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The New Corporate Gatekeeper

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THE NEW CORPORATE GATEKEEPER

PETER J. HENNING†

I. INTRODUCTION

The term "gatekeeper" is used with some regularity these days to describe the roles of various professionals who work to keep corporations from running afoul of the law in their dealings with the public, thereby helping to avoid harm to investors and the markets.[1] For

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1. There is no single definition of what constitutes a gatekeeper for a corporation whose securities are traded in the public markets. *See* Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 890 (1984):

> Gatekeeper liability has received widest play in response to securities violations and similar "transactional" delicts rather than in response to wrongdoing that occurs wholly within the bowels of the firm. Gatekeepers can be drafted from among the many outsiders who supply specialized expertise to the managers of publicly-held corporations and facilitate their relations with constituencies outside the firm: outside directors, lawyers, accountants, and investment bankers.

Id.; Stephen Choi, *Market Lessons for Gatekeepers*, 92 NW. U. L. REV. 916, 946 (1998):

> The traditional gatekeeper acts as both a centralized source of information and decisionmaker in removing products from the market. Purchasers may simply look to see which products make it to the market to determine whether the product made it through a gatekeeper's screening process. Regardless of the purchasers' level of sophistication or knowledge, traditional gatekeepers ensure that buyers purchase products above only a certain level of quality.

Id.; John C. Coffee, Jr., *The Attorney As Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1297 (2003) ("[G]atekeepers are independent professionals who are so positioned that, if they withhold their consent, approval, or rating, the corporation may be unable to effect some transaction or to maintain some desired status.") [hereinafter "*Attorney As Gatekeeper*"]; Arthur B. Laby, *Differentiating Gatekeepers*, 1 BROOK. J. CORP. FIN. & COM. L. 119, 123 (2006) ("[A] person or firm that provides verification or certification services or that engages in monitoring activities to cabin illegal or inappropriate conduct in the capital markets."); Lawrence A. Cunningham, *Beyond Liability: Rewarding Effective Gatekeepers*, 92 MINN. L. REV. 323, 327 (2007) example, auditors are charged with reviewing corporate financial statements to ensure they accurately reflect assets and liabilities, while investment bankers require sufficient disclosure of the risks facing a company when it seeks to sell securities to the public. Even lawyers have seen the label slapped on them for how they advise clients on transactions.

Corporate counsel have come to be seen as one on the roster of financial gatekeepers because they are well-equipped to prevent violations, using their authority to keep a deal from happening if it is tainted by fraud or misrepresentations.[2] Professor John Coffee points out that corporate lawyers, unlike litigators, oversee the due diligence process and prepare disclosure documents used in a range of deals, from bank loans and government contracting to selling stocks and bonds in the markets, putting them in a position to call a halt if there is anything untoward.[3]

Calling someone a gatekeeper is a pithy shorthand for recognizing an obligation to monitor compliance with the law. There is a nagging fear

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("Gatekeepers work with an enterprise to correct misreporting before it occurs. They do so by threatening to withhold support necessary to complete a report or consummate a transaction. Gatekeepers can deny access to capital markets."); Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 413 (2008) ("[P]rivate intermediaries who can prevent harm to the securities markets by disrupting the misconduct of their client representatives."); Emerich Gutter, *Whistleblowers Under the Dodd-Frank Act and Their Impact on Gatekeepers*, 30 REV. BANKING & FIN. L. 753, 755 (2011) ("Gatekeepers help prevent the formation of a market for lemons by reducing the impact of informational asymmetries. Because gatekeepers are perceived as credible, independent parties, their investment of reputational capital assures the market of an activity's legitimacy."). Regardless of the definition one might choose, the role of the gatekeeper is to serve as an intermediary to prevent misconduct by the corporation.

2. Professor Coffee argues that focusing on gatekeepers may be a more effective way of policing corporations:

> Because the gatekeeper will receive little, if anything, from corporate involvement in crime or misconduct, [so] it can be deterred more easily than can the corporation or its managers, who may profit handsomely from crime or who may be tempted to engage in criminal activities to achieve goals or thresholds that allow them to remain in office.

Coffee, *supra* note 1, at 1297. Professor Morgan, on the other hand, takes a much less sanguine view of labeling lawyers as gatekeepers, asserting that the term "is almost useless" and warning that if the lawyer has one of the few companies looking to act dishonestly, "you should get out of that representation immediately." Thomas D. Morgan, *Comment on Lawyers As Gatekeepers*, 57 CASE W. RES. L. REV. 375, 377 (2007).

3. JOHN C. COFFEE, JR., GATEKEEPERS: THE ROLE OF THE PROFESSIONS IN CORPORATE GOVERNANCE, 192 (Oxford 2008) [hereinafter "GATEKEEPERS"]. Professor Laby notes that "[a]ll gatekeepers are not alike," and there is a need to distinguish the roles played by those who are independent of the corporate client, like an outside auditor, from those who work within the organization or are retained directly by it, such as lawyers. Laby, *supra* note 1, at 120.

that those inside an organization may be so overwhelmed by the pressure to produce results to retain the good favor of managers that they will do almost anything to succeed in meeting unrealistic internal sales targets or Wall Street's omnivorous expectations of rising quarterly earnings, and corporate lawyers may be powerless to stop transgressions.[4] The gatekeepers should be the thin blue line, if you will, between the insatiable corporate appetite for success at any cost and the demands of the government and investors that companies not even test the line of legality. Gatekeepers protect the public by putting their own reputational capital at risk in certifying compliance with the law, serving as intermediaries who can prevent wrongdoing within an organization.[5] But are lawyers up to that task?

For lawyers, at least, this expansive approach to gatekeeping, especially if it entails reporting potential violations to outsiders, seemingly conflicts with the traditional understanding of the attorney as representing solely the interests of the client. Under this view, lawyers are "zealous advocates" owing no obligation to protect the interests of third parties, except perhaps ensuring that legal services are not misused for illegal or obstructive conduct.[6] In the transactional context, however, imposing an additional obligation on corporate counsel to keep the company from harming investors and the markets does not necessarily detract from the representation of the client because the two roles are at least plausibly compatible. One of the corporate lawyer's jobs is to certify the client's compliance with the law, so that preventing violations

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4. *See* Professor Stephen L. Pepper, *Three Dichotomies in Lawyers' Ethics*, 28 GEO. J. LEGAL ETHICS 1069, 1081 (2015) (with particular attention to the *Corporation As Client*) ("Putting the limited roles and goals of the business executive and the lawyer together in service to a very large and powerful non-human entity – the typical major corporation – is a frightening notion.").

5. Coffee, *Attorney As Gatekeeper*, *supra* note 1, at 1299–99:

> The gatekeeper in effect pledges reputational capital that it has built up over many years and many clients to secure its representations about the particular client or transaction. At least in theory, a gatekeeper would not rationally sacrifice this reputational capital for a single client who accounts for only a small portion of its revenues.

Id.

6. *See* Kabir Ahmed & Dezso Farkas, *A Proposal to Encourage Up-the-Ladder Reporting by Insulating in-House Corporate Attorneys from Managerial Power*, 39 DEL. J. CORP. L. 861, 868 (2015) ("[I]t is one thing to suggest that an attorney can withhold consent from completing a possible fraudulent transaction, but it is quite another thing to extend the role of a gatekeeper to one that should report out confidential corporate information to the SEC."); Jill E. Fisch & Kenneth M. Rosen, *Is There A Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097, 1102 (2003) ("The role of a corporate lawyer has been the subject of two competing visions: the hired gun or total commitment model and the gatekeeper model.").

or reporting misconduct would usually be in the corporation's ultimate best interest, even if it causes some short term pain by potentially scuttling a deal or triggering an investigation and possible sanctions.[7] If monitoring transactions were all that a lawyer acting as a gatekeeper was supposed to do, then there should be little controversy about this added role for corporate counsel. When part of your job is to make sure the law is not broken in the transaction, it is not a particularly onerous requirement to impose a modest gatekeeping function[8] on a company's lawyers even if, as a practical matter, it is difficult to make sure employees do not commit crimes or regulatory violations on behalf of the organization.

Catchy labels have a certain visceral appeal, so they can be easily expanded to contexts beyond their accepted meaning. For example, "insider trading" has a fairly narrow application to the misuse of information for personal profit in breach of a duty of trust and confidence in connection with trading in securities. But as of late it has been used by New York Attorney General Eric Schneiderman to describe something he called "Insider Trading 2.0" to assail the use of private market data for profitable trading by high frequency trading firms.[9] That is not the type of securities fraud denominated as insider trading because there would be no misuse of information and the data is available to anyone willing to pay.[10] But calling something insider trading generates an immediate

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7. *See* John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 360 (2004):

> Litigators tend to view the attorney's role narrowly as that of an advocate for, and protector of, the client–a bulwark between the client and an oppressive state. Securities attorneys are less ready to buy into this rhetoric, however, and generally do not have the same self-image of themselves. For the most part, they agree that they have at least an ethical responsibility to perform due diligence on documents they draft and file with the SEC. For over a quarter century, prominent securities attorneys have recognized that, as a result, their professional role is closer to that of the auditor than to that of the litigator.

Id.

8. *See* Fred Zacharias, *Lawyers As Gatekeepers*, 41 SAN DIEGO L. REV. 1387, 1389 (2004) ("Lawyers are gatekeepers and always have been. Whatever one's position on the merits of the specific reforms currently being proposed, it is important to avoid the misconception that lawyers have no role to play in preventing client misconduct.").

9. Press Release, New York State Office of the Attorney General, A.G. Schneiderman Calls For New Efforts To Eliminate Unfair Advantages Provided By Trading Venues To High-Frequency Traders (Mar. 18, 2014) (on file with author).

10. *See* Peter J. Henning, *What's So Bad About Insider Trading Law?*, 70 BUS. LAW. 751, 762 (2015):

> What Mr. Schneiderman is targeting is not insider trading, at least in the United States, because there is no breach of a fiduciary duty in dispensing the information. Indeed, under the securities laws, there is nothing illegal

negative response, so the moniker is a handy one to apply even if the actual transactions do not fit the legal definition of a violation. Similarly, a Ponzi scheme, named after Charles Ponzi for his efforts to entice investors to send him money for postage stamp speculation,[11] involves soliciting new investors to pay off earlier ones to maintain the façade of a successful program.[12] But that term was used by Eliot Spitzer, the former New York Attorney General and Governor, in 2009 to describe how the Federal Reserve Board responded to the financial crisis by providing bailout loans to numerous banks that were secured by distressed assets that had little market value at the time.[13] It was certainly a fetching rhetorical flourish, but the Troubled Asset Relief Program was far from the type of scheme designed to fleece gullible investors by using new money to pay off old investors; indeed, the federal government made a

> about a firm selling access to information it generates properly, at least so long as it is within the control of the provider and offered to anyone willing to pay.

Id.

11. Chief Justice Taft, in Cunningham v. Brown, 265 U.S. 1 (1924), explained how Mr. Ponzi's scheme unfolded:

> In December, 1919, with a capital of $150, [Charles Ponzi] began the business of borrowing money on his promissory notes. He did not profess to receive money for investment for account of the lender. He borrowed the money on his credit only. He spread the false tale that on his own account he was engaged in buying international postal coupons in foreign countries and selling them in other countries at 100 per cent. profit, and that this was made possible by the excessive differences in the rates of exchange following the war. He was willing, he said, to give others the opportunity to share with him this profit. By a written promise in 90 days to pay them $150 for every $100 loaned, he induced thousands to lend him. He stimulated their avidity by paying his 90-day notes in full at the end of 45 days, and by circulating the notice that he would pay any unmatured note presented in less than 45 days at 100 per cent. of the loan. Within eight months he took in $9,582,000, for which he issued his notes for $14,374,000. He paid his agents a commission of 10 per cent. With the 50 per cent promised to lenders, every loan paid in full with the profit would cost him 60 per cent. He was always insolvent, and became daily more so, the more his business succeeded. He made no investments of any kind, so that all the money he had at any time was solely the result of loans by his dupes.

Id. at 7–8.

12. *See* In re Bullion Reserve of N. Am., 836 F.2d 1214, 1219 n.8 (9th Cir. 1988) ("A 'Ponzi' scheme is any sort of fraudulent arrangement that uses later acquired funds or products to pay off previous investors.").

13. MSNBC, *Eliot Spitzer Takes On The Fed – MSNBC w/ Dylan Ratigan (7/24/09)*, YOUTUBE (July 25, 2009), https://www.youtube.com/watch?v=gAtSmR7Z-Kg&feature=player_embedded.

profit on a number of the programs used to prop up the economy after the financial crisis hit.[14]

Describing someone as a gatekeeper acting on behalf of the corporation is a metaphor for how outside professionals (like lawyers) should ensure companies make full and complete disclosure consistent with their legal obligations. But like most evocative metaphors, it is malleable and prone to misuse. The notion of the gatekeeper harkens, at least in the videogame version of medieval life, to armor-clad guards protecting the entrances to a medieval city from marauders, someone who does more than just act as a clarion but also as a protector. So it is not just ensuring compliance with applicable laws that marks the gatekeeping role, but the notion can be expanded to include a more active role to prevent misconduct and report those misdeeds.

There appears to be a developing view of the lawyer that extends the gatekeeping obligation to require blowing the whistle on misconduct. The oft-heard lament from judges and regulators decrying "Where were the lawyers?" when malfeasance occurs is usually offered without regard to whether attorneys should have been able to keep violations from happening or were somehow required to report wrongdoing as soon as they became aware of it.[15] If the occurrence of corporate violations means there was gatekeeper failure, and if lawyers are gatekeepers for their corporate clients, then the obligation of counsel may be much broader than just ensuring transactions stay within the bounds of the law.[16] Instead, it may also involve ferreting out potential misconduct and

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14. For example, the Public Private Investment Program put in place by the Department of the Treasury to help restore the market for residential and commercial mortgage-backed securities, resulted in a profit of over $3.8 billion on the original investment of $18.6 billion. *See Legacy Securities Public-Private Investment Program*, PROGRAM UPDATE, Oct. 28, 2013, at 3, *available at* https://www.treasury.gov/initiatives/financial-stability/reports/Documents/External%20Report%2013%20-9%20Final.pdf.

15. *See* Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1 (2009):

> Whenever a new corporate or governmental scandal erupts, onlookers ask, "Where were the lawyers?" Why would attorneys not have advised their clients of the risks posed by conduct that, from an outsider's perspective, appears indefensible? When numerous red flags have gone unheeded, people often conclude that the lawyers' failure to sound the alarm must be caused by greed, incompetence, or both.

Id.

16. Speaking in favor of the Sarbanes-Oxley Act, Senator John Edwards used the following logic to highlight the role of lawyers in the corporate decision-making process:

> The truth is that executives and accountants do not work alone. Anybody who works in corporate America knows that wherever you see corporate executives and accountants working, lawyers are virtually always there

telling the government when it occurs, adding to the gatekeeping obligation a measure of whistleblowing – yet another analogy.

This emerging role for lawyers comes on the heels of corporate conduct like that seen at Enron and during the financial crisis.[17] Corporations have instituted much more extensive compliance programs in the past few years, although it is hardly a surprise that those have not stopped all misconduct. What has been spawned is a new practice area at most large law firms, which offer services to help companies comply with the law, with the promise of reduced penalties and less legal exposure.[18] With compliance now the norm, the push from the government appears to take the notion of a gatekeeper a step further by requiring corporate lawyers, in particular those inside the company, to do more than just monitor how the organization responds to reported wrongdoing. It appears that the role of the corporate lawyer is evolving to include an obligation to ensure that regulators and prosecutors are apprised of any potential misconduct as soon as that knowledge becomes available. This shifts the onus to the company's lawyers to come forward with information that may be harmful to the client, a form of whistleblowing without all the bells and whistles like monetary rewards and anti-retaliation protections that usually accompany those programs.

> looking over their shoulder. If executives and/or accountants are breaking the law, you can be sure that part of the problem is that the lawyers who are there and involved are not doing their jobs.

148 CONG REC. S6524-02, S 6551 (daily ed. July 10, 2002) (statement of Sen. Edwards).

17. Ahmed and Farkas, *supra* note 6, at 873 ("Both the Enron scandal and the 2008 financial crisis point to the stark reality that upper management has the propensity to engage in such conduct. When managerial malfeasance does occur, the consequences for the corporation and investors are dire."); Merritt B. Fox, *Gatekeeper Failures: Why Important, What to Do*, 106 MICH. L. REV. 1089, 1090 (2008) ("That gatekeeper failures substantially contributed to the Enron and WorldCom scandals is already well recognized.").

18. *See* Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 952 (2009) ("The sheer size of the compliance industry, which includes multiple American Lawyer 100 firms who proudly trumpet their assistance on their websites, severely undercuts the notion that corporations and compliance providers are engaged in a concerted, bad-faith attempt at intentional window-dressing."); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1345 (1999):

> An elaborate cottage industry of ethics compliance and preventive law experts lay claim to dramatically reducing the likelihood of criminal liability by maintaining an organizational commitment to ethical standards. Corporations need only commit the necessary capital and human resources to insure against the devastation of a criminal investigation, indictment, and conviction. Unfortunately, the reality of corporate compliance and criminal liability is far more complex than most of these experts suggest.

Id.

Indeed, the current rules established by the Securities and Exchange Commission ("SEC") for its whistleblower program generally excludes corporate counsel from receiving a reward for providing information obtained in the course of representing the client.[19]

For the lawyer who fails to inform the government of all potential wrongdoing, there is the potential of a prosecution for obstruction of justice. The job of the corporate attorney is moving away from the "wise counselor" model of legal representation and toward that of the whistleblower obliged to disclose information about potential violations by the corporate client or risk being viewed as a participant in the misconduct, subject to civil and criminal sanctions. This view of the gatekeeper's obligation puts lawyers, especially in-house counsel at a company, in an almost untenable position because it assumes a measure of independence from corporate management that might not exist.[20]

The focus of this essay is on the developing role of the corporate lawyer, especially in-house counsel, as a gatekeeper with expanded reporting obligations[21] that makes counsel into a type of whistleblower, and the questions this triggers about fitting new obligations within the traditional view of the attorney as owing an exclusive duty to the client. The in-house lawyer is put in the most difficult position because that attorney has only a single client and must interact with management on a

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19. *See* Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-4(b)(iv)(4)(i) (2015):

> The Commission will not consider information to be derived from your independent knowledge or independent analysis in any of the following circumstances: (i) If you obtained the information through a communication that was subject to the attorney-client privilege, unless disclosure of that information would otherwise be permitted by an attorney pursuant to § 205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise.

Id.

20. *See* Geoffrey Miller, *From Club to Market: The Evolving Role of Business Lawyers*, 74 FORDHAM L. REV. 1105, 1111 (2005) ("Lawyer independence, however, is effective at checking client misconduct only if lawyers actually act independently. Underlying much of the contemporary misgivings, both among lawyers and in popular consciousness, is the concern that obligations of independence are too often honored in the breach.").

21. *See* Pam Jenoff, *Going Native: Incentive, Identity, and the Inherent Ethical Problem of in-House Counsel*, 114 W. VA. L. REV. 725, 731 (2012):

> The in-house attorney's role as gatekeeper has taken on exponentially greater significance following scandals such as Enron and Tyco, in which corporate attorneys were found to have been negligent, or in some cases, complicit in fraud. Moreover, the passage of Sarbanes-Oxley in response to these scandals has placed a greater level of responsibility upon corporate counsel for detecting and reporting suspected violations.

Id.

regular basis – the very people the government may want identified as the wrongdoers who exercise significant control over the lawyer's future livelihood.[22] This can be especially problematic when lawyers can be viewed as a cost center in a company who contribute little to its bottom line, at least in any direct way.[23] The American Bar Association has long opposed imposing any reporting obligation on attorneys acting as gatekeepers, such as disclosing possible money laundering by clients.[24] To avoid the cumbersome process of trying to impose new ethical rules for lawyers, which would likely require congressional approval, the government has taken a backhanded approach by telling lawyers that they are the next targets in an effort to prevent corporate misconduct. Taking an indirect approach by threatening the livelihood of attorneys may entice them to disclose wrongdoing more quickly, adding a whistleblowing function to the role of corporate gatekeeper.

II. THE LANGUAGE OF GATEKEEPING

In the late 1980s, Lincoln Savings & Loan surrounded itself with prominent lawyers and accountants, helping give the impression that it was complying with the law. Federal District Judge Stanley Sporkin, once the director of the SEC's Division of Enforcement, questioned how so many highly qualified professionals could have missed the fraudulent activities going on at the bank seemingly right in front of them. He wrote:

> Where were these professionals, a number of whom are now asserting their rights under the Fifth Amendment, when these clearly improper transactions were being consummated? Why didn't any of them speak up or disassociate themselves from the transactions? Where also were the outside accountants and attorneys when these transactions were effectuated?[25]

22. *See* Pepper, *supra note* 4, at 1079 ("In-house lawyers working in the corporations are not just vulnerable to but also clearly dependent upon the client. They are employees with very limited short-term mobility and just the one client.").

23. *See* Jenoff, *supra* note 21, at 733 ("Whereas in a firm the lawyers are the rainmakers or fee generators who bring in the revenue, in a company the attorneys are back office expense and arguably more expendable.").

24. *See* American Bar Association, Report to the House of Delegates, Task Force on Gatekeeper Regulation and the Profession, *available at* http://www.americanbar.org/content/dam/aba/migrated/leadership/recommendations03/104.authcheckdam.pdf.

25. Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990).

Of course, the idea that lawyers and other gatekeepers should actively prevent misconduct may overlook the incentive to let a client come as close to the line as possible on the assumption that the government is unlikely to discover wrongdoing on its own.[26]

Whistleblowers who try to work through internal mechanisms may not be able to rely on the gatekeepers to fulfill their limited obligations to prevent misconduct. Sherron Watkins, at the time a vice president at Enron, wrote an anonymous letter in 2001 to the company's chief executive, Ken Lay, outlining financial and accounting problems that included this prescient observation: "I am incredibly nervous that we will implode in a wave of accounting scandals."[27] Mr. Lay turned to the company's regular outside counsel, Vinson & Elkins, to conduct an investigation. But rather than order the type of thorough internal inquiry we are used to seeing today, the law firm was told that there should be no "second-guessing" of the decisions made by Enron's outside auditors from Arthur Andersen, nor was it to engage in a "discovery-style" investigation.[28] Add to that the law firm's own role in helping craft the financial vehicles used to engage in the problematic accounting maneuvers at issue, and the conclusion was almost foreordained–Vinson & Elkins found nothing that would require a more complete investigation of the company.[29] This conclusion came a few months before Enron's (and Arthur Andersen's) precipitous collapse due to the accounting fraud

26. *See* Cunningham, *supra* note 1, at 349 ("If the system relies on gatekeepers to promote fair reporting, and gatekeepers know that, it is not irrational for gatekeepers to believe that they can conceal complicity.").

27. Anonymous Memorandum from Sherron Watkins, Vice President of Corporate Development, Enron, to Kenneth Lay, Chairman, Enron (Aug. 15, 2001), *available at* http://www.justice.gov/archive/enron/exhibit/03-15/BBC-0001/Images/9811.001.PDF.

28. The use of regular outside counsel may well have been an effort to ensure that a thorough investigation was *not* undertaken. Professor Hazard pointed out a few years before Enron's accounting fraud came to light that "there are times, I have been told, when outside counsel may be retained on the basis of selected facts precisely to accommodate a response that provides a desired outside opinion." Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011, 1019 (1997).

29. *See* Gutter, *supra* note 1, at 762–63:

> Attorneys from the firm were heavily involved in the structuring of Enron's SPEs, which were so complex that Enron may have been unable to use the entities without the firm's assistance. Even more concerning, Vinson & Elkins responded to concerns that Enron would 'implode in a wave of accounting scandals' by issuing a report stating that the company need not reevaluate its use of SPEs. Enron announced a $1 billion deduction from its third-quarter earnings the next day.

Id.

that came to light, resulting in numerous convictions of Enron executives but no discipline for its lawyers.[30]

Prior to the corporate accounting scandals of the early twenty-first century, the bar was quite resistant to the notion that lawyers had any type of gatekeeping role in connection with their clients, or that the SEC should play any role in regulating the conduct of corporate counsel.[31] That changed in 2002 when Congress adopted the Sarbanes-Oxley Act in the wake of the collapse of Enron and other companies from accounting fraud that took steps to address the failure of lawyers and others to do enough to prevent misconduct inside companies.[32] Section 307 of the law gave the SEC the power to adopt rules authorizing lawyers to report corporate misconduct, and to discipline violators by suspending or even barring violators from future representation before the agency.[33] The rules adopted under this provision include "up-the-ladder" reporting to the highest authorities within a corporation, and if that does not succeed in addressing the problem, then an attorney is authorized to report misconduct to the SEC.[34]

This was seen at the same time as a significant step in turning lawyers into gatekeepers for their corporate clients. In offering this

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30. *See* Peter J. Henning, *Board Dysfunction: Dealing with the Threat of Corporate Criminal Liability*, 77 U. CIN. L. REV. 585, 592–93 (2008):

> After a one-month 'investigation' that included interviewing eight Enron executives, two accounting partners at Arthur Andersen, and Watkins–but little else–Vinson & Elkins reached the unsurprising conclusion that Enron had not suffered any harm from Fastow's transactions despite the conflict of interest and "aggressive accounting." The law firm reported that the company's auditors were comfortable with transactions they had previously approved, the expected response of anyone asked about their professional services. The only fault the law firm could find with the transactions was that they represented "bad cosmetics"—as if accounting and related-party transactions were simply a matter of appearances and spin.

Id.

31. *See* Theodore Sonde & F. Ryan Keith, *"Up the Ladder" and Over: Regulating Securities Lawyers-Past, Present & Future*, 60 WASH. & LEE L. REV. 331 (2003):

> Since that time, the legal profession, in one form or another, has tried to deny its responsibilities for client conduct that may be fraudulent or worse. At the same time, the profession has disputed the authority of the SEC to discipline its members when they violate the securities laws or assist their clients in doing so.

Id.

32. Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (2002).

33. *Id.* at § 307, 116 Stat. 745, 784. Section 307 provides that "the Commission shall issue rules . . . setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission." *Id.*

34. Standards of Professional Conduct for Attorney Appearing and Practicing Before the Commission, 17 C.F.R. § 205 (2003).

provision, then-Senator Jon Corzine asserted that "we cannot overlook the role corporate lawyers, the lowest common denominator, can play in addressing abuses and ensuring that our markets have integrity."[35] Professor Coffee, in his influential book "Gatekeepers: The Professions and Corporate Governance," noted that "[f]ew attorneys probably consider themselves gatekeepers" but argued that "differences between the corporate lawyer and the litigator all suggest that the corporate lawyer is well positioned to serve as a gatekeeper."[36] Despite resistance from lawyers who viewed themselves solely as the "zealous advocates" of their clients, the idea of a gatekeeping role began to be accepted, at least in the transactional context.

But the SEC decided not to adopt a proposal that went even further by authorizing a "noisy withdrawal" that would have required counsel to disclose that the representation of the client had been terminated "based on professional considerations."[37] Fierce opposition from the organized bar, worried about how this would affect the attorney-client relationship and the protection of communications, led the SEC to drop the proposal.[38] The rule in place is similar[39] to amendments adopted by the American Bar Association in 2003 to Model Rule of Professional Conduct 1.13(c) that permits a lawyer for an organization to breach the protection afforded to confidential client communications by reporting to others to stop illegal activity when the leadership of the corporate client refuses to desist from misconduct that is a clear violation of law.[40] In

35. 148 CONG. REC. S6556 (daily ed. July 10, 2002) (statement of Sen. Corzine).

36. Coffee, *supra* note 1, at 192–93.

37. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296-01 (Feb. 6, 2003). The proposed rule would have required an attorney, in certain circumstances, to withdraw from representation, of an issue, to notify the Commission that they have done so, and to disaffirm documents filed or submitted to the Commission on behalf of the issuer. *Id.* The SEC deferred implementing the proposed rule, and it has not been considered again.

38. Sonde & Keith, *supra* note 31, at 332 ("The release caused an uproar in the legal community, with the rules as drafted threatening to revolutionize the contours of the attorney-client privilege, as well as the general corporate environment to which issuer-clients and securities lawyers had become accustomed.").

39. *See* Zacharias, *supra* note 8, at 1387 n.1 ("The ABA's most recent revisions to the Model Rules includes a revised Model Rule 1.13 . . . that parallels the adopted and proposed SEC regulations.").

40. Model Rule of Professional Conduct 1.13(c) provides:

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

addition, the SEC authorized an attorney to go outside the organization and report wrongdoing if there was not a sufficient response to reported wrongdoing.[41] That decision put the rule in the middle of a much more contentious discussion over whether a lawyer could disclose confidential information about a client's fraudulent conduct, not just potential violence. In 2001, the ABA House of Delegates rejected a proposal to allow disclosure of client fraud, just months before the Enron accounting shenanigans broke.[42] It took until 2003 for the ABA, following the SEC's lead, to amend Model Rule 1.6 to permit a lawyer to disclose information to prevent or rectify financial harm in which the client had used the attorney's services.[43]

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

MODEL RULES OF PROF'L CONDUCT r. 1.13 (AM. BAR ASS'N 1988); *see also* Caroline Harrington, *Attorney Gatekeeper Duties in an Increasingly Complex World: Revisiting the "Noisy Withdrawal" Proposal of Sec Rule 205*, 22 GEO. J. LEGAL ETHICS 893, 900–01 (2009) ("The 2003 amendments to the *Model Rules* were symbolically significant, given the organized bars' pre-SOX reluctance to assign any duties of preventing or rectifying client fraud, at least since the 1983 adoption of the *Model Rules*.").

41. Roger C. Cramton, et. al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 728 (2004).

42. *Id.* at 729:

> Periodically, the ABA's House of Delegates had considered proposals to amend Model Rule 1.6, the rule on lawyer-client confidentiality, to allow lawyers to disclose substantial frauds, at least those in which the lawyer's services had been used, but time after time the House of Delegates refused, albeit by relatively slim majorities. Most damning, the ABA House of Delegates rejected just such a reform proposal in August 2001, a few months before the disclosure of Enron's massive frauds.

Id.

43. Stephen Fraidin & Laura B. Mutterperl, *Advice for Lawyers: Navigating the New Realm of Federal Regulation of Legal Ethics*, 72 U. CIN. L. REV. 609, 642–43 (2003):

> In August 2003, the ABA resolved the Model Rules' internal conflicts by amending ABA Model Rule 1.6. Amended ABA Model Rule 1.6 affirmatively permits a lawyer to disclose its organizational client's confidential information to prevent, mitigate, or rectify the consequences of client crimes or fraud that threaten substantial financial harm to others and in which the lawyer's services were used. In so doing, the ABA followed the SEC's lead with respect to lawyers' whistleblowing activity.

Id; *see also* Ryan Morrison, *Turn Up the Volume: The Need for "Noisy Withdrawal" in A Post Enron Society*, 92 KY. L.J. 279, 302 (2004) ("Because of Enron, the ABA reversed course in 2003 and amended Model Rule 1.6 to include the crime or fraud exception."); Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559, 601–02 (2005):

As tough-minded as these new ethical rules appeared, disclosure to a third party under the SEC and legal ethics rules remained optional, not mandatory, so that the lawyer who learns about a corporate client's intention to engage in misconduct, or has been doing so with counsel's assistance, must report to superiors but need do nothing further.[44] There is no obligation to warn victims or the relevant authorities that a company has embarked on a course that is likely to result in violations.[45] Instead, the rules only give permission to reveal what is intended, with the lawyer retaining discretion to decide if an outside report should be made, and to whom.[46] That report, of course, would likely cost the lawyer a client, and for in-house counsel, probably their job–a heavy price to pay for making a discretionary choice. There are no reported instances of such disclosures to outsiders over the objection of a corporate client, although there are undoubtedly situations in which corporate counsel has threatened to do so as a means to get management to desist from illegal action. But the notion of the lawyer as a gatekeeper insuring the corporate client does not violate the law remains largely a private matter, shrouded behind the protections afforded by client confidentiality unless the lawyer chooses to make misconduct known.[47]

The financial meltdown in 2008 caused another crisis in confidence about whether companies were willing to follow the law. The perception has been that executives at Wall Street firms and the global banks got away with fraudulent activities that resulted in significant financial harm with no personal accountability for the losses suffered by investors.[48]

> Why did the changes to Rules 1.13 and 1.6 pass this time? Presumably because the ABA felt compelled to "do something" when it appeared that the SEC, in implementing section 307 of the Sarbanes-Oxley Act, was about to impose even sharper constraints on the discretion of lawyers representing public corporations–i.e., more demanding ladder-climbing duties and perhaps even a "noisy withdrawal" duty.

Id.

44. Michael L. Fox, *To Tell or Not to Tell: Legal Ethics and Disclosure After Enron*, 2002 COLUM. BUS. L. REV. 867, 888, 891 (2002).

45. *Id.* at 896 ("In some respects, Sarbanes-Oxley appears to be only a codification of the ethics rules. There is no whistle-blower provision for outside reporting, and this makes the law unexceptional in some respects, and, very possibly, too small and too weak of a band-aid in others.").

46. *Id.*

47. *See, e.g.*, *id.* at 891 ("[T]he ABA Model Rules . . . have, in their provisions, allowed for much more discretion on the part of the attorney with regard to the handling of misdeeds by constituents of the corporate client.").

48. *See* Ted Kaufman, *Why DOJ Deemed Bank Execs Too Big To Jail*, FORBES (July 29, 2013, 9:30 AM), http://www.forbes.com/sites/tedkaufman/2013/07/29/why-doj-deemed-bank-execs-too-big-to-jail/ ("[T]hose most responsible for indicting and prosecuting Wall Street executives seem to believe that, just as there are banks that are

Preet Bharara, the United States Attorney for the Southern District of New York and the premier official for prosecuting financial misconduct, lamented the difficulty of holding individuals responsible for corporate misconduct:

> Maybe there's a lot of smoke—now comes the proof. This guy's going to testify, "My accountant's a smart guy—I just relied on my accountant." The accountant's going to say, "I just relied on what he gave me," and everyone has plausible deniability. That's a simple example of a way in which people can get away with even criminal activity when they're making false certifications to the government.[49]

Comparisons have been made between the corporate debacles triggered by the accounting frauds at companies like Enron with the excessively risky investment programs, especially those involving subprime loans and mortgage-backed securities, that fueled the financial crisis.[50] Once again, the perceived failures of lawyers along with other gatekeepers was a featured point in the critique of corporate misconduct.[51] Thus, this signaled a shift away from viewing the lawyer as having gatekeeping duties only in the transactional context.

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too big to fail, there are people who are too big to jail."); *see also* Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), http:// www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/ ("[T]he Department of Justice has never taken the position that all the top executives involved in the events leading up to the financial crisis were innocent; rather, it has offered one or another excuse for not criminally prosecuting them-excuses that, on inspection, appear unconvincing.").

49. George Packer, *A Dirty Business*, THE NEW YORKER, June 27, 2011, at 51.

50. *See* Donald C. Langevoort, *Chasing the Greased Pig Down Wall Street: A Gatekeeper's Guide to the Psychology, Culture, and Ethics of Financial Risk Taking*, 96 CORNELL L. REV. 1209, 1213 (2011):

> There is a strong similarity in this crisis with the round of financial reporting scandals from earlier in the decade–Enron, WorldCom, and the like–that provoked Congress to pass the Sarbanes-Oxley Act in 2002. Lawyers are at the heart of the disclosure risk management that Sarbanes-Oxley demands, as are independent directors, especially those on the audit committee, and the firm's independent auditors. Something did not work the way it was supposed to, and there is pressure to do much better.

Id.; *see also* Robert J. Rhee, *The Madoff Scandal, Market Regulatory Failure and the Business Education of Lawyers*, 35 J. CORP. L. 363, 365 (2009) ("Among the many leitmotifs of the financial crisis is the failure of lawyers as regulators and gatekeepers. This is not a new theme, as Enron collapsed only a few years ago.").

51. *Id.*

To enhance the ability to detect and prosecute corporate misconduct, the Dodd-Frank Act goes in a different direction than the Sarbanes-Oxley Act by encouraging corporate insiders to report violations through whistleblower programs that offer enhanced financial incentives in exchange for supplying information about corporate wrongdoing.[52] Much to the chagrin of management, the SEC rules implementing the whistleblower program permit employees and others with knowledge of potential violations to go straight to the government with information rather than first reporting internally through expensive compliance programs that companies spent large amounts of money to implement in the wake of Enron and its ilk.[53] Moreover, the protection afforded to corporate whistleblowers is much broader under the Dodd-Frank Act, with a private right of action against an employer who retaliates for reporting misconduct.[54] The new program has led to an increasing flow of information to the SEC, unfiltered by corporate lawyers, that has allowed the agency to initiate investigations and pursue civil enforcement actions for conduct that might have gone unnoticed.[55]

II. EXPANSION OF THE LAWYER'S GATEKEEPING ROLE

There is a growing sense that lawyers may not be fulfilling even the limited gatekeeping role they have been called on to play since the Sarbanes-Oxley Act because corporations continue to engage in misconduct.[56] This has led to a subtle shift in the language used to describe how the government perceives lawyers charged with keeping companies from engaging in misconduct. Where the lawyers were once seen as a first line of defense inside a corporation whose presence would

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52. 15 U.S.C. § 78u-6(b) (2010).

53. Securities Whistleblowers Incentives and Protections, 17 C.F.R. § 240.21F-9(a)(1)-(2) (2011).

54. 15 U.S.C. § 78u-6(h)(1)(B)(i) (2010).

55. U.S. Securities and Exchange Commission, *2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, at 3 (Nov. 17, 2014), *available at* http://www.sec.gov/about/offices/owb/annual-report-2014.pdf:

> As a result of the Commission's issuance of significant whistleblower awards, enforcement of the anti-retaliation provisions, and protection of whistleblower confidentiality, the agency has continued to receive an increasing number of whistleblower tips. In Fiscal Year 2014, OWB received 3,620 whistleblower tips, a more than 20% increase in the number of whistleblower tips in just two years.

Id.

56. *See* Cunningham, *supra* note 1, at 333 ("[L]awyers no doubt play a role in superintending capital market integrity, although it is not exactly clear whether they are gatekeepers or whistleblowers or something more of a hybrid.").

make it more difficult to act improperly, they are now viewed as acting with a bullseye on their backs as potential targets of prosecution and civil enforcement actions when violations do occur.[57] SEC Chairwoman Mary Jo White, in a March 2014 speech, stated, "We will continue our focus on pursuing these cases to ensure that gatekeepers understand their special duties and responsibilities, and that they will be held accountable if they do not safeguard the interests of investors as they are obligated by law to do."[58] It is not clear exactly what those "special duties and responsibilities" are, but there is an ominous tone that lawyers are not doing enough to prevent misconduct.

The notion that an attorney representing a company owes an obligation to someone other than the client appears to be the accepted norm now, rather than a novel extension of the role of counsel in representing a corporation. Chairwoman White pointed out that the SEC planned to "enlarge our enforcement footprint with a renewed focus on 'gatekeepers,'"[59] a warning shot that lawyers would be among those subjected to increased scrutiny and enforcement actions, which would affect their ability to continue to practice law. The means for holding lawyers responsible for misconduct by a corporate client can come through the authority granted to the SEC to pursue violations based on a defendant aiding and abetting a violation, which now includes both knowing and reckless conduct that "provides substantial assistance" in a violation.[60] If the lawyer has participated in a business decision that results in a violation, or fails to take steps to prevent the violation, then such behavior could be viewed as a measure of assistance, which could turn the attorney into an accomplice.

SEC Commissioner Kara M. Stein pointed to the lack of cases against lawyers for their failures as a gatekeeper as a potentially troubling shortcoming in the SEC's current enforcement program.[61] In a speech in May 2014, she stated:

> But one gatekeeper that often is absent from the list of cases I see every week are the lawyers. Lawyers often serve as trusted advisers, and they give advice on almost every corporate transaction. They prepare and review disclosures that investors

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57. Mary Jo White, SEC Chairwoman, Perspectives on Strengthening Enforcement (Mar. 24, 2014) (transcript available at http://www.sec.gov/News/Speech/Detail/Speech/1370541253621).

58. *Id.*

59. *Id.*

60. 15 U.S.C. § 78t(e) (2010).

61. Kara M. Stein, Keynote Address at Compliance Week 2014 (May 19, 2014) (transcript available at http://www.sec.gov/News/Speech/Detail/Speech/1370541857558).

> rely upon – disclosures that are at the core of the Commission's regulatory program. And in most cases, they do a good job. But when lawyers provide bad advice or effectively assist in a fraud, sometimes their involvement is used as a shield against liability for both themselves, and for others. Are we treating lawyers differently from other gatekeepers, such as accountants?[62]

Ms. Stein points to a lawyer's "bad advice" as one basis for finding that they are participants in a company's violation, especially if their work could help shield others from potential liability.[63] It is more, however, than just the lawyer's failure to prevent misconduct *ex ante* under the traditional gatekeeping role that is being scrutinized. Instead, Ms. Stein focuses on the provision of legal services as a basis for identifying corporate counsel as one of the perpetrators of misconduct, or as an accomplice, so that failing to prevent violations would itself constitute a violation.[64]

The threat of criminal prosecution of counsel in connection with representation of the corporate client came to fruition in 2011 in the case of Lauren Stevens, an in-house lawyer for GlaxoSmithKline.[65] She was charged with obstruction of justice and making false statements to the Food and Drug Administration for failing to turn over documents in response to a request for voluntary disclosure related to off-brand promotion of a drug manufactured by the company.[66] The trial ended when the district judge granted an acquittal at the close of the government's case-in-chief based on his finding that Ms. Stevens acted in good faith and relied on outside counsel in responding to the request.[67]

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62. *Id.*
63. *Id.*
64. *Id.*
65. United States v. Stevens, 771 F. Supp. 2d 556 (D. Md. 2011).
66. *Id.* The original indictment in the case was dismissed without prejudice because the federal prosecutors failed to properly instruct the grand jurors about the advice of counsel defense and may have failed to submit exculpatory evidence for the grand jury's consideration before returning the indictment. *See id.*:

> The grand juror's question was not just any question, but rather was much akin to asking about an elephant in the room. The grand jury was well aware of the Defendant's role as the leader of a team of lawyers and paralegals, and the question was a natural one that arose out of her status. The question went to the heart of the intent required to indict. The incorrect answer either substantially influenced the decision to indict or, at the very least, creates grave doubt as to that decision. Accordingly, dismissal of the indictment is appropriate and required in the interests of justice.

Id.

67. *Id.* at 562. *See also* Katrice Bridges Copeland, *In-House Counsel Beware!*, 39 FORDHAM URB. L.J. 391, 392 (2011) ("Judge Titus, who presided over Stevens' trial,

Despite the favorable outcome, the in-house attorney was put in a position no lawyer ever wants to be in: facing criminal charges for how she represented her client in responding to a government inquiry. The obstruction of justice laws are very broad, so legal representation can easily slip over the line from vigorous defense to illegal conduct, at least in the view of prosecutors.[68]

Corporate lawyers have been targeted in other instances in which they participated in business decisions that turned out to violate the law. Starting in 2005, a number of companies reported backdating stock options issued to employees that were not properly disclosed in their filings with the SEC and violated tax laws.[69] Among those accused of civil violations for their role in the backdating were lawyers from Apple Inc.[70] and Mercury Interactive LLC,[71] while criminal charges were filed against attorneys at Comverse Technology[72] and Monster Worldwide.[73] These lawyers failed as gatekeepers at their respective companies by not ensuring that the option grants complied with the relevant tax laws and the timely disclosure required of a publicly-traded company.[74] The business and legal decisions regarding options awards largely overlapped, thus exposing the company's lawyers to prosecution for their involvement in the substantive violations, even if they did not have the ultimate decision-making authority.[75]

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found that Stevens acted in good faith and on the reliance of counsel in her response to the FDA's inquiry . . . ").

68. *See* Greta Fails, *The Boundary Between Zealous Advocacy and Obstruction of Justice After Sarbanes-Oxley*, 68 N.Y.U. ANN. SURV. AM. L. 397, 420 n.103 (2012):

> While the Stevens case could arguably be a one-off—an example of rogue prosecutorial overreach that is unlikely to be repeated . . . the prosecution's legitimate arguments, the instability of interpretations of section 1519, and the policy goals underlying Sarbanes-Oxley counsel that this may be the first in a line of cases in which prosecutors attempt to police lawyer conduct.

Id.; *see also* Copeland, *supra* note 67, at 415 ("The Stevens prosecution is the ultimate example of targeting an attorney for her legal advice.").

69. *See, e.g.*, S.E.C. v. Mercury Interactive, LLC, No. C 07-2822 JF (RS), 2008 WL 4544443 (N.D. Cal. Sept. 30, 2008); S.E.C. v. Nancy R. Heinen and Fred D. Anderson, No. 07-2214-HRL (Lloyd) (N.D. Cal. April 24, 2007); United States v. Olesnyckyj, No. 07-cr-120 (S.D.N.Y. 2007); United States v. Sorin, No. 06-cr-723 (E.D.N.Y. 2006).

70. *Heinen*, No. 07-2214-HRL (Lloyd).

71. *Mercury Interactive, LLC*, 2008 WL 4544443.

72. *Sorin*, No. 06-cr-723. The defendant was sentenced a year-and-a-day in prison after pleading guilty.

73. *Olesnyckyj*, No. 07-cr-120. The defendant was sentenced to one year of probation.

74. *See Mercury Interactive, LLC*, 2008 WL 4544443; *Heinen*, No. 07-2214-HRL (Lloyd); *Olesnyckyj*, No. 07-cr-120; *Sorin*, No. 06-cr-723.

75. *See id.*

Along with greater scrutiny of lawyers, there has been an increase in the regulatory requirements imposed on corporations, which draws counsel more deeply into dealings with the government. Financial firms are now subject to oversight from multiple regulators, not only at the federal level but also in the states where they operate. [76] It is common these days to see settlements in which multiple agencies assess penalties along with the Department of Justice extracting its own fines.[77] For example, Bank of America reached a $16.65 billion civil settlement related to the sale of residential mortgage-backed securities that involved payments to the Department of Justice, Federal Deposit Insurance Corporation, and the SEC, along with attorneys general in California, Delaware, Illinois, Kentucky, Maryland, and New York.[78]

The reach of regulators has been extended to industries once largely outside the purview of federal oversight. For example, the automobile industry had long operated without much scrutiny from the federal government, and the primary safety regulator–the National Highway Traffic Safety Administration ("NHTSA")–was at best a minor nuisance to the automakers.[79] That has changed since the revelation by General Motors ("GM") in 2014 of defective ignition switches in its vehicles that caused at least 120 deaths and multiple injuries as the company failed to identify the cause of numerous accidents for years.[80] A report[81] prepared by Anton R. Valukas after an internal investigation pointed to what the

76. *See* Press Release, U.S. Dept. of Justice Office of Public Affairs, Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis (Aug. 21, 2014) (on file with author).

77. *Id.*

78. *Id.*

79. *See* Bent Snavely and Alisa Priddle, *NHTSA's Rosekind is Cracking Down on U.S. Auto Industry*, DETROIT FREE PRESS (May 24, 2015), http://www.freep.com/story/money/business/2015/05/24/nhtsa-mark-rosekind-recalls-automotive-gm-takata-fiat-chrysler/27648463/:

> NHTSA was belittled on Capitol Hill during hearings over the General Motors ignition switch crisis last year and blamed for not taking aggressive action in 2009 when Toyota's sudden acceleration problems surfaced. And in 2013, the agency was openly challenged by Fiat Chrysler Automobiles on its initial call for recall of 2.6 million Jeep SUVs. FCA later agreed to a lesser recall.

Id.

80. Antonin R. Valukas, *Report to the Board of Directors of General Motors Company Regarding Ignition Switch Recalls* (May 29, 2014), *available at* http://www.nhtsa.gov/About+NHTSA/NHTSA+Electronic+Reading+Room+(ERR) [hereinafter "*Valukas Report*"].

81. *Id.*

company's CEO called a "pattern of incompetence and neglect,"[82] finding that "[a]lthough everyone had responsibility to fix the problem, nobody took responsibility."[83] In one instance, a new attorney asked why a recall had not been issued and was told "this is how it works. We raise it with engineering and they decide."[84] GM fired some of its lawyers for failing to respond to the defect in a timely manner.[85] It is important to note that these lawyers were litigators, which is not the type of role for an attorney generally engaged in the gatekeeping function typically involved in protecting investors and the market. Yet, that should not insulate them from at least some of the blame for how long the defect went undetected and exposed consumers to grave risk of injury.[86]

The Valukas Report includes an interesting recommendation for how GM's lawyers should interact with the government in the future: "NHTSA should be viewed not only as a regulator but also an ally in the effort to ensure that the Company's vehicles are as safe as they can be. Interactions with NHTSA should be consistent with that type of relationship."[87] Note that this "ally" imposed the maximum $35 million civil penalty on GM for its failure to timely report the ignition switch defect.[88] That certainly looks like a much more adversarial approach from the regulator than conduct by an agency aligned with the company.

Given the power regulators have over the companies they oversee, including the authority in some fields to remove officers and directors from office and impose significant fines on the organization, can corporate counsel realistically consider an agency to be an "ally"? If so,

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82. *See* Bill Vlasic, *G.M. Inquiry Cites Years of Neglect Over Fatal Defect*, N.Y. TIMES, June 5, 2014, at A1.

83. *Id. See also Valukas Report*, *supra* note 80, at 2.

84. *Valukas Report, supra* note 80, at 184 n.846.

85. *See* Peter J. Henning, *How G.M.'s Lawyers Failed in Their Duties*, N.Y. TIMES DEALBOOK (June 9, 2014, 2:47 PM), http://dealbook.nytimes.com/2014/06/09/how-g-m-s-lawyers-failed-in-their-duties/. The company settled the criminal investigation by agreeing to a deferred prosecution agreement that required it to forfeit $900 million and use a monitor for three years to assess its compliance with auto safety standards. Press Release, U.S. Dept. of Justice U.S. Attorney's Office, Manhattan U.S. Attorney Announces Criminal Charges Against General Motors And Deferred Prosecution Agreement With $900 Million Forfeiture (Sept. 17, 2015) (on file with author).

86. *See* Sung Hui Kim, *Inside Lawyers: Friends or Gatekeepers?*, 84 FORDHAM L. REV. 1867, 1867-68 (2016) ("Though primary blame should perhaps rest with GM's engineers, who apparently did not understand how their vehicles were built, GM's inside lawyers, who handled engineering, safety, and products liability issues, must be faulted for having obscured the deadly defect.").

87. Valukas Report, *supra* note 80, at 263.

88. Press Release, National Highway Traffic Safety Administration, U.S. Department of Transportation Announces Record Fines, Unprecedented Oversight Requirements in GM Investigation (May 16, 2014) (on file with author).

then that would signal a major change in the relationship between the lawyer and an organizational client by expanding the attorney's role to serving the regulator's needs along with those of the corporation, acting perhaps as a whistleblower on behalf of the government to ensure it has complete information about potential violations while also representing the company. How those two roles would be reconciled is a significant challenge because the rules of the profession continue to view the lawyer as owing a primary duty to advance their client's interests by maintaining the confidentiality of information and providing competent representation, even if the lawyer believes the client engaged in wrongdoing.

This new approach will have its greatest impact on the in-house lawyer, who serves a single client and participates in a range of decisions that have implications for how business is conducted. This lawyer is in a particularly precarious position because they do not have an array of clients to fall back on, thus their livelihood depends on maintaining a good working relationship with management. In serving the corporate client, that lawyer has to avoid becoming "Dr. No" by responding negatively to most management inquiries about how to proceed. Corporate counsel has to build up trust with executives so that they will seek out legal advice rather than shut the lawyers out of business decisions. But there is also the danger of an in-house lawyer becoming too much a part of the management "team" who will fall in line and not dissent from directives issued by more senior officers, even if it puts the company at risk of violating the law.[89]

If an additional duty is also owed to the regulators to act as a type of whistleblower in fulfilling the gatekeeping function, then there will be

89. *See* Sally R. Weaver, *Ethical Dilemmas of Corporate Counsel: A Structural and Contextual Analysis*, 46 EMORY L.J. 1023, 1034 (1997) ("Corporate counsel often acknowledge the increased effectiveness that they enjoy when senior management believes that they are 'team players.'"); *see also* Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel As Gatekeeper*, 74 FORDHAM L. REV. 983, 1003 (2005) ("Management creates the reality for inside counsel. Management defines objectives, identifies specific responsibilities for inside lawyers, and determines whether an inside lawyer's performance is acceptable. Management is vested with the authority to speak on behalf of the organization and is entrusted to give direction to inside counsel."); Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 976–77 (2005) ("Solidarity between a general counsel and other members of senior management can compromise counsel's service as a legal adviser and as the company's agent in its dealings with third parties . . . ."); E. Norman Veasey & Christine T. Di Guglielmo, *The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation*, 62 BUS. LAW. 1, 25–26 (2006) ("The in-house lawyer's involvement in business strategy and offering business advice can create pressure, often asserted by corporate managers, on the lawyer to enable transactions rather than to act as a 'bottleneck' to getting the deal done.").

suspicion among management about divided loyalties even among the most conscientious managers. That can lead to serious concerns about whether the most sensitive information should be shared with lawyers who may conclude there is an obligation to report to their "ally" – the government regulator.[90] The more in-house lawyers are perceived as potential whistleblowers, the less corporate management will include them in their deliberations.[91] For the lawyers, the challenge is dealing with the representatives of a client–individuals potentially viewed by the government as wrongdoers–who control their economic well-being.[92] In

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90. *See* Jan C. Nishizawa, *Ethical Conflicts Facing in-House Counsel: Dealing with Recent Trends and an Opportunity for Positive Change*, 20 GEO. J. LEGAL ETHICS 849, 856 (2007) ("When trust is placed in the in-house counsel to provide legal and business advice, the in-house counsel's decision to confront corporate constituents about suspected wrongdoing may cause a breakdown in trust.").

91. That does not mean the lawyers will never learn of misconduct, but it is more likely to be ex post than ex ante. That may lead to riskier decisions that could lead to criminal and civil penalties. Professor Coffee argues that the potential for reporting outside the company will still have a deterrent effect on management, even if the in-house lawyer is not consulted in advance. *See* Coffee, *supra* note 7, at 363:

> Thus, even if it were true that clients would consult less, this impact could be more than fully offset by the fact that it would become more dangerous to disregard the lawyer's advice. Add to this mix the likelihood that ex ante advice will not be chilled, and the net impact is to increase the attorney's leverage over the client by making it more dangerous to ignore the attorney's advice. If law compliance is the goal, such an impact seems socially desirable.

Id. It is difficult to separate out the legal issues from the underlying business decision, and so management may find it more expedient to keep the lawyers away from the process when there is a greater risk that it will be revealed if they are present. That may encourage conduct which tests the limits of the law even if it is not something done with the intent to violate the law. Thus, the lawyer's effectiveness will be diminished because legal advice will be largely reduced to *ex post* consultation rather than *ex ante* guidance.

92. *See* Kim, supra note 89, at 1005–06:

> But for inside counsel, as employees of the firm, the economic pressures are not just greater in degree, but also different in kind. First, inside counsel are necessarily economically dependent on a single client. If they get fired, they lose their entire income, their insurance, and their basic livelihood. If pensions or stock options have not vested, then enormous sums of money can be forfeited as well. Even worse, if they get fired for whistle-blowing, they may get blacklisted–without recourse under the law to sue for retaliatory discharge. Second, even if getting fired is not likely, inside counsel feels unremitting pressure to justify herself and her department as a corporate cost center. In today's competitive and profit-oriented environment, no position feels completely secure, and the case that an adequate return on firm investment is being achieved must always be made. The best way to do so is to facilitate, not interfere with, corporate transactions favored by management.

Id.

that context, asking the lawyer to act as a type of whistleblower with none of the protections afforded that role may be going too far in changing the role of corporate counsel.

III. CONCLUSION

If corporate counsel, in particular an in-house lawyer, is expected to view regulators as an "ally" by providing information that makes government oversight more effective, then that may undermine the gatekeeping role that puts the attorney in the position to prevent misconduct. If lawyers are kept away from risky or sensitive business decisions because of the potential they will disclose information harmful to the corporation, then an uncounseled client may well stray across the line into illegality. Holding lawyers accountable for helping a company commit fraud or other illegal acts is nothing novel because legal advice does not magically immunize the attorney from the consequences of a recommended course of conduct that turns out to violate the law. But expanding the lawyer's gatekeeping function to require that appropriate steps be taken to ensure the government has been made aware of potential violations shifts the attorney away from what is most important about having a gatekeeper–preventing violations before they occur. In essence, the fact that a company violates the law should not necessarily mean corporate counsel failed. Asking lawyers to do more to assist the government in ferreting out wrongdoing by reporting violations on peril of being identified as a participant in the misconduct risks compromising the ability of corporate counsel, especially those working inside the organization, to effectively represent their client.