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COMMENT ON LAWYERS AS GATEKEEPERS

Thomas D. Morgan[†]

It is a privilege to be here today and it is with no lack of respect for any of the preceding speakers that some of the comments I make today will contrast with those you have heard.¹ I will make four basic points and hope that my remarks will at least help put some of the earlier ideas into perspective.

First, it seems to me clear that the massive corporate wrongdoing we have recently seen has not been caused by insufficient lawyer regulation. For at least thirty-five years, lawyers have been extensively regulated by states acting through rules based first on the ABA Model Code of Professional Responsibility and now on the ABA Model Rules of Professional Conduct. It is and always has been improper in every state for a lawyer to participate in any of the kinds of corporate misconduct that we have read and heard about.²

It has been illegal under what is now Model Rule 1.2(d), for example, for a lawyer to counsel or assist a client's crime or fraud.³ A lawyer also has an obligation under Model Rule 1.4⁴ to keep the client informed about any information relating to the representation, including information concerning a corporate fraud about which the lawyer is aware, and under Model Rule 1.13(b) to report information about fraud or other illegality up the corporate management ladder.⁵

In addition, Model Rule 1.16(a) requires lawyers to withdraw from any representation in which they are aware that their client is involved

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¹ Editor's Note: Professor Morgan presented these comments in response to a paper not being published in this Symposium. The editors have published these comments because they provide additional ideas to those in other papers in the Symposium.

² See, e.g., THOMAS D. MORGAN, *LAWYER LAW: COMPARING THE ABA MODEL RULES OF PROFESSIONAL CONDUCT WITH THE ALI RESTATEMENT OF THE LAW GOVERNING LAWYERS* 606-18 (2005).

³ MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2002).

⁴ E.g., *id.* R. 1.4(a)(5), (b).

⁵ *Id.* R. 1.13(b).

in criminal or fraudulent conduct,⁶ and Model Rule 1.6(b) now reflects the law that has existed in most states permitting a lawyer to disclose the intention of the client to commit a crime or fraud, or even the fact that the client has committed a crime or fraud to the extent the effects of the misconduct can be mitigated.⁷ Finally, Model Rule 1.13(c) now gives a lawyer the right to report client misconduct to regulatory authorities, not simply corporate management,⁸ and Model Rule 4.1(b) imposes an obligation on a lawyer in some circumstances to warn persons who might be injured by a crime or fraud being committed by a client.⁹

In short, the SEC regulations that we have discussed today are basically taken from state rules with which lawyers should have been familiar for an extended period of time. The point has been made correctly that those were state rules, and it is absolutely true that the states have done a terrible job of enforcing these rules through the disciplinary system. If the truth be known, the states have done a terrible job, in general, in enforcing lawyer discipline standards.

What has substituted for the threat of lawyer discipline, however, is the world of lawyer malpractice. Lawyer liability has exploded, beginning in about 1990 with the filing of the savings-and-loan failure cases. Firms have faced major consequences, paying judgments of \$50 million or more for their failure to meet their professional responsibilities.¹⁰ Regardless of how much insurance these firms have, under any typical policy there is a "retention" or deductible amount that means it costs the lawyers significant money out of pocket. In other cases, the lawyers have reportedly borne all the losses because their policies do not cover the lawyers' own participation in a fraud.¹¹

My point is that there is a significant liability regime that people who only count discipline cases tend to miss. That regime has led to an enormous amount of education and review in law firms, primarily stimulated by lawyer malpractice insurance companies who are very anxious for lawyers to understand and comply with the law. That reality should not be overlooked as we think about what the rules should be.

⁶ *Id.* R. 1.16(a)(1).

⁷ *Id.* R. 1.6(b)(2) & (3).

⁸ *Id.* R. 1.13(c).

⁹ MODEL RULES OF PROF'L CONDUCT R. 4.1(b) (2002).

¹⁰ See, e.g., *In re Am. Cont'l Corp. v. Lincoln Sav. and Loan Sec. Litig.*, 794 F. Supp. 1424, 1450-52 (D. Ariz. 1992) (\$51 million settlement).

¹¹ E.g., *FDIC v. Mmahat*, 907 F.2d 546 (5th Cir. 1990) (\$35 million judgment).

That Sarbanes-Oxley¹² transformed state rules into a federal requirement is not a trivial matter, but federalizing the rules did not really change the dynamics of the problem of getting lawyers to act. I hesitate to use a sensitive analogy but the easiest law to get a legislature to pass today would be a law against the shootings in public schools that the country has recently seen. Yet we all know, if we think about it at all, that we have had state laws against murder for a long time. The dynamics of situations that lead people to shoot up public schools are not going to be changed significantly simply by adopting a new body of laws. I believe the same is true of the dynamics of situations in which lawyers appear not to catch corporate misconduct.¹³

Second, I know I am a lone wolf on this point, but I think the term “gatekeeper” is almost useless. Indeed, it is worse than useless in that it tends to get in the way of sound thinking about the lawyer-client relationship. Even the articles on gatekeepers reveal that it is not a very clearly defined term.¹⁴ At one level it is used positively, i.e., to describe the world in the sense of saying that lawyers are involved in corporate transactions and can have influence. That much we all agree. But “gatekeeper” is also used normatively to suggest that somehow less wrongdoing would occur if it were not for lawyer complicity.

The latter view, I respectfully suggest, is simply not true. A lot of wrongdoing—environmental pollution, for example—often takes place in settings where lawyers have not been directly involved in the situation at all. In those and many other cases, trying to know what has happened and then trying to report accurately what has happened both represent continuing challenges for lawyers. Most corporate wrongdoers do not wear signs saying “Criminal.” The normative view is sometimes expressed as a preference that we set up a kind screener group who will certify, or give a “Good Housekeeping seal,” to disclosure documents. With all respect, again, that is virtually impossible to do unless one assumes perfect knowledge or sufficient imagination to anticipate where most of the hidden problems are.

I think we can all look back at Enron, and say people should have known something was wrong. But there are many circumstances that

¹² 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)).

¹³ I have previously made this argument in Thomas D. Morgan, *Sarbanes-Oxley: A Complication, Not a Contribution, in the Effort to Improve Corporate Lawyers' Professional Conduct*, 17 GEO. J. LEGAL ETHICS 1 (2003).

¹⁴ E.g., John C. Coffee, Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid"*, 57 BUS. LAW. 1403 (2002).

are not remotely that clear. My own view is that we ought to be striving to see the lawyer as a counselor—a goader toward proper conduct and proper reporting—rather than as a gatekeeper. This would have a couple effects. One is that it would align the standard to how most lawyers try to think of themselves. As both GERALYN PRESTI¹⁵ and JOSEPH BAUER suggested during this Symposium, companies basically want to do the right thing. The number of companies out there who are saying to themselves “how can we figure out a way to act dishonestly” may not be zero, but it is relatively few. If you have one of those companies as your client, you should get out of that representation immediately.

Lawyers should then ask themselves how they can structure the relationship in a way that will help reestablish the kind of trust and mutual respect of the kind that Professor Geoffrey Miller suggests may have existed back in the club era but that is harder to achieve in a world that we now understand is more market driven and competitive.¹⁶ That is indeed a challenge, and I don’t have the complete answer to how to achieve it, but I think that it is the right direction in which to point.

The second aspect of this idea is that if we could adopt that cooperative point of view, perhaps we could come closer to avoiding some of the problems we have seen lately in terms of preserving the attorney-client privilege. If you release privileged information to somebody with whom you have a common interest, you have not waived the privilege. If lawyers are truly gatekeepers rather than counselors, we run the risk of getting ourselves into a situation in which the release of privileged communications to outside counsel, who would be deemed a gatekeeper, might be regarded as disclosure to an adverse party, such that release of the information would be a privilege waiver. That would take what should be a straightforward communication with counsel and make it a lot more complicated and risky than it has to be.¹⁷

My third point is to suggest that there is a downside to noisy withdrawal. What I am seeing is the use of the power that the

¹⁵ GERALYN M. PRESTI, *Current Ethical Issues for Securities Lawyers—A Comment on Humes*, 57 CASE W. RES. L. REV. 357 (2007).

¹⁶ GEOFFREY MILLER, *From Club to Market: The Evolving Role of Business Lawyers*, 74 FORDHAM L. REV. 1105 (2005).

¹⁷ The courts are at least beginning to catch on to this idea that auditors have a common interest with the company. See, e.g., *Merrill Lynch & Co. v. Allegheny*, 229 F.R.D. 441 (S.D.N.Y. 2004). We talk about auditors as gatekeepers too, but in fact, they have an interest in trying to help the company report accurately and comply with its legal requirements. If we can get the courts to see everybody as on a team, then we can begin to clarify some of these attorney-client privilege issues, I think, in a way that will be helpful.

attorneys are given by the SEC rules as a tool in what I would describe as corporate politics. We have all assumed that the corporation has a single purpose, a single direction, and that all the people in it are either honest or dishonest. The fact of the matter is that there are multiple elements in most corporations. Sometimes someone in a company may want his or her point of view taken more seriously and thus will assert that the other person's point of view constitutes illegality. Indeed, it is not only illegal, it is so illegal that the lawyer or other employee threatens to take the issue to the audit committee. It may be allegedly so illegal that there is a requirement to report under Sarbanes-Oxley and the whistleblower protection that goes with that reporting arises. That kind of misuse of the obligations lawyers have is a problem that I believe would only be exacerbated by a requirement of noisy withdrawal.

I have suggested, as well, that noisy withdrawal represents the worst of all worlds.¹⁸ Both the SEC rules and Model Rules 1.6(b) and 1.13(c) establish a system of permissive withdrawal and indeed permissive disclosure of exactly what the problem is thought to be. Noisy withdrawal, on the other hand, is what I call a game of charades, in which the disclosing party may wave his or her arms and possibly make faces, but he or she may not tell people what they really need to know. More seriously, if lawyers or their clients then have to tell the market that a law firm or a lawyer withdrew at XYZ company, that information will almost certainly have an impact on investors that may or may not be assessed accurately. Almost inevitably, people that were holding the stock will be less wealthy tomorrow than they were yesterday. At some point, the market may well learn enough information to correct itself, but the idea that more information is inevitably better than less—at least if the information is bad or ambiguous—is in my view simply wrong.

Fourth and finally, I would suggest that one of the biggest threats to the world of increased reporting and increased sensitivity to fraud issues these days is the work of the ABA Task Force on the Attorney Client Privilege.¹⁹ I do not mean to attack its members personally. They have put in a lot of time and effort on a volunteer basis to try to help improve the situation, but that committee has gotten two propositions through the ABA House of Delegates that I believe are problematic.

¹⁸ *E.g.*, Testimony of Thomas D. Morgan, Hearing on the Role of Attorneys in Corporate Governance, before the Committee on Financial Services, Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises, United States House of Representatives (Feb. 4, 2004).

¹⁹ The Task Force website is <http://www.abanet.org/buslaw/attorneyclient/home.shtml>.

The first Task Force proposition is that corporate lawyers now have an obligation to the individual constituents in the organization to protect their individual attorney-client privilege. I certainly agree that corporate lawyers have to tell those with whom they deal whom they represent and that they are not the individual's lawyer.²⁰ Indeed, I would have lawyers say, "I'm the corporation's lawyer and if you want your own lawyer, you will have to go hire one." But that duty to warn is a separate question from whether the corporate counsel has a duty to help the individuals protect their individual rights. In my judgment, the obligation is to the company, not to the individuals.

Second, the ABA Task Force has resisted allowing companies to get credit for engaging in privileged internal investigations and then waiving the privilege in dealings with the Justice Department, the SEC, or anybody else in an effort to try to clear things up. As Richard Humes noted,²¹ many people like the idea of limited waiver as a substantive matter, but the politics of it today are couched in allegations that one should fight evildoers in the enforcement agencies rather than genuinely help clients get out of whatever mess they find themselves in. Surely, the ABA can propose something better than that and the rest of us should not take it seriously.

²⁰ MODEL RULES OF PROF'L CONDUCT R. 1.13(f) (2002).

²¹ Richard Humes, *Remarks of an SEC Associate General Counsel*, 57 CASE W. RES. L. REV. 341 (2007).