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George A. Leet Business Law Symposium: Lawyers in the Crosshairs: The New Legal and Ethical Duties of Corporate Attorneys - Introduction

George W. Dent Jr.

GEORGE A. LEET BUSINESS LAW SYMPOSIUM

LAWYERS IN THE CROSSHAIRS: THE NEW LEGAL AND ETHICAL DUTIES OF CORPORATE ATTORNEYS

INTRODUCTION

George W. Dent, Jr.[†]

Welcome to the George A. Leet Business Law Symposium. The symposium was endowed by a generous gift from George A. Leet, a 1946 graduate of our law school, and a dedicated supporter of the University for many years. Mr. Leet spent almost his entire career with the National Labor Relations Board, ultimately serving as Senior Associate Executive Secretary. His abiding interest in business law is manifested in this symposium series, which is held in alternate years. The George A. Leet Business Law Symposium adds luster to our school by bringing national leaders in law, business, government, and academia to discuss challenging and critical issues in the field.

George Leet passed away last year but his legacy lives on in this symposium. I think he would be proud of how that legacy is being served today with a colloquy on the most important and controversial issue in business law right now. The corporate scandals at Enron, Tyco, WorldCom, etcetera, a few years ago, prompted agonized questions about what went wrong and how such catastrophes could be avoided in the future.[1] One of the most poignant questions was, where

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1 Terry Maxon, *As the Rules Change, So Do Lawyers' Roles; Latest Report in the Enron Fallout Amplifies Calls for Watchdog Duty*, DALLAS MORNING NEWS, Dec. 7, 2003, at 1D; Richard A. Oppel, Jr., *House Hearing to Focus on the Performance of Enron's Lawyers*, N.Y.

were the lawyers? Each of these fiascos seems to have involved serious violations of the law. Already they have led to several criminal convictions of corporate officers. But in none of those cases did the lawyers step in to avert a disaster. Perhaps it is unfair to indict business lawyers, generally, over these incidents. Lawyers, generally, do not know about illegal client conduct. Clients usually hide their misdeeds, especially from lawyers. And even if a lawyer knows of or suspects illegality, it may be unnecessary or inappropriate for the lawyer to divulge that information to the outside world. And even if the lawyers in these cases did not perform as we would wish, it does not necessarily follow that we should radically alter time-honored principles of professional responsibility.

It is not surprising though, that public outcry has triggered efforts that are still under way to transform the role of corporate lawyers. Congress adopted the Sarbanes-Oxley Act,[2] including Section 307, which imposes new requirements on the lawyers who learn of illegal acts within a corporate client. The act also includes Section 602,[3] which provides statutory support for SEC Rule 102(e), under which the Commission can discipline lawyers who violate or aid and abet a violation of the federal securities laws.[4] Although the text of Rule 102(e) has not changed radically in many years, SEC enforcement actions under the rule have mushroomed. There is also concern that, without changing the language of the rule, the SEC has altered its enforcement program, and now under Rule 102(e) it pursues attorneys allegedly guilty of nothing worse than negligence. Private damage actions against lawyers also seem to have increased.

There is a proposal to revise the federal sentencing guidelines to make waiver of these privileges a factor in mitigating the penalty for a criminal conviction. The Justice Department and the SEC now seem to consider waiver of these privileges a factor in deciding whether to prosecute or bring an enforcement action against a corporation. At the same time, there is a proposal to amend rule 502 of the Federal Rules of Evidence to provide that voluntary disclosure to a government agency during an investigation does not waive the attorney-client privilege or work product, generally.

TIMES, Mar. 14, 2002, at C4; Andrew Ross Sorkin, *Corporate Conduct: Conglomerate; "We Are Ready for It," Ex-Chief of Tyco Says as His Trial Begins*, N.Y. TIMES, Sept. 30, 2003, at C4; David Streitfeld, *Vinson & Elkins' Turn in the Enron Spotlight*, L.A. TIMES, Mar. 14, 2002, at B1.

[2] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C. (2006)).

[3] *Id.* at § 602 (codified at Securities Exchange Act of 1934, 18 U.S.C. 78d-3 (2006)).

[4] 17 C.F.R. § 201.102(e) (2006).

Ostensibly, this amendment would strengthen the privileges by changing the traditional rule that a waiver to anyone is a waiver to the whole world. However, many practitioners see this proposal as a further step in the evolution of a culture of waiver, in which the waiver of the privileges, which was traditionally made only in exceptional circumstances, would become routine.

Behind all these specific issues is the ultimate question: to whom does the corporate lawyer owe allegiance? Is it the client, the entity, the corporation, or is it something broader and more abstract like the public interest? It is sometimes argued that the public corporation, because it is public, should not be treated the same as an individual or private business. In many ways, this principle has gained general acceptance. We now expect public companies to disclose all their material information, a practice unthinkable seventy-five years ago. We now hear arguments that lawyers should be viewed as independent gatekeepers, not as hired guns or, more politely, confidential advisors. Is that where we are or should be headed? Part of this broader question is the issue of who defines the interests of the corporate client? If, as is happening more often, an insurgent shareholder or group elects a minority of directors who request information from the company's lawyer, must the lawyer obey? So, I think George Leet should be pleased that this symposium has attempted to tackle such an important and timely topic.