was the revitalization of the distinction between "commercial" and "noncommercial" activity. Both seem easily satisfied when one is talking about legal services, especially for lawyers engaged in corporate, securities, and banking transactions, many of which, of course, involve publicly held entities. In *Lopez*, the majority found somewhat off-putting the tenuousness of the connection between possession of a handgun in a school zone and cumulative effects on "national productivity"; similarly, in *Morrison*, the Court rejected the suggested cumulative economic impact of gender-based violence. In contrast, the activities of business lawyers routinely have great interstate effects, as the spate of legal ethics

416. E.g., *Lopez*, 514 U.S. at 559.
417. Id. at 560–61, 564–66. See also id. at 580 (Kennedy, J., concurring) ("[N]either the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus.").
418. One commentator, though generally disfavoring federalizing legal ethics, reaches the same conclusion. See H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73, 119–120 (1997) ("Even if the revitalized 'substantial effects' test turns out to have bite beyond situations such as Lopez... any reasonable assessment of the interstate effects of attorney conduct would find the test met .... Whatever the merits, or workability, of [the 'commercial'/'noncommercial' activities] distinction, the conduct of lawyers would appear to fall comfortably on the 'commercial' side of the line.").
scandals has so painfully demonstrated. Professor Zacharias' conclusion thus remains sound.

As a doctrinal matter, one might regard the states as better situated to regulate matters as to which there is considerable geographic variability, thereby benefiting from the "laboratory" approach extolled by Justice Brandeis' famous dissent in *New State Ice Co. v. Liebmann.* The practice of business law, however, does not exhibit that kind of variation and is, if anything, becoming more and more homogenized year by year (due in part to increased statutory uniformity in corporate, commercial, and bankruptcy law and initiatives by the ABA Business Law Section, such as its Model Stock Purchase and Model Asset Purchase agreements). Where some variation exists (though, even here, less than before) is not in law practice but in the rules of professional conduct adopted from state to state. However, these variations seem only to have exacerbated the negative externalities arising from the above-mentioned scandals—externalities that have profoundly affected not only states other than those regulating the lawyers in question but also, of course, the national markets as well. Thus, again speaking doctrinally, the case for decentralized regulation is weak, and, as the social costs related to these scandals continue to escalate, the need for credible, national regulation grows ever stronger.

Given the trajectory of the scandals discussed in Part II and their consequent harm, it is readily apparent that things have gotten out of hand and that the bar is in need of a fundamental reexamination and redefinition of what it is that lawyers, particularly business lawyers, are "supposed" to do. Professional discipline, for a vari-

421. The only thing Congress may not do is take a hybrid approach and establish federal standards for the states to enforce. The Supreme Court has repeatedly invalidated such "commandeering" approaches. See *Printz v. United States,* 521 U.S. 898 (1997); *New York v. United States,* 505 U.S. 144 (1992).

422. The dissent reads in part:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.


423. Incidentally, the accounting profession showed itself even more in need of ethical guidance and redirection than the lawyers. It is no longer quite as funny a joke that one can always find an accountant to bless whatever transaction one is doing. In the past twenty years, the public has seen a number of scandals involving accountants. First, Ernst & Young's predecessor, Ernst & Ernst, certified the manifestly crooked books of the banks owned by
ety of reasons, has provided little incentive for law firms to monitor the partners who are bringing in juicy fees from major corporate clients. The spread of limited liability partnerships accentuates the willingness of partners to ignore the risks that other partners are taking. Today's emphasis on "the bottom line" both in corporations and law firms gives rise to a culture exalting prominence in the annual listings of profits per partner over all other values.

This is a systemic problem that requires a systemic solution. Band-aids, like SOXA § 307, are woefully inadequate at this late date. Equally unsatisfactory, from a normative perspective, is piecemeal regulation of the practice of law by federal agencies in discrete regulatory jurisdictions, particularly where those agencies are vulnerable to regulatory capture or have axes to grind that may threaten to conflate an agency's own regulatory agenda with legitimate lawyer regulation goals.

To the extent that there has already been some federal intrusion into regulating lawyers' (and, for that matter, accountants') conduct, federal agencies have operated in particular regulatory niches where the danger is that agency self-interest in furthering its regulatory goals may be incompatible with objective regulation of professionals practicing in that area. The SEC has endeavored to

the Butcher brothers in Tennessee and endeavored to bully bank examiners who had the temerity to question the assets. Mayer, supra note 92, at 294. Second, Arthur Andersen blessed accounting irregularities at Financial Corporation of America and Charles Keating's notorious Lincoln Savings (even going so far as to cooperate with Jones, Day lawyers in file stuffing in the latter instance). Id. Third, what was then Deloitte, Haskins & Sells gave its imprimatur to the books of CenTrust Savings in Florida, where the chairman, David Paul, used insured deposits to purchase yachts, paintings by old masters that he hung in his own home, solid gold bathroom fixtures, and lavish hotel suites in New York City. Id. Fourth, Touche Ross endorsed the books of Beverly Hills S&L, revealed in subsequent congressional hearings to be engaged in clearly criminal enterprises. Id. Fifth, Ernst & Young's other predecessor, Arthur Young & Co., blessed not only some of Keating's shenanigans at Lincoln Savings, the arguably even more notorious Vernon Savings of Dallas at a time when 96% of its loans were bad, and also helped Western Savings of Dallas continue to grow after it was clearly insolvent—small wonder that Ernst & Young ended up having to settle with OTS and RTC for $400 million. Id.

Of course, as all of the most notorious S&Ls claimed after having been seized by the government, all the transactions in which they had engaged had been blessed by prominent law firms, and all the so-called "profits" they had booked had likewise been blessed by prominent (then, Big Eight) accounting firms. A common notion was that the regulators were incompetent (which, in the case of the FHLBB, may not have been too far off the mark) or, worse, on a jihad to deprive red-blooded American entrepreneurs of the fruits of their entrepreneurship. That accusation could not, however, be leveled at the General Accounting Office, which found, in a study of eleven large S&L failures, that seven of these had been audited with so little regard for honest practice that it referred the accounting firms in question to the AICPA for disciplinary action. Years passed, but no disciplinary action was taken. See generally Mayer, supra note 92, at 293–94.
take the high road by imposing on private lawyers the species of gatekeeper obligations that Reinier Kraakman has dubbed "chaperone," as distinct from that favored by the OTS, "bouncer." The SEC is satisfied that the lawyer's professional obligations are met if he acts in good faith and exerts reasonable efforts to prevent violations of the law by the client. With SOXA § 307 and the statutory injunction to prescribe "minimum standards for professional conduct," of course, gatekeeper responsibilities will have to become tougher in the securities law area, but that is only fitting given the overarching purposes of protecting investors and the integrity of the public securities markets.

Some in the private bar have been critical of the SEC's pre-SOXA efforts in this regard. They have argued that the agency lacked both a statutory mandate to establish standards for the practice of law (no longer true) and any particular expertise in establishing or applying such standards (debatable), and they point out the absence of any uniform nationwide standard on the very issues of confidentiality and disclosure that were at issue in both National Student Marketing and Carter & Johnson. Critics have also pointed to the in terrorem effect of an SEC Rule 2(e) proceeding as potentially depriving clients of the detached and disinterested legal advice to which they are entitled.

The SEC, to its credit, has been fastidious in acknowledging the concerns expressed by the private bar. Indeed, even after its initial regulatory proposal pursuant to SOXA § 307, the Commission backed off its "noisy withdrawal" proposal with alacrity when, not unexpectedly, it drew fire from the ABA and virtually the entire universe of elite law firms engaged in securities law practice.

It would seem, therefore, that the bar's criticisms of the SEC are unjustified; in fact, the concern here is not regulatory zeal but regulatory capture. The SEC has traditionally been very deferential.

424. See Reinier H. Kraakman, Corporate Liability Strategies and the Costs of Legal Controls, 93 YALE L.J. 857 (1984); Reinier H. Kraakman, Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy, 2 J.L. ECON. & Org. 53 (1986). Bouncer gatekeepers, as the rubric so vividly suggests, would show would-be wrongdoers the door by denying them professional assistance. Chaperone gatekeepers, by contrast, would "detect and disrupt misconduct in an unfolding relationship with enforcement targets . . . ." Id. at 63.

425. This is clearly the stance adopted by Carter & Johnson and Gutfreund. See supra notes 147–52 and accompanying text.

426. For an interesting discussion of gatekeeper responsibilities and the suitability of securities lawyers for that role, see John C. Coffee, Jr., The Attorney As Gatekeeper: An Agenda for the SEC, 103 COLUM. L. REV. 1293 (2003).

427. See Lorne & Callcott, supra note 154, at 1302 n.38 (citing remarks of former SEC Commissioner Edward H. Fleischman).
to the private securities bar, particularly the Committee on Federal Regulation of Securities of the ABA’s Business Law Section. This is due, in part, to the revolving door nature of that practice. A review of the active members of that segment of the bar over the past twenty years will yield several former SEC Commissioners, several former General Counsels, and several former directors of the Divisions of Corporation Finance, Investment Management, and Enforcement. Still, whatever one’s view of the agency—ogre or cream puff—it is apparent that adequate prescriptive and enforcement roles with respect to the professional obligations of attorneys are better performed elsewhere.

At the other extreme have been the FDIC (at least when acting in its receivership capacity) and, of course, the OTS. The latter’s most notorious escapade, the Kaye, Scholer asset freeze, has been discussed ad nauseam, but it is nonetheless exemplary of the OTS’s proclivity toward exploiting federal enforcement authority in order to bring to bear the awesome power of the federal government in a manner that is ad hoc and retributive rather than being part of

428. That committee, although not necessarily any longer the largest in the Business Law Section, has had dominant influence over the policies and politics of the Section by virtue of the fact that a preponderance of the chairs of the Section have come out of that committee.

429. In FDIC v. O’Melveny & Myers, 669 F.2d 744 (9th Cir. 1982), rev’d and remanded on other grounds, 512 U.S. 79 (1994), reaffirmed on remand, 61 F.3d 17 (9th Cir. 1995), the receiver of a failed thrift was held to have stated a claim for relief against a law firm that had assisted the thrift in two real estate syndications offered to investors. When the private placement was made, the thrift was in unsound financial condition; its officers had fraudulently overvalued assets, embezzled funds, and generally “cooked the books.” The complaint alleged that O’Melveny, knowing of the recent resignations of the thrift’s prior auditors and outside law firm, did not question the auditors or the law firm about the reasons for their resignations, or federal or state regulators or the thrift’s financial officer (who was in it up to his neck and who, if asked, would certainly have lied) about the thrift’s financial status before giving legal opinions and doing other work that assisted a service company owned by the thrift in soliciting investors for a real estate project. After the thrift failed, the FDIC, acting as conservator, rescinded the investments and was assigned the investors’ claims against O’Melveny. The receiver then brought suit against O’Melveny for professional negligence and negligent misrepresentation.

430. OTS has a well-deserved reputation in the federal judiciary for abusing its power, inter alia, by making arguments that are “barely intelligible,” “convoluted,” “capricious,” and by attempting “to circumvent the statutory language ... [because of] excessive zeal.” Wachtel v. Office of Thrift Supervisor, 982 F.2d 581, 585–86 (D.C. Cir. 1993). See also Kaplan v. Office of Thrift Supervisor, 104 F.3d 417, 424 (D.C. Cir. 1997) (finding OTS acting director’s rejection of ALJ’s recommended decision to dismiss the case to be “based on unreasonable judgments which could be characterized as arbitrary and capricious” and treating the respondent as a “scapegoat.”); Fisher, Neither Evaders Nor Apologists, supra note 47, at 357 n.44 (reviewing above cases and detailing unprofessional attempt by OTS to avoid decision on the merits of Vacancies Act challenge to agency action).
any thoughtful, organized approach to regulating the practice of law. Kaye, Scholer is not, however, the only example; there were many others during the S&L crisis, and all shared the same defect in terms of the regulation of lawyers and the prescription of standards of professional conduct. Namely, an innate conflict of interest exists on the part of the agency prone to impose novel obligations and novel theories of lawyer regulation upon counsel ex post in an effort to deputize the private bar to assist the agency in performing its appointed regulatory tasks. This is a compelling argument for prohibiting piecemeal regulation of lawyers by federal agencies with a regulatory axe to grind and preferring the independent federal agency approach offered in Part V.

An example of comparatively recent vintage demonstrates the danger of federal agency abuse quite clearly. Long after the S&L crisis had subsided, OTS commenced an enforcement action against a law firm (the "Firm"), which had previously been engaged as special counsel by a thrift institution ("Thrift") in connection with its conversion from mutual to stock form. The gravamen of the OTS’s allegations was that a prior transfer (which antedated, by two years, The Firm’s representation of Thrift as conversion counsel) of depositors, without notice, from Thrift to a separate, stock subsidiary (which was itself also a depository institution), as well as "identity blurring" (i.e., failure to maintain separate corporate existence) between Thrift and that subsidiary, constituted violations of OTS regulations that were or should have been known to the Firm, as conversion counsel, and should have been disclosed or otherwise acknowledged in the conversion application the Firm prepared.

The Firm, like many specializing in thrift regulatory work, represented a large number of depository institutions and their affiliates

431. OTS derives its enforcement authority from Section 8 of the Federal Deposit Insurance Act, which allows the bank and thrift regulatory agencies to prosecute a variety of administrative enforcement actions against insured depository institutions and against "institution affiliated parties" ("IAPs"). For a non-in-house lawyer to be an IAP, the lawyer must fall within one of two paragraphs of the statutory definition. 12 U.S.C. §§ 1813(u)(3) (2002) (defining IAP to include "any . . . person . . . who participates in the conduct of the affairs of an insured depository institution"); or 1813(u)(4) (displaying intention of Congress to implicate lawyers but only where the lawyer "knowingly or recklessly participates in (A) any violation of any law or regulation; (B) any breach of fiduciary duty; or (C) any unsafe or unsound practice, which caused . . . more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution").

432. The author was engaged by The Firm and its counsel as an expert witness on the ethical responsibilities of counsel representing depository institutions. Factual information set forth herein is derived from several sources, including the allegations made by OTS and submissions made to OTS on behalf of the Firm by its counsel.
(including predominantly savings associations and savings and loan holding companies) before the federal regulatory agencies, and the bulk of its practice was before the OTS. The adverse publicity and opprobrium, together with erosion of the working relationship with OTS staff, that attend an OTS enforcement action posed so significant a threat to the continued viability of The Firm and its practice that the Firm, as a practical matter, had no choice but to capitulate (as Kaye, Scholer had done, though without any showing remotely comparable to that in Kaye, Scholer of culpability on the part of the Firm).

Such an enforcement action was, in this author’s view, inconsistent with sound regulatory policy. Lawyers in private practice are not guarantors or insurers of the accuracy of factual information that has been furnished by their clients and, absent some palpable basis for suspecting the existence of material omissions by a client, had—both under then-applicable law and even now under SOXA—no professional or ethical responsibility to ferret out such omissions. The Firm was not the outside general counsel to Thrift but merely special counsel engaged in connection with a mutual to stock conversion—essentially a securities offering. Here, the matters that OTS complained were undisclosed in the conversion application the Firm drafted were considerably outside the scope of the Firm’s engagement and, in fact, antedated by several years the Firm’s involvement with this client. The lawyers who worked on the conversion had no reason to know (or even suspect) the facts in question and no duty under existing rules of professional responsibility to ferret them out. Yet, the threatened enforcement action would have imposed what is tantamount to strict liability because they failed to discover those facts.

These problems, and the institutional incentives that give rise to them, would be eliminated if federal regulation of the practice of law were divorced from agencies with other substantive federal regulatory jurisdiction and responsibilities. Imagine how an independent and unbiased agency might analyze this situation.

To begin with, law is “intended to channel and regulate behavior, as well as to enable complex forms of interaction, cooperation, and reliance. To function properly law must be known by those it is intended to regulate or enable. In our densely populated, technologically and socially complex society, much of the law cannot be

To perform his function, the lawyer must have access to the facts. For these, he is generally dependent upon the client, but clients do not always cooperate fully: they may tell the story, but not the whole story.\footnote{434. \textit{See generally} Monroe H. Freedman, \textit{Understanding Lawyers' Ethics} 147–160 (1990).} There are many reasons for this and not all of them are in any way "sinister" or motivated by a desire on the part of the client to violate or evade the law. Fear, uncertainty, denial, repression, conflict aversion, or simply memory lapse are all possible factors, as is the degree of the client's sophistication and prior experience with the legal system.\footnote{435. \textit{See} Pepper, \textit{supra} note 433, at 335.}

These difficulties are magnified, of course, when representing a corporate client because no one individual normally possesses all the pertinent information. As a result, in a wide variety of business lawyering contexts, including mutual to stock conversions, the lawyer is forced to rely to a large extent upon a large and diverse group of client representatives for information. The due diligence process is not intended to be a comprehensive factual audit of a corporate client's business. Nor, in the case of a regulated client, is it intended to be a regulatory audit; it is rather an exercise in obtaining the types of information that the lawyer, by dint of training and experience in prior transactions, knows will be pertinent to the particular type of engagement.

Back now to the case: The Firm sent Thrift a detailed, multipage, single-spaced Due Diligence Information Checklist by means of which the Firm sought production of and access to a comprehensive array of factual information about Thrift and its subsidiaries and service corporations. OTS did not deny that the types and quantity of information sought by the Firm were clearly consistent with professional standards with respect to securities offerings. Thrift failed to furnish the "whole" truth to the Firm by omitting to provide information relating to Thrift's earlier failures to provide depositors in its subsidiary with the requisite disclosures. Nor did the Firm find anything in prior OTS reports of examination that would fairly have put the Firm on notice of this lurking issue.

To the extent, however, that OTS was suggesting that its reports of examination \textit{should} have put the Firm on notice of the regula-
tory infractions at Thrift, then OTS was already aware of the information its enforcement staff was seeking to penalize the Firm for not disclosing! Thus, had the Firm been able to read the tea leaves from an isolated and ambiguous statement in a single examination report to infer the existence of the undisclosed facts, as OTS appeared to suggest the Firm should have, then the Firm would have structured the proposed conversion along the lines that the Firm ultimately did recommend once it became aware of the facts concerning the depositors of the subsidiary. Disclosure of the reasons for structuring the transaction that way (which undoubtedly would have generated complaints from the depositors of Thrift, as opposed to those of the subsidiary) would simply have informed OTS of that which it already knew.436 Nothing in the concept of a "higher calling" requires this of an attorney. Given the OTS's formidable array of supervision, oversight, and monitoring powers via the examination process, it is clear that the agency does not need any outside law firm, much less one serving as special counsel with respect to a limited engagement, to serve as an additional, independent source of disclosure. Indeed, in an ironic echo of what was argued—inappropriately, because of its interference with the examination process—by Kaye, Scholer, the breadth of that very regulatory and supervisory power enjoyed by the OTS suggests that depository institutions may have an especially compelling need for independent advice and representation from counsel who are untainted by conflicts of interest that arise from application of some ex ante duty to the federal government.

An independent agency, acting prospectively and by rulemaking, would not be operating with the handicap of OTS's regulatory blinders or other institutional problems.437 Uncritically imposing a "duty to investigate/guarantee" type of obligation upon outside counsel to depository institutions would likely end up being extremely counterproductive from the regulatory policy point of view. While superficially attractive to an agency laboring under the difficulties of regulating with scarce resources, placing a lawyer under a duty to anticipate and address each and every regulatory

436. Indeed, even after OTS suspended the conversion, the Firm continued to work with the client and the OTS Staff to find ways to salvage the transaction. That course of conduct scarcely counsels invoking the awesome equitable enforcement power of the United States Government.

437. One might suggest, by way of example, an overstaffed enforcement division desperately searching, in a time of overall prosperity and regulatory compliance, for ways to justify their continued employment.
concern that conceivably might arise—even when the facts known to the lawyer do not suggest any regulatory impropriety—would ultimately be self-defeating if, as a consequence, one were to diminish the ability of the lawyer to provide the client with the progressive representation that has become so important a part of modern business lawyering.

That is particularly true in the highly complex framework of regulated industries, where Congress, in demarcating the balance of interests effected by its regulatory enactments, often deliberately chooses to leave open certain areas of the law for future development through experimentation and innovation. For example, many of these "gaps" in our balkanized system of depository institution regulation represent conscious, open-textured areas of legal ambiguity where imaginative lawyering has enabled clients to adapt to changing market conditions.

Nothing here should be read as suggesting that a lawyer would or should be permitted to ignore applicable law or regulations or aid or counsel actions that the lawyer has reason to believe would be in violation of such law or regulations. If, however, the consequence of honest but mistaken lawyering were that a federal agency could subsequently argue that the lawyer had violated a duty to the agency, or if the agency could argue that the lawyer had a duty to ferret out material omissions by the client even where the lawyer has no reason to suspect the existence of such omissions, a prudent lawyer would be driven to one of two courses of action. He could either refuse to represent certain categories of client, or continue to represent them but ensure that any advice or assistance given, whenever there was any conceivable doubt regarding the state of the law, should always err in the direction of the views the lawyer believes the agency might take. Neither option is appropriate to a legal system such as ours that embraces—indeed depends upon—robust and progressive (albeit responsible) legal representation of clients, whether they be individuals or corporations.

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438. See supra note 229.

439. Such continued representation would doubtless entail significantly higher billing rates to compensate for the drastically increased liability risk as well as pressure from (or perhaps withdrawal of coverage for this area of practice by) malpractice insurance carriers.
V. SOME SUGGESTIONS FOR IMPLEMENTING THE FEDERAL ALTERNATIVE

The solution of partial federal regulation suggested herein necessitates the creation by Congress of a new federal agency to regulate the practice of law in key areas of federal interest, starting with such subjects as conflicts of interest, the appropriate scienter standard and the duty (if any) to investigate, and the duty of confidentiality. An agency will benefit from the ability to have in-house expertise, the lack of which can be detrimental to a legislature from the public choice point of view.440 This new federal agency would be completely independent of other regulatory agendas within the executive branch (or, for that matter, the judicial branch) and would consider individual topics with the broad perspective that the organized bar, at its best, has brought to professional responsibility issues, only without suffering from the innate conflict of the bar’s self-interest. The agency would also be able to consider the propriety of special or more highly nuanced contextual rules for lawyers in certain areas of practice, rather than the largely “one-size-fits-all” approach of the current legal ethics regime that proceeds from an antiquated and no longer true (if it ever was) view of lawyering as a unitary profession. For ease of reference, and with due regard to its purpose in salvaging the legal profession from the “flood” of scandal and disillusionment, call the proposed agency the Attorney Regulatory Commission, or “ARC.”

ARC would be established as a multi-member commission, together with a modest staff of attorneys and investigators. It need not be a particularly large bureaucracy, at least not initially (and hopefully not ever). Its initial mandate would be to prescribe uniform, national standards of attorney conduct in corporate,441 commercial, tax, and financial regulatory law (the latter an

440. See William J. Keefe & Morris S. Ogul, The American Legislative Process: Congress and the States 296-98 (7th ed. 1989) (relating capacity to resist political pressures of organized groups with their lobbyists and experts for hire to a legislature’s independent analytical and information-gathering resources).

441. Some might object that corporate law, being a creature of state law, is ill-suited to national, uniform standards. Yet, whatever differences may persist in the substantive laws states enact to govern the corporations they charter, the practice of those representing those corporate entities is already fairly uniform, as evidenced by the proliferation, under the aegis of the ABA Business Law Section, of “model” corporate documents such as stock purchase and asset purchase agreements. Indeed, state corporate law itself is converging toward uniform standards, with the adoption by 37 states (now 38, with the November 2003 revision
intentionally broad category, encompassing, at a minimum, securities, banking, savings and loan, credit union, insurance, and commodities regulation) and to enforce compliance with those standards.

As a general proposition, administrative agencies have proved to be remarkably effective from the public choice perspective. Nevertheless, a federal agency tasked with regulation of lawyers would, of necessity, be heavily populated by lawyers, and the threat of enhanced levels of access to such decisionmakers by the organized bar and of promulgation of regulations unduly favorable to the bar must be addressed. Fashionable though it may be to say that law is politics, ARC needs to be insulated from both direct lobbying and from the blandishments of the political branches of government as influenced by various interest groups (indirect lobbying).

Even apart from the shadows of the Keating Five and others, the preceding discussion is rife with examples of the political necessities of the Massachusetts corporate laws) of the Revised Model Business Corporation Act. In any event, to the extent that minor differences in substantive law might affect the ethical standards to be applied to particular lawyers, the contextual regulatory model proposed for ARC would duly take those into account.


443. Contrast Professor Zacharias' expectations if Congress were directly enacting federal rules of attorney conduct:

[O]ne would expect Congress to endure heavy lobbying by (1) lawyer organizations seeking to limit intrusions on lawyer discretion, and (2) corporate clients that can use lawyers best when they are not obligated to third-party societal interests. In adopting its models, the ABA confronted similar pressures, but was able to convince members that significant self-regulation was necessary to fend off more intrusive outside regulation. At the point the bar faces outside regulation, it has little incentive to compromise. If Congress's main lobbying constituency is the bar, one would expect Congress to heed the bar's demand that Congress adopt the lowest common denominator—the least restrictive provisions—among the existing state rules.

Zacharias, supra note 404, at 377 (citing MODEL RULES OF PROF'L RESPONSIBILITY, supra note 81) ("To the extent lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated."). When mentioning the lobbying influences that had been brought to bear upon the ABA during the drafting of the Model Rules, Zacharias cites, inter alia, Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 YALE L.J. 1299, 1252-54 (1991); Deborah L. Rhode, Why the ABA Bothers: A Functional Perspective on Professional Codes, 59 TEX. L. REV. 689, 703-14 (1981); Ted Schneyer, Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct, 14 LAW & SOC. INQUIRY 677, 703-23 (1989).


445. As reported frequently in the media, the trial lawyers were highly influential during the Clinton Administration.
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cization of attorney regulation. In order to be successful as a regulator, ARC must therefore be inoculated, to the maximum extent possible, from these and other political pressures. In short, ARC needs to be an "independent" agency.

Attorney regulation, like the regulation of financial markets that have suffered by its laxity, presents a particularly compelling case for an expert and truly independent agency (along the lines that the Federal Reserve is independent). The regulatory task calls into play the classic justifications for an independent agency: (1) to professionalize and provide expertise to regulatory policy; (2) to provide a stable and consistent basis for regulatory continuity; (3) to allow for constant regulatory adaptation to changing conditions; and (4) to eliminate the political influence of special interests.\(^4\)

To ensure the independence of an ARC, the terms of the commission members must be of sufficient duration (certainly longer than a single Presidential administration). The size of the commission should be large enough to ensure diversity from both the political perspective (no more than a bare majority of commissioners belonging to any one political party) and the interest perspective (some should be lawyers, some should be judges, and some should be laypersons). The commitment of the Executive and Congress to the agency's independence must be strong. Compensation for members and staff attorneys must be reasonably competitive. Finally, the agency's funding must, to the maximum extent possible, be autonomous and disjunct from the congressional appropriations process.\(^4\)

Immunizing the agency from undue political influence does not, however, make its functions apolitical. Indeed, it is vital that competing interests have an opportunity to be heard and that their input be solemnly weighed and considered in the process of fashioning sensible, coherent ethical rules. Furthermore, given that an appropriate and effective enforcement mechanism for those rules must be in place, considerations of fundamental fairness dictate that the rules need to be prospective in application. Attorneys certainly ought not to be held liable on the basis of ethical


\(^4\) Much of the agency's budget could be supported by annual "bar association"-type dues paid by lawyers in the practice areas covered by the ARC's jurisdiction. These funds would have to be declared by Congress not to be government funds or appropriated monies, as it has done for Federal Reserve assessments against member banks. See 12 U.S.C. § 244 (2000).
standards—promulgated with the wisdom of hindsight—that did not exist at the time of the conduct complained of and were unforeseen by the lawyers involved.

Thus, in promulgating national standards of attorney conduct, ARC would proceed solely by rulemaking. The modus operandi, preferably, would be notice and comment rulemaking under the Administrative Procedure Act (APA), though negotiated rulemaking could conceivably be an effective alternative in certain matters. Such rulemaking could, in appropriate instances, include holding public hearings for the purpose of taking testimony and gathering "legislative" facts from a variety of disparate interests. The rules, once adopted, could then be supplemented by agency interpretations, which would be available online at the agency's website and published periodically (not less frequently than annually) in a compilation of such interpretations in the Federal Register and maintained in the Code of Federal Regulations, and accompanied by a provision imposing sanctions on those who violate the rules.


449. In normal rulemaking, only the agency drafts the contents of the proposed rule. In negotiated rulemaking, authorized under the Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified at 5 U.S.C. § 581 et seq. (2001)), notice of that choice of rulemaking method will be published in the Federal Register, along with "a description of the subject and scope of the rule to be developed," a listing of "interests likely to be significantly affected by the rule," and the "persons proposed to represent such interests." 5 U.S.C. § 584(a) (2000). Members of the public or interest groups not so proposed, but who "will be significantly affected by a proposed rule and who believe that their interest[s] will not be adequately represented ... may apply for, or nominate another person for, membership on the negotiated rulemaking committee. ..." Id. § 584(b). The agency is then only a member of that committee, the meetings of which are run by a "facilitator" who "impartially aids in the discussions and negotiations." Id. § 582(4). This process will produce a rule only on the basis of consensus, defined by statute as "unanimous concurrence among the interests represented ...." Id. § 582(2). Whether or not to use this process, or to proceed by normal notice and comment rulemaking, would be entirely within ARC's discretion.

450. For the agency's rules and interpretations to be assured of receiving judicial Chevron deference, the congressional delegation of power to the agency should explicitly include the authority to make rules with the force of law. See Christensen v. Harris County, 529 U.S. 576 (2000); see also United States v. Mead, 533 U.S. 218 (2001) (both holding that Chevron deference applies only to agency interpretations that have the "force of law"). Moreover, Mead explicated that agencies act with the force of law only if Congress intended to delegate authority for them to act in that way. 533 U.S. at 226–27. For an interesting argument that much federal legislation since the New Deal operated under a "convention" whereby rule-
Disciplinary mechanisms could consist of a variety of administrative enforcement proceedings, ranging from cease and desist actions, to disbarment (either permanent or temporary) from one or more areas of practice within the ARC's jurisdiction, to orders to make restitution to clients or victims. The advantage of enforcement by an independent body like the ARC is that it removes the omnipresent taint of unfairness that lingers over enforcement or disciplinary actions brought by a regulator with substantive jurisdiction over the practice area (e.g., the SEC, the OTS). Full due process rights would be afforded attorneys who wished to contest ARC enforcement proceedings, with ultimate review by a federal court of appeals based on traditional APA standards. Final enforcement orders of the ARC (whether consented to or imposed after unsuccessful contesting by the attorney respondent) would be enforceable by the agency in federal district court, and copies would be forwarded to the state bar authorities of the jurisdictions where the attorney respondent is admitted for such further action, if any, as they might deem appropriate. In certain cases, ARC, after a preliminary investigation, would also be empowered to make referrals to the Department of Justice, federal agencies with substantive jurisdiction, and state disciplinary boards.

As an example of how interpretive guidance could be of enormous benefit to the bar, consider structuring. Structuring transactions is an important component of the skill set vital to the practices of a broad range of tax, corporate, and regulatory lawyers. As with any element of the lawyer's armory, structuring is susceptible to abuse. Thus, it seems appropriate to distinguish between suitable and unsuitable applications of this technique.

Suppose lawyers are working on a proposed merger of two banking organizations—each, for the sake of simplicity, consisting of a bank wholly owned by a holding company with no other subsidiaries—that are directly competing with each other in the same geographic market. The merger will therefore have an effect on competition and so implicates antitrust policy. That policy, in banking regulation, is embodied in provisions of the Bank Holding Company Act (BHC Act) and the Bank Merger Act. Were it not making grants had the force of law only if coupled with a statutory provision imposing sanctions on violators, but could only be procedural or interpretive in the absence of such a statutory sanctions provision, see Thomas W. Merrill & Kathryn Tongue Watts, Agency Rules With the Force of Law: The Original Convention, 116 HARV. L. REV. 467 (2002).

451. The antitrust standards of Section 7 of the Clayton Act, 15 U.S.C. § 18 (2002), have been engrafted nearly verbatim into both Section 3(c) of the Bank Holding Company Act,
for the presence of the two holding companies, the transaction would clearly be governed by the latter statute, which gives the parties flexibility, depending upon how the transaction is structured, with respect to being able to preselect the federal agency that will have approval authority over the merger. To have that choice—which would be among the Office of the Comptroller of the Currency (the "Comptroller"), the Federal Reserve Board (the "Fed"), and the FDIC—one would need to be rid of at least one of the holding companies. Otherwise, approval would have to be pursuant to the BHC Act, which eliminates any choice of agency decisionmaker, as the Fed exercises sole jurisdiction under that Act.

Suppose further it turns out that not being able to avail oneself of the choice under the Bank Merger Act would be outcome determinative because of the Fed's (deserved) reputation as the most conservative of the three agencies on competitive issues (i.e., the least likely to approve the transaction). To avoid the Fed, then, is a consummation devoutly to be wished for the parties and their counsel. They must therefore figure out a way to rid themselves of at least one holding company. Liquidation as part of the merger will not do as, under the BHC Act, the Fed would have a hook into the overall transaction because of its approval authority over such liquidations. The best approach then is a multi-step process: (i) to organize de novo a subsidiary of the bank (Diagram 1), (ii) merge the holding company with and into that subsidiary—i.e., merge the grandparent into the grandchild (Diagram 2), and (iii) merge the two banks (Diagram 3) in a transaction subject to the Bank Merger Act and structured so as to be subject to approval by either the Comptroller or the FDIC. Finally, if desired, the subsidiary of the now merged bank can be liquidated, yielding the final structure (Diagram 4).

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452. Merging the holding company into the bank (i.e., parent into child) is not possible here, because state and federal law generally permit banks to merge only with others of their kind and not artificially with general business corporations (like holding companies).
Why is this an example of *suitable* structuring? After all, the sole purpose is to avoid the Fed! Nonetheless, this sort of structuring is an appropriate exercise of the lawyers’ skills to maximize the likelihood of regulatory approval for what both clients want to accomplish, and, most important perhaps, there are no adverse side effects. No third party is injured. Avoiding the Fed does not in any way alter the regulatory burden imposed on the parties to the proposed merger. Since all three agencies must apply the identical
statutory competitive impact standard, federal antitrust policy will be fully vindicated.\footnote{453} Moreover, the structural opportunity is one that Congress expressly provided, and so exploiting it can scarcely be said to be inimical to the spirit of the law or antithetical to public policy. In short, use of the technique here effects avoidance but not evasion.

By contrast, examples of unsuitable structuring are plentiful, and some have already been discussed, e.g., the Enron SPEs and myriad instances during the S&L crisis in which law firms structured transactions that had no other purpose than evasion of a variety of regulatory burdens: federal regulations, lending policies, and agency orders or supervisory agreements.\footnote{454} Even more important, these structurings led with depressing regularity to inordinate amounts of economic harm being visited upon innocent third parties.

Another fruitful area for consideration is competence. Professional competence is so fundamental\footnote{455} that it is seldom discussed; yet, the instances of lawyers and law firms undertaking representations they had no business accepting are astonishingly numerous. Competence can be measured by knowledge and experience, but it can also be affected by the existence of institutional factors that render lawyers who are concededly competent as a matter of law. Problems in the knowledge/
experience category crop up frequently with litigators. Criminal lawyers often accept engagements to represent insiders in securities and bank regulatory enforcement proceedings. While it is true that such enforcement proceedings may, from time to time, lead to criminal referrals, thereby making the advice of a seasoned criminal lawyer useful, the majority of criminal lawyers lack the requisite securities or financial regulatory expertise to be able to represent the client competently in the civil enforcement context. Similarly, Kaye, Scholer, with no in-house expertise in savings and loan regulation, had no business accepting the representation of Lincoln against its regulators. Institutional problems have been encountered both with and without the accompanying specter of conflict of interest. Clearly, Vinson & Elkins' undertaking the engagement to conduct an internal investigation implicating its own prior work for Enron rendered the firm legally incompetent by reason of the obvious conflict. Other law firms have faced institutional pressures of a different sort that have compromised their abilities. While competence is an ethical obligation clearly identified in the Model Rules, the competitive pressures of business generation have caused it to be routinely ignored; the failure of bar authorities to bring any disciplinary actions in connection with such violations suggests the need for, at a minimum, sterner guidance.

Other areas that might benefit from plenary consideration via ARC rulemaking include:

- the existence (and if so, the scope) of a duty of inquiry; 457
- the proper scope of the duties of confidentiality and rectification of client fraud, a pervasive problem in the scandals discussed above; 458


457. Cf. FDIC v. O'Melveny & Myers, 969 F.2d 744, 746-47, 749 (9th Cir. 1992) (detailing background of allegations that O'Melveny failed to inquire of law firm that it replaced and of accounting firm that client had likewise replaced the reasons therefor and concluding that these were suspicious enough circumstances as to mandate further inquiry), rev'd on other grounds, 512 U.S. 79 (1994) (invalidating decision predicated on federal common law), remanded to 61 F.3d 17 (9th Cir. 1995) (reinstating decision, this time unambiguously grounded in California law); FDIC v. Clark, 978 F.2d 1541 (10th Cir. 1992) (upholding jury verdict against law firm engaged to investigate claims that bank president had conspired to defraud the bank when lawyers merely accepted the president's explanation and made no further inquiry).

458. One obvious advantage to federalizing the rules in this area is that it will no longer subject ethical norms to the vagaries of state variations on the text of model rules, thereby
problems relating to conflicts of interest and the obligation to exercise independent professional judgment;\textsuperscript{459}

• the obligation to monitor or supervise the behavior or work product of law firm attorneys;\textsuperscript{460}

• the circumstances (if any) under which it would be appropriate to adopt Ted Schneyer's suggestion of disciplining entire law firms;\textsuperscript{461}

• identification of appropriate gatekeeping functions (e.g., promulgating standards with respect to the rendering of legal opinions used to facilitate or enable transactions).\textsuperscript{462}

The foregoing description of the proposed ARC, its structure and authority, and types of ethical issues it could profitably address,

eliminating situations, such as took place in the O.P.M. scandal, where a minority rule in a particular jurisdiction can so tie the lawyers' hands that they can continue representing a client they know has previously used their services to commit fraud, even when they suspect (but do not yet "know") that the client means to do so again in the future.


\textsuperscript{460} Recall the injunctive relief denied by the court in National Student Marketing with respect to LBL's implementing internal policies and procedures to assure future compliance with its obligations as counsel in securities matters. See supra note 110. See also FDIC v. Jones, Day, Reavis & Pogue, No. A-90-CA-925 (W.D. Tex. filed Oct. 30, 1990) (on file with author); FDIC v. Wise, No. 90-F-1688 (D. Colo. filed Sept. 21, 1990) (on file with author); FDIC v. Martin, No-90-408-CIV-T-17B (M.D. Fla. filed Apr. 6, 1990) (on file with author).


\textsuperscript{462} There is already federal precedent for this, of course, in the Treasury's Circular 230. See supra notes 161–65 and accompanying text.
is by no means comprehensive, nor was it intended to be. It is not a blueprint, but rather a thumbnail sketch, of an alternative mechanism for elaboration and enforcement of norms of ethical attorney conduct. This mechanism, if properly implemented, has the potential to cauterize the gaping wounds the bar has inflicted upon itself and upon an unsuspecting public and, one day, to restore the practice of law to its former status as a learned profession and bring renewal to the concept of a "higher calling."

**CONCLUSION**

The proliferation of specialties and subspecialties in law practice, together with the inadequacies of prevailing ethics regulation and the vagaries of ethics rules formulations from state to state have not served well. Manipulation, motivated by politics and self-interest, of the ideology of the bar to adhere to rules of ethics predicated on an antiquated and no longer realistic model of a unified profession has likewise been counterproductive. The multiplicity of scandals in corporate America over the past 35 years eloquently attests to that conclusion.

Those in the organized bar who have opposed contextual rules and challenged the authority of the federal government to bring enforcement actions have not adequately balanced the needs of the profession—and the public it serves—against the extent to which it has been transformed from that outmoded model. Stubborn refusal to address these changes comprehensively and constructively has not only demoralized many segments of the legal community, debased the legal profession in the public's eyes, and tolerated the sorts of moral indeterminacy that have given rise to the scandals described herein, but has also tempted federal responses that are themselves counterproductive and could well lead to the outright balkanization of the legal profession. The model of partial federal regulation offered herein is by no means the only, or necessarily the optimal, solution, but, hopefully, it will spark additional discussion and debate that might, with any luck, lead to a workable system for providing lawyers the solid, thoughtful, and objective guidance they need to don the legal profession's venerable mantle and fulfill its time-honored pledge.