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PETER C. KOSTANT

From Lapdog to Watchdog: Sarbanes-Oxley
Section 307 and a New Role for
Corporate Lawyers

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I. INTRODUCTION

Much of the commentary on the Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley”)¹ has been negative and harsh. Critics have characterized Sarbanes-Oxley reforms as largely irrelevant, ineffective, or actually harmful.² Whatever the effects of the Sarbanes-Oxley legislation in its entirety are, this essay will focus on one area, the impact of Section 307³ on corporate legal practice, which should be overwhelmingly positive. I wrote an earlier article, two years after the passage of the statute, in which I predicted that it would help to improve corporate lawyering.⁴ In this essay, I will discuss how three years later, the benefits of this legislation are even clearer.

Broadly speaking, the greatest benefit of Sarbanes-Oxley Section 307 has been the beginning of a sea change in the perceived role of corporate lawyers. These lawyers can no longer justify their role as the compliant servants of senior corporate managers.⁵ Instead, corporate lawyers now must recognize that they serve as gatekeepers for their corporate clients and that they must be responsive to the ultimate authority of corporations, the boards of directors.⁶ Former Securities and Exchange Commission (“SEC”) commissioner and law professor, Harvey Goldschmid has explained that gatekeepers are “guardian[s] with independent professional responsibilities, including a responsibility for protecting the institu-

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1. 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.).
 2. See, e.g., Eric M. Fogel & Andrew M. Geier, *Strangers in the House: Rethinking Sarbanes-Oxley and the Independent Board of Directors*, 32 DEL. J. CORP. L. 33, 34 (2007) (“[Sarbanes-Oxley] ultimately will be ineffective in preventing corporate scandals in the future.”); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 491 (2003) (“[Internal compliance structures] may largely serve a window-dressing function that provides both market legitimacy and reduced legal liability.”); Larry E. Ribstein, *Markets vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 32 (2002) (suggesting that provisions set forth in Sarbanes-Oxley will not only be costly to implement, but also inhibit the efficient flow of information within firms and the relationship between corporations and their lawyers); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1563, 1591 (2005) (characterizing Sarbanes-Oxley governance as a “dismal saga” partly due to the fact that the Act’s provisions are “ill matched to fulfill their stated objectives”); Gregory Carl Leon, *Stigmata: The Stain of Sarbanes-Oxley on U.S. Capital Markets* 7 (George Wash. U. Law Sch. Pub. Law, Research Paper No. 224, 2006), available at <http://ssrn.com/abstract=921394> (“The voices of those that persist in the opinion that [Sarbanes-Oxley] is beneficial to the U.S. market are few and far between.”).
 3. 15 U.S.C. § 7245 (Supp. IV 2004). Section 307 required that the SEC promulgate minimum standards of conduct for lawyers involved in representing public corporations before the SEC; therefore, the SEC promulgated Rule 205. See *infra* note 59 and accompanying text. For an overview of Sarbanes-Oxley, see John C. Coffee, Jr., *A Brief Tour of the Major Reforms in the Sarbanes-Oxley Act*, SH097 ALI-ABA 151 (2002).
 4. Peter C. Kostant, *Sarbanes-Oxley and Changing the Norms of Corporate Lawyering*, 2004 MICH. ST. L. REV. 541 [hereinafter Kostant, *Changing Norms*].
 5. See *id.* at 549 (“[Sarbanes-Oxley] requires, rather than merely permits, that lawyers for public companies must act when they have evidence . . . of material illegal activities, or breaches of fiduciary duty.”).
 6. See, e.g., DEL. GEN. CORP. LAW § 141(a) (2008).

tion.⁷ In a recent comprehensive study of corporate gatekeepers, Professor John C. Coffee concludes that “all boards of directors are prisoners of their gatekeepers. No board of directors—no matter how able and well-intentioned its members—can outperform its professional advisors.”⁸ Sarbanes-Oxley legislation largely focused on the duties of corporate gatekeepers, but of this entire group—lawyers, accountants, investment bankers, securities analysts, and credit-rating agencies—only one profession, the lawyers, have traditionally denied what would seem to be the rather obvious fact that their role is to be gatekeepers.⁹

II. PRE-SARBANES-OXLEY CORPORATE PRACTICE

For at least thirty years, and especially with the adoption by the American Bar Association (“ABA”) of the Model Rules of Professional Conduct (“Model Rules”) in 1983, “any suggestion of the attorney having gatekeeping responsibilities was eliminated.”¹⁰ Many lawyers for large public corporations saw themselves as advocates for senior inside corporate managers, especially for the chief executive officers (“CEOs”), who had the power to hire and fire them and set their compensation.¹¹ In this context, it is not surprising that corporate lawyers conflated the interests of the corporate entities that they purportedly served with the interests of the senior corporate managers who they treated as their “real” clients.¹² All too often instead of helping to ensure that corporations complied with the law, corporate lawyers helped senior corporate managers “to create endless shells under which to hide and move the peas.”¹³

7. Harvey J. Goldschmid, Comm’r, SEC, The Orison S. Marden Lecture sponsored by the Association of the Bar of the City of New York: A Lawyer’s Role in Corporate Governance: The Myth of Absolute Confidentiality and the Complexity of the Counseling Task (Nov. 17, 2003). For a careful analysis of how gatekeepers function as reputational intermediaries for a third-party enforcement gatekeeper regime, see Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 62–66 (1986).

8. JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 1 (2006) [hereinafter COFFEE, GATEKEEPERS].

9. *Id.* at 192.

10. *Id.* at 201.

11. *See id.* at 229 (“Because legal ethics at its core views the attorney as a client-serving professional who is not permitted to dominate the relationship (and because market conditions make it unlikely that lawyers could do so today), legal ethics does not hold out a practical remedy for gatekeeper failure.”). Additionally: Within the bar, the dominant view has long been that legal ethics commands lawyers to engage in zealous advocacy on behalf of their clients’ positions and permits them to take any action up to the point where such behavior becomes unlawful. Thus, the lawyer may pursue any lawful goal of the client, however socially or morally unappealing, and may raise any non-frivolous legal claim or assert any permissible procedural defense on its behalf.

Id. at 197.

12. *See* Stephen M. Bainbridge & Christina J. Johnson, *Managerialism, Legal Ethics, and Sarbanes-Oxley Section 307*, 2004 MICH. ST. L. REV. 299, 306–07.

13. Jeffrey N. Gordon, *Governance Failures of the Enron Board and the New Information Order of Sarbanes-Oxley*, 35 CONN. L. REV. 1125, 1138 (2003).

The increasingly subservient role of corporate lawyers reflected changes in the structure of corporate legal practice. Over the last thirty years, the power and independence of outside counsel has decreased.¹⁴ While it is easy to exaggerate the extent to which powerful outside law firms had previously acted as a brake on the opportunism of senior corporate managers, at least these firms had some leverage.¹⁵ This was because law firm-client relationships were stable and long-term. In theory, and to some extent in practice, if a law firm said “no” to a proposed transaction, it was often abandoned by senior management.¹⁶

The structure of corporate legal practice changed with the increased power of inside general counsel.¹⁷ The asymmetry of legal competence, which had previously favored the outside lawyers, shifted in-house. Inside general counsel knew how to evaluate legal advice and hire law firms to provide exactly the services that they, and the senior corporate managers who were their peers, wanted done.¹⁸ As Professor Ronald Gilson, a scholar of corporate and securities law, has aptly explained, having hired a “champion,” senior managers were not interested in a “chaperone.”¹⁹ Law firms now actively competed for corporate clients and willingness to acquiesce with management demands became a useful selling point. At the same time, while inside general counsel could, in theory, be a source of independent advice about legal compliance, their role in fact was “ambiguous” and filled with “tension.”²⁰ These inside lawyers identified with the senior corporate managers and saw their role as serving them.

The organized bar readily accepted and actively supported a non-gatekeeper role for all lawyers.²¹ The ethics rules that the ABA kept amending seemed designed to maximize the extent to which lawyers could profit from obeying the wishes of the senior corporate managers of their corporate clients while minimiz-

14. See generally Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869 (1990).

15. See generally Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

16. A lion of the bar, Elihu Root, is famous for saying that about “half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.” Clyde Spillenger, *Evasive Advocate: Reconsidering Brandeis as People’s Lawyer*, 105 YALE L.J. 1445, 1524 n.270 (1996). For a description of the “lawyer statesmen” of an earlier time, see generally ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

17. See Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 960–64 (2005).

18. See *id.*

19. Gilson, *supra* note 14, at 909.

20. DeMott, *supra* note 17, at 956.

21. Professor William H. Simon calls this the “Dominant View” of the lawyers’ role, which requires, or at least permits, lawyers to pursue any goal of a client through any arguably legal course of action. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* 7–9 (1998); see also Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1188–90 (2003) (“[L]awyers can assist corporate managers to inflict enormous damage and then argue, often plausibly, that they are only doing the job they are supposed to do.”).

ing any liability that lawyers might face for doing so. The Model Rules as adopted by the ABA in 1983 changed the ethical framework to make it easier for corporate attorneys to remain passive or actually assist with client misconduct.²² For example, before the adoption of Sarbanes-Oxley Section 307 forced its amendment in 2002, Model Rule 1.13 supported this role.²³ While the rule dutifully recited that attorneys for a corporation must serve the entity, and not any of its constituents, the rule was written extremely narrowly and was too vague to provide any meaningful guidance for lawyers trying to ensure corporate compliance with the law.²⁴ If corporate agents were acting to harm the corporation, or subject it to liability, the lawyer could only act if she knew that the conduct was illegal and would cause material harm, and the misconduct was related to the lawyer's representation.²⁵ Legal ethics commentators criticized the rule as extremely deferential to senior corporate managers, not mentioning any duty to rectify past wrongdoing and not requiring any particular action.²⁶ Even in the

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22. See Roger C. Cramton, George M. Cohen & Susan P. Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 778–82 (2004); Peter C. Kostant, *Sacred Cows or Cash Cows: The Abuse of Rhetoric in Justifying Some Current Norms of Transactional Lawyering*, 36 WAKE FOREST L. REV. 49, 60–63 (2001) [hereinafter Kostant, *Sacred Cows*]; Kostant, *Changing Norms*, *supra* note 4, at 544–46 (“[T]he ABA’s Model Rules of Professional Conduct actually encourage corporate lawyers to act as uncritical servants of senior managers.”); see also Bainbridge & Johnson, *supra* note 12; Gordon, *supra* note 21; Susan P. Koniak, *When the Hurlyburly’s Done: The Bar’s Struggle with the SEC*, 103 COLUM. L. REV. 1236 (2003) [hereinafter Koniak, *Hurlyburly*]; William H. Simon, *The Kaye Scholer Affair: The Lawyer’s Duty of Candor and the Bar’s Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243 (1998).
23. The previous version of Model Rule 1.13 provided that counsel for “an organization represents the organization acting through its duly authorized constituents.” MODEL RULES OF PROF’L CONDUCT R. 1.13(a) (1983). In addition, the Rule contemplated a relatively limited up-the-ladder reporting obligation:
- If a lawyer for an organization knows that . . . [a] person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. . . . Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:
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- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act [o]n behalf of the organization as determined by applicable law.
- Id.* at R. 1.13(b). If the relevant internal decision maker insisted on taking action “that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign” *Id.* at R. 1.13(c); see also Bainbridge & Johnson, *supra* note 12, at 309.
24. Kostant, *Changing Norms*, *supra* note 4, at 544–45.
25. For a description of how seldom, if ever, lawyers “know” of misconduct, see Koniak, *Hurlyburly*, *supra* note 22.
26. Kostant, *Changing Norms*, *supra* note 4, at 545 (“Rule 1.13 makes lawyers overly deferential to corporate managers.”); see also MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 201–05 (1st ed. 1990) (explaining that the Model Rules make corporate attorneys better equipped to protect their

most egregious cases, lawyers were not required to report to the board of directors.²⁷

The Model Rules entirely deleted any mandatory or even permissive duties for lawyers to rectify client frauds that had utilized the lawyers' services.²⁸ A duty to rectify had existed under the prior Canons of Professional Ethics ("Canons"), adopted in 1908, and under the Model Code of Professional Responsibility ("Model Code"), adopted in 1969.²⁹ The Model Rules also narrowed to the

individual clients than they are able to protect their corporate clients); GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 17.5 (3d ed. 2000 & Supp. 2004-2) (explaining that the distinction between serving the corporate entity and serving the senior managers, who are responsible for hiring and firing the lawyers, is not always completely understood in the corporate world *and* corporate lawyers); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 746 (1986) ("[Rule 1.13 is] too solicitous of organization charts and customary corporate etiquette."); Stephen Gillers, *Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure*, 1 *GEO. J. LEGAL ETHICS* 289, 291 (1987) (explaining that although the 1980 draft of Rule 1.13 had a "definite view" of the corporate attorney's responsibilities following the discovery of wrongdoing, "subsequent drafts and the final version became progressively more vague and less insistent"); Peter C. Kostant, *Exit, Voice and Loyalty in the Course of Corporate Governance and Counsel's Changing Role*, 28 *J. SOCIO-ECON.* 203, 233 ("[C]orporate lawyers, pursuant to the Model Rules, are required to be overly loyal to inside management and therefore unable adequately to serve the corporate entity and its constituents."). As Bainbridge and Johnson have written:

Several aspects of former Model Rule 1.13 deserve note. First, Rule 1.13(b) referred to the officer's "legal obligation to the organization," but focused exclusively on violations of law and ignored breaches of fiduciary duty. Second, the Rule required the lawyer to act "in the best interest of the organization," rather than to protect the interests of its directors (or shareholders for that matter). Third, the Rule required that counsel minimize any "disruption" and, in particular, minimize the risk of revealing information to "persons outside the organization." Accordingly, a lawyer generally could not make a so-called "noisy withdrawal." Finally, the Rule was merely permissive both with respect to the up-the-ladder and resignation options. Hence, the lawyer was not required either to withdraw or disclose to the board management misconduct (so long as he did not participate in such misconduct).

Bainbridge & Johnson, *supra* note 12, at 309.

27. In the representation of Lincoln Savings & Loan by Kaye Scholer, which resulted in the law firm paying out a settlement amount of \$41 million, neither the ABA Task Force nor the New York Bar's Disciplinary Board found cause for discipline. Peter C. Kostant, *Breeding Better Watchdogs: Multidisciplinary Partnerships in Corporate Legal Practice*, 84 *MINN. L. REV.* 1213, 1217 n.27 (2000). The ABA appointed a "Working Group on Lawyers' Representation of Regulated Clients," which issued a report stating that Rule 1.13 did not require the law firm to advise the board of directors that senior managers were engaged in fraud. *Id.* at 1240 n.121; Simon, *supra* note 22, at 263 n.29.
28. Cramton, Cohen & Koniak, *supra* note 22, at 779-81.
29. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(B) (1980):
 A lawyer who receives information clearly establishing that:
 (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, [the lawyer] shall reveal the fraud to the affected person or tribunal.

Id. See also Cramton, Cohen & Koniak, *supra* note 22, at 779-80; Kostant, *Sacred Cows*, *supra* note 22, at 60-61 (explaining that although eventually subject to a narrow exception for "privileged communications," the Canons and Model Code maintained a duty to rectify for attorneys serving a corporate entity); Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 *VAND. L. REV.* 75, 80-81 (1993) ("With respect to the duties of

point of extinction the lawyers' power to disclose client confidences in order to prevent criminal or fraudulent conduct and sought to make purportedly absolute confidentiality regardless of context the foundation for all legal practice.³⁰

Some skeptics have correctly suggested that prior to the adoption of the Model Rules, the organized bar was willing to accept duties to rectify or disclose client fraud only because such "duties" were hollow, and were never enforced by state disciplinary boards.³¹ When the SEC, in the 1970s, attempted to require that securities lawyers not remain passive while their clients violated federal securities laws, the organized bar quickly responded.³² The ABA amended the ethics rules in order to challenge the federal regulators. This was done first by amending the Model Code to narrow exceptions to rules of client confidentiality and then by adopting the Model Rules.³³ Until the very eve of the passage of Sarbanes-Oxley, the ABA stuck to its guns in rejecting a gatekeeper role for any attorneys. The ABA House of Delegates refused to accept amendments to the Model Rules, as part of Ethics 2000,³⁴ which would allow disclosure to prevent

lawyers toward third persons in the event of client fraud, the Code was particularly murky, but could be construed, at least as originally drafted, to obligate the lawyer to prevent or rectify the fraud.").

30. Cramton, Cohen & Koniak, *supra* note 22, at 781.
31. See, e.g., Kostant, *Changing Norms*, *supra* note 4, at 552–53. As Robert Gordon wrote, "lawyers can assist corporate managers to inflict enormous damage and then argue, often plausibly, that they are only doing the job they are supposed to do." Gordon, *supra* note 21, at 1190. Disciplinary bodies rarely sanction powerful lawyers that represent large corporate clients. For example, in one of the biggest savings and loan scandals, internal documents appeared to indicate that a prestigious law firm may have assisted management in avoiding detection of illegal schemes but were not reported to independent directors. See Peter C. Kostant, *When Zeal Boils Over: Disclosure Obligations and the Duty of Candor of Legal Counsel in Regulatory Proceedings After the Kaye Scholer Settlement*, 25 ARIZ. ST. L.J. 487, 500 (1993) (discussing the 1992 charges against law firm Kaye Scholer). The possibility that a transactional lawyer will be disciplined for ethical violations is "remote." Langevoort, *supra* note 29, at 80.
32. COFFEE, GATEKEEPERS, *supra* note 8, at 207–08. See *infra* note 33 and accompanying text for a discussion of *SEC v. National Student Marketing Corporation*.
33. COFFEE, GATEKEEPERS, *supra* note 8, at 212–13. Prior to the passage of Sarbanes-Oxley, courts rarely, if ever, addressed the problem of corporate lawyers assisting or remaining silent while their clients engaged in fraud. See Kostant, *Sacred Cows*, *supra* note 22, at 51–52; Kostant, *Changing Norms*, *supra* note 4, at 546–47. When the SEC attempted to hold corporate lawyers liable for failing to prevent their clients from violating the federal securities laws, the federal courts failed to clarify the lawyer's duties. See *SEC v. Nat'l Student Mktg. Corp.*, 457 F. Supp. 682 (D.D.C. 1978) (ruling on the SEC's complaint alleging a securities fraud scheme involving multiple parties); Susan P. Koniak, *When Courts Refuse to Frame the Law and Others Frame it to Their Will*, 66 S. CAL. L. REV. 1075, 1080–84 (1993) [hereinafter Koniak, *Courts*] (discussing the history of *National Student Marketing Corporation*). By 1988, the SEC capitulated to the resistance of the organized bar and conceded that it would not seek "to develop or apply independent standards of professional conduct" and would "generally refrain[] from using its administrative forum to conduct *de novo* determinations of the professional obligations of attorneys." COFFEE, GATEKEEPERS, *supra* note 8, at 212.
34. The ABA established the Ethics 2000 Committee in 1997 in order to update the Model Rules consistent with developments in law and practice. Cramton, Cohen & Koniak, *supra* note 22, at 731.

serious financial fraud or require reporting of serious corporate misconduct to boards of directors.³⁵

The organized bar's interpretation of its ethical duties was an attempt to justify the culture in which lawyers could uncritically serve senior corporate managers.³⁶ By ignoring context, and conflating transactional lawyers with criminal defense lawyers, whose role was to defend clients charged with past crimes in adversarial proceedings, the bar sought to "ambiguate" the social meaning of what lawyers did.³⁷ The social meaning of unquestioning loyalty to senior corporate managers was rationalized as being a necessary part of loyal and effective advocacy.³⁸ The ideology was that all lawyers must be attack dogs, not watchdogs, if any lawyer was to serve her clients.³⁹ This universal role was spun as necessary and admirable. In a *Wall Street Journal* article, one bar champion made the ludicrous claim that Sarbanes-Oxley would have prevented John Adams from defending the British soldiers charged with killing civilians in the Boston Massacre of 1770.⁴⁰ Because of the absence of enforcement by bar disciplinary agencies or courts, the actual language of the ethics rules was of no practical regulatory importance for corporate lawyers,⁴¹ but the rhetoric of the rules did help to justify the compliant behavior of lawyers obediently serving senior corporate managers.

The rhetoric of the bar erroneously equated the ethical duties of a criminal defense lawyer who strictly maintained client confidences, and legally and zealously represented a defendant against the powerful state in an adversarial proceeding with those of a transactional lawyer who represented corporate clients

35. See Koniak, *Hurlyburly*, *supra* note 22.

36. See Gordon, *supra* note 21, at 1190 (describing a "pervasive" belief among corporate law practitioners that an attorney's "active approval" of, "passive acquiescence" to, and "failure to inquire and investigate" fraud committed by senior management is consistent with the ethical standards set forth by the bar); Koniak, *Hurlyburly*, *supra* note 22, at 1245-46 (accusing corporate attorneys of being partly responsible for the frauds perpetrated by the senior management of corporations and criticizing the bar's acquiescence to this norm); Kostant, *Sacred Cows*, *supra* note 22, at 61-62 (criticizing the bar's removal from the ethical guidelines, in the Model Rules, a lawyer's duty to disclose client fraud); Kostant, *Changing Norms*, *supra* note 4, at 544 ("[T]he ABA's Model Rules of Professional Conduct actually encourage corporate lawyers to act as uncritical servants of senior managers."). I previously explained that the bar justifies loyalty to senior managers of corporate clients as necessary in order for corporate attorneys to serve, not only as independent advocates, but also as "bastions of freedom against a potentially tyrannical state." *Id.* at 546; see also Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992); Koniak, *Courts*, *supra* note 33; Simon, *supra* note 22.

37. See Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181, 2187-88 (1996).

38. Kostant, *Changing Norms*, *supra* note 4, at 551-53.

39. *Id.* at 546.

40. Mitchell Pacelle & Michael Schroeder, *Proposed SEC Rules Could Turn Lawyers into Whistle-Blowers*, WALL ST. J., Jan. 9, 2003, at A1 (quoting Edward H. Fleischman).

41. Cramton, Cohen & Koniak, *supra* note 22, at 782 ("[S]tate disciplinary authorities had neither the will nor the resources to charge large firm lawyers with assisting [in] client fraud.").

engaged in serious, ongoing misconduct.⁴² Unfortunately, courts, which did have the power to regulate lawyers, accepted and repeated this bar's rhetoric when they absolved lawyers who appear to have acquiesced to client misconduct.⁴³ Thus, in *Schatz v. Rosenberg*, a lawyer who knew that his client was using false financial statements to defraud a seller, was held not liable because to decide otherwise might prevent the client "from reposing complete trust in his lawyer."⁴⁴ Another court found that lawyers who failed to question clients about illegal schemes were not liable because compliance with the law was "in the last analysis management's responsibility."⁴⁵ Numerous courts explained that even if crimes would be prevented, lawyers should not be expected to "tattle" on clients,⁴⁶ and lawyers providing legal services in fraudulent transactions were not liable because they were "merely . . . scrivener[s]" or provided routine legal services.⁴⁷ Thus, neither professional discipline nor court-imposed liability provided any meaningful disincentive for lawyers to continue to uncritically serve senior corporate managers.⁴⁸

42. *Id.* at 781.

43. Kostant, *Sacred Cows*, *supra* note 22, at 52–53.

44. 943 F.2d 485, 493 (4th Cir. 1991).

45. Fortson v. Winstead, 961 F.2d 469, 475 (4th Cir. 1992).

46. *Camp v. Dema*, 948 F. 2d 455, 463 (8th Cir. 1991) (affirming a grant of summary judgment in favor of the attorney because the attorney had no duty to "tattle" on his corporate client); *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 497 (7th Cir. 1986) ("Neither lawyers nor accountants are required to tattle on their clients in the absence of some duty to disclose."); *Schatz*, 943 F.2d at 498 (citing *Barker*); *see also* Kostant, *Sacred Cows*, *supra* note 22, at 57, 89.

47. *Camp*, 948 F. 2d at 464 (citing *Schatz*, 943 F.2d at 497) (holding that a lawyer who did not provide his client with a legal opinion, but whose actions only represented the "daily grist of the mill," was a mere "scrivener," and not liable); *see* *Ames v. Uranus, Inc.*, No. 92-2170-JWL, 1994 WL 482626, at *10 (D. Kan. Aug. 24, 1994) (holding that "the drawing up papers in accordance with customary practices of corporate law" is consistent with the lawyer's role as a "scrivener" and "does not transform the lawyer into the maker"); *In re Cascade Int'l Sec. Litig.*, 840 F. Supp 1558, 1566 (S.D. Fla. 1993) (finding that lawyers charged with making misrepresentations on behalf of their clients were mere "scriveners" whose conduct did not represent "atypical" legal service); *Agapitos v. PCM Inv. Co.*, 809 F. Supp. 939, 948 (M.D. Ga. 1992) (considering it "routine" for an attorney to prepare and selectively explain closing documents in connection with a fraudulent real estate transaction, and thus holding that the attorney lacked the requisite scienter to be held liable); *Kenney v. Deloitte, Haskins & Sells*, No. C91-0590-BAC, 1992 WL 551108, at *5 (N.D. Cal. Nov. 23, 1992) (finding a lawyer to be a mere scrivener because he did not provide a legal opinion or make an affirmative representation, and therefore, absent intent to violate the law, he could not be held liable for aiding and abetting); *Southwest Realty, Ltd. v. Daseke*, No. CA3-89-3055-D, 1992 WL 373166, at *11–12 (N.D. Tex. May 21, 1992) (granting summary judgment to an attorney alleged to have aided and abetted a fraudulent takeover because, absent the duty to disclosure, liability requires high conscious intent); Kostant, *Sacred Cows*, *supra* note 22, at 75–78 (discussing *Schatz*, in which the court found that the defendant law firm merely "papered the deal," that is, put into writing the terms upon which the parties agreed and prepared the documents necessary for closing the transactions, and therefore not liable for fraudulent misrepresentations made to a third party).

48. *COFFEE, GATEKEEPERS*, *supra* note 8, at 215–16 (discussing *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) and Section 20(e) of the Private Securities Litigation Reform Act of 1995 ("PSLRA")).

III. THE IMPACT OF SARBANES-OXLEY SECTION 307

A. *Enactment of Sarbanes-Oxley Section 307*

The enactment of Section 307 of Sarbanes-Oxley⁴⁹ represents a turning point for how lawyers representing public corporations before the SEC are required to behave.⁵⁰ After thirty years of protestations to the contrary by the organized bar, there can now no longer be any serious doubt that corporate lawyers must act as gatekeepers, part of whose role is to help ensure that their corporate clients comply with the law. It is no longer acceptable for corporate lawyers to use their critical skills in facilitating the attempts of insiders to skirt the law and their fiduciary duties.⁵¹ Sarbanes-Oxley clearly mandates that corporate lawyers be part of the gatekeeping regime, acting as watchdogs for legal compliance.

Section 307 provides specific and mandatory duties for corporate lawyers. When lawyers for public companies receive evidence (not the virtually impossible to establish knowledge) of material illegal activities, or breaches of fiduciary duty, they must report the evidence to the chief legal officer (“CLO”) or the CEO of the corporation.⁵² If the CLO or CEO fails to provide an “appropriate response,” then the lawyer is required to “report the evidence to the audit committee . . . or to another committee of the board of directors comprised solely of [independent] directors . . . , or to the full board.”⁵³

Unlike in pre-Sarbanes-Oxley Model Rule 1.13, a lawyer’s corrective duties are clear in Section 307, and the duty to report misconduct is now mandatory.⁵⁴ Lawyers can no longer pretend that senior corporate managers are their clients. Also, the trigger for requiring lawyers to take corrective action has been lowered to credible evidence from the impossible to achieve knowledge standard. Lawyers must also report past misconduct, and the misconduct no longer need be in connection with the legal representation.⁵⁵ Most importantly, while courts and ethics

49. 15 U.S.C. § 7245 (Supp. IV 2004).

50. For a comprehensive discussion of the Sarbanes-Oxley legislation and the SEC rules thereunder, see Cramton, Cohen & Koniak, *supra* note 22, at 727–28.

51. *Id.* at 751–52 (“The purpose of Section 307 was to change . . . corporate legal culture and practice and encourage more reporting of dubious corporate activities.”).

52. *See* 15 U.S.C. § 7245. For further discussion of lawyers for public companies who receive evidence of illegal activities, see Koniak, *Hurlyburly*, *supra* note 22 and accompanying text.

53. Cramton, Cohen & Koniak, *supra* note 22, at 728 (quoting 15 U.S.C. § 7245).

54. *Id.* at 739.

55. As Susan Koniak has written, lawyers are trained to believe their clients, and to argue all colorable defenses, so they seldom, if ever, “know” that illegality is occurring. Koniak, *Hurlyburly*, *supra* note 22, at 1247.

authorities seldom, if ever, enforced Model Rule 1.13,⁵⁶ the SEC now has the specific authority to enforce Section 307.⁵⁷

Pursuant to Section 307's enabling language, the SEC promulgated "minimum standards of professional conduct for attorneys appearing and practicing before the [SEC]."⁵⁸ As finally adopted, Rule 205 requires lawyers to report up evidence of material illegality or breach of fiduciary duties to the board or a qualified legal compliance committee unless the attorney believes that the CLO or CEO has provided an appropriate response.⁵⁹ Rule 205 also allows, but does not require, "reporting out" by the lawyer to prevent substantial injury to the corporation or investors.⁶⁰ Section 307 and Rule 205 represent a clear prescription that corporate attorneys act as corporate gatekeepers.⁶¹

B. *The Reaction of the Organized Bar*

In writing about regulatory competition, Professor Simon Deakin discussed some of the consequences of regulatory failure. He concluded that when state regulatory regimes fail utterly, a mandatory federal regulatory regime may be imposed.⁶² This occurred in the United States in the 1930s in the areas of securities regulation and labor relations.⁶³ Arguably, it happened again when Section 307 federalized minimum standards for corporate lawyers practicing before the

56. Cramton, Cohen & Koniak, *supra* note 22, at 739.

57. *Id.* at 740–41.

58. 15 U.S.C. § 7245 (Supp. IV 2004) ("[T]he SEC must promulgate minimum standards of professional conduct for attorneys appearing and practicing before the [SEC].").

59. Rule 205 defines who appears and practices before the SEC when representing an issuer. 17 C.F.R. § 205.2(a) (2007). Attorneys must report evidence of a material violation "up-the-ladder" within an issuer to the CLO or the CEO of the company or the equivalent, such as a "qualified legal compliance committee" ("QLCC"). Press Release, SEC, SEC Adopts Attorney Conduct Rule Under Sarbanes-Oxley Act (Jan. 23, 2003), *available at* <http://www.sec.gov/news/press/2003-13.htm>. Under certain circumstances, attorneys are permitted but not required to execute a "noisy withdrawal." *See id.* A noisy withdrawal is "to withdraw from representing an issuer and notify the [SEC] that they have withdrawn for professional reasons." *Id.* The SEC applies an objective, rather than a subjective, standard for "evidence of a material violation" in determining when an attorney's obligation to report up-the-ladder is triggered. *Id.* Without consent from his client, an attorney can reveal confidential information related to his "representation to the extent the attorney reasonably believes necessary (1) to prevent the issuer from committing a material violation likely to cause substantial financial injury to the financial interests or property of the issuer or investors; (2) to prevent the issuer from committing an illegal act; or (3) to rectify the consequences of a material violation or illegal act in which the attorney's services have been used." *Id.*

60. *See* Press Release, SEC, *supra* note 59.

61. *See* Cramton, Cohen & Koniak, *supra* note 22. In effect, the law mandates the position originally taken by the SEC in *In re Carter & Johnson* that lawyers must attempt to prevent fraud, and if they fail to do so, they must rectify it. *In re Carter & Johnson*, No. 3-5464, 1981 WL 314179 (SEC Feb. 28, 1981).

62. Simon Deakin, *Two Types of Regulatory Competition: Competitive Federalism Versus Reflexive Harmonisation: A Law and Economics Perspective on Centros*, CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 2:231, 12–13 (1999).

63. *Id.*

SEC. Without pressure from Congress, the organized bar was not prepared to make meaningful change.⁶⁴ As recently as August 2001, the House of Delegates of the ABA rejected an amendment to Model Rule 1.6 that would allow attorneys to disclose confidential information to prevent clients from committing fraud against third parties.⁶⁵ Even in the wake of the Enron scandal, the ABA House of Delegates, in February 2002, refused to reconsider this position on client fraud.⁶⁶ Indeed, a rear-guard defense was maintained after the adoption of Section 307, when the Conference of Chief Justices continued to argue the ABA's position, opposing the SEC's permissive disclosure and noisy withdrawal rules, while explicitly maintaining that the states traditionally were the exclusive regulators of the bar.⁶⁷

The ABA did not begin to accept defeat until August 2003, when Model Rule 1.6 was amended to allow disclosure of confidential information to prevent client fraud, and Model Rule 1.13 was amended to require, rather than merely to permit, reporting up to the board of directors.⁶⁸ Lawyers for corporations were permitted to disclose confidential information to third parties to prevent substantial injury to the organization, but not to prevent harm to third parties.⁶⁹

Perhaps the clearest indicator of the extent to which Section 307 represents a turning point for the rules of corporate practice is the observation by Professors Cramton, Cohen, and Koniak in their comprehensive study of lawyers' legal and ethical duties after Sarbanes-Oxley that the new duties, which the bar had so vigorously opposed, represents what any prudent corporate lawyer would do to protect her client, and herself. "The bar's discomfort with the rules" therefore

64. Cramton, Cohen & Koniak, *supra* note 22, at 729-30.

65. Model Rule 1.6 provides, in pertinent part:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm.

MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003); *see also* Cramton, Cohen & Koniak, *supra* note 22, at 729.

66. Cramton, Cohen & Koniak, *supra* note 22, at 729.

67. *Id.* at 730-31. *See supra* note 59 (discussing the SEC's original noisy withdrawal proposal).

68. Cramton, Cohen & Koniak, *supra* note 22, at 732-33, 739. Model Rule 1.13 provides:

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

MODEL RULES OF PROF'L CONDUCT R. 1.13 (2003). This duty was still only triggered by the high threshold of knowledge, only covered prospective misconduct, and was only with regard to matter that was related to representation.

69. Cramton, Cohen & Koniak, *supra* note 22, at 780-82.

indicates the extent to which the norms of behavior as understood by the bar “deviate[] from what one would expect from a prudent and faithful entity agent.”⁷⁰

C. Meaningful Penalties for Lawyer Misconduct

Whatever the nuances of the post-Sarbanes-Oxley revision of Model Rule 1.13, “it remains doubtful whether up-the-ladder reporting by an organization’s lawyer will become routine and whether departures from the report obligation will be punished.”⁷¹ There is no reason to expect that state bar disciplinary boards will suddenly, for the first time, begin to regulate corporate lawyers. What is now certain is that the regulatory environment for corporate lawyers has changed. Courts and the SEC are carefully reviewing lawyers’ activities.

In 2003, the SEC brought a securities fraud action against Spiegel, Inc.⁷² The court-appointed special examiner scrutinized the conduct of the two large law firms that had advised Spiegel and its controlling insiders.⁷³ While the activities occurred before Section 307 and Rule 205 took effect, the special examiner observed that:

None of Spiegel’s legal advisers withdrew—“noisily” or otherwise—from representing Spiegel. If the SEC’s proposed withdrawal rule had then been in effect, the SEC would have been alerted to take action sooner, and investors would have received information they could have acted on to make informed investment decisions about Spiegel. In this case, the absence of a “noisy withdrawal” requirement allowed Spiegel to keep investors and the SEC in the dark.⁷⁴

The special examiner’s report was not legally binding because it was only preliminary, and the conduct pre-dated the effective date of Sarbanes-Oxley. Nevertheless, it should remind lawyers representing public companies that if fraud or breaches of fiduciary duty by insiders occur, the lawyers’ actions will be carefully examined. In evaluating the *Spiegel* case, it seems likely that if the company’s law firm had used the leverage of threatening disclosure to the SEC, pursuant to Rule 205’s permissive reporting out provision, the securities fraud would probably have been averted. Similarly, if the second law firm⁷⁵ had candidly reported information to the board of directors that was consistent with the

70. *Id.* at 733.

71. *Id.* at 739.

72. SEC v. Spiegel, Inc., No. Civ.A. 03 C1685, 2003 WL 22176223 (N.D. Ill. Sept. 3, 2003).

73. Cramton, Cohen & Koniak, *supra* note 22, at 734 (discussing *Spiegel*).

74. *Id.* at 822.

75. This law firm represented Spiegel’s controlling shareholder, but would probably be deemed to also be representing the entity. *See id.* at 830.

correct advice that the corporation's original law firm had given, the fraud would likely have been avoided even without any threat of reporting out.⁷⁶

In *In re Enron*, the activities of the company's lawyers were analyzed by both the bankruptcy court⁷⁷ and the federal district court.⁷⁸ The district court ruled that the law firm that assisted in the preparation of disclosure documents and press releases, even without signing them, could be held liable not for aiding and abetting, but for primary securities law violations.⁷⁹ It is notable that in successfully arguing this position, the SEC was recycling arguments it had used earlier in *Klein v. Boyd*, a 1998 case in which the Third Circuit initially accepted the SEC's position, but which was vacated after the court granted a motion for rehearing en banc and the case was settled.⁸⁰ Even if this broad theory of primary liability is not followed by other courts, lawyers who advise or draft disclosure documents that they do not sign are expressly covered by Rule 205.⁸¹

In the post-Sarbanes-Oxley legal environment, the liability climate for corporate lawyers has grown much hotter. Two civil actions have been brought against general counsels alleging breaches of fiduciary duty and fraud,⁸² and there have been three criminal proceedings with two convictions⁸³ and several guilty pleas.⁸⁴ Over the past three years the SEC has also brought thirty enforcement actions, an unprecedented number, against corporate lawyers.⁸⁵

D. Changes in Social Meaning

I agree strongly with Professor Fanto's analysis in this issue that Sarbanes-Oxley is important as a social response to the overreaching and greed of corporate executives and financiers.⁸⁶ Sarbanes-Oxley is indeed an indictment of the ideology that sanctions the excessive pursuit of self-interest. While Professor Fanto is concerned with the culture of executives and financiers, my focus has long been on changing the culture of corporate lawyering, which Section 307 has begun to

76. *See id.*

77. *See* DeMott, *supra* note 17, at 974–75.

78. *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 235 F. Supp. 2d 549 (S.D. Tex. 2002).

79. *Id.*

80. *Id.* at 585–86; *Klein v. Boyd*, No. 97-1143, 1998 U.S. App. LEXIS 4121 (3d Cir. Mar. 9, 1998), *vacated on grant of rehearing en banc*.

81. 17 C.F.R. § 205.2(a)(1)(iii) (2007).

82. DeMott, *supra* note 17, at 974 n.96 (referencing *Pereira v. Farace*, 413 F.3d 330 (2d Cir. 2005)); *In re Walt Disney Co. Derivative Litig.*, No. Civ.A. 15452, 2005 WL 2056651 (Del. Ch. Aug. 9, 2005).

83. DeMott *supra* note 17, at 974 n.97 (discussing the convictions of general counsels for Rite Aid Corporation and Inso Corporation).

84. *Id.* at 974 n.99.

85. *Id.* at 956, 975.

86. James Fanto, *A Social Defense of Sarbanes-Oxley*, 52 N.Y.L. SCH. L. REV. 517, 517–22 (2008).

accomplish.⁸⁷ Corporate lawyers need to apply their critical intelligence to guiding corporate clients in complying with the law, not uncritically assisting senior corporate managers in opportunistic behavior. In an earlier article, I examined how Sarbanes-Oxley might begin to change the social meaning surrounding the role of corporate lawyers.⁸⁸

When corporate lawyers behaved as the uncritical facilitators for an “elite feeding frenzy” by senior corporate managers at the expense of corporations and their investors, the bar tried to justify this behavior as a necessary result of lawyers acting as the loyal champions of clients. The argument was that an essential part of the role of all lawyers was to be attack dogs, and lawyers could only function by protecting clients in an adversarial system against hostile forces including the powerful state. The organized bar made this argument seem plausible by ignoring the context of most corporate practice and treating all legal practice as akin to criminal defense work.⁸⁹ This lumping together of the diverse roles of legal advisors to an entity (the real but ephemeral client) with loyal advocates for insiders (the humans who hire and fire the lawyers) helped to justify pre-Sarbanes-Oxley norms of corporate lawyer behavior.⁹⁰ These norms were bolstered by a disciplinary system that seldom, if ever, examined what lawyers were doing and virtually never disciplined lawyers for assisting opportunistic senior corporate managers. All too often, as discussed above, the courts accepted the bar’s rhetoric.⁹¹

Norms of behavior—the way groups of people act—occur in a context of social meaning.⁹² As Professor Dan Kahan has written, actions are invested with meaning and may signify what a person or community believes or cares about.⁹³ To take one example, a woman who smokes a cigarette at a private dinner party in 2008 may be indicating that she does not care about the health and comfort of others. A woman doing the very same activity in 1925 might be indicating that she is emancipated, sophisticated, and an independent person. It is easy to see how, as the social meaning of smoking changed, people’s conduct also changed. Smoking in a social setting, even though legal, became far less common.

87. Kostant, *Changing Norms*, *supra* note 4, at 541–42 (suggesting that slight clarifications of social meaning can powerfully affect norms of behavior).

88. *Id.* at 555–58.

89. *Id.* at 557.

90. *Id.* at 555–58.

91. *Id.* at 556–57.

92. For an explanation of social meanings, see Lessig, *supra* note 37. The distinction between the analysis of social norms, which is primarily behavior-focused, and that of social meaning is that an analysis of the latter allows for a richer understanding because it offers the perception of social behaviors within a social context. *Id.* Explorations into the social meaning of a subject focus not only on the “function of the action” but also on the “contextual understandings behind it.” *Id.* at 2183.

93. See Kostant, *Changing Norms*, *supra* note 4, at 555–56.

Subtle changes in social meaning can have a dramatic influence on changing conduct.⁹⁴

There are many reasons that social meaning changes. One important reason is access to new information (smoking and second hand smoke are dangerous), which can be an important impetus for change. Another is the expressive function of law (i.e., a ban on smoking in restaurants), which helps to indicate what conduct the community values and what it abhors.⁹⁵ Section 307 and the corporate scandals that precipitated it worked in both ways. A great deal of information had become available about what senior corporate managers, and their lawyer agents, were doing.⁹⁶ The new law and regulations expressed what lawyers should and should not do. The lawyers' role was to act as gatekeepers helping with legal compliance not legal avoidance.⁹⁷ The expressive function of Sarbanes-Oxley makes it harder for lawyers to justify any other behavior. There is now far less ambiguity about the role of corporate lawyers. They must act as gatekeepers when they represent the corporation.⁹⁸

As adjustments in social meaning helped to change the culture and social norms of corporate practice, there is evidence that corporate lawyers are accepting and, indeed, welcoming this new gatekeeper role.⁹⁹ In a survey of 1,216 in-house lawyers, 71 percent supported the mandatory reporting-up rule, and 46 percent believed that it was necessary to correct existing corporate ethics practices.¹⁰⁰ There is at least anecdotal evidence that many lawyers are in favor of their newly defined role, believing that they "are more tightly woven into the web of responsibility."¹⁰¹ A 2004 Quality of Life survey of 1,139 in-house lawyers found that while general counsel were working longer hours and feeling greater stress, staff attorneys reported feeling "more useful than before, more vital to the smooth operation of their companies."¹⁰²

E. A Market for the New Role of Corporate Lawyer

There are new economic incentives for gatekeeper corporate lawyers. The mandatory reporting up requirement is beneficial in getting material information to boards of directors who are therefore likely to encourage it. Unlike senior

94. *See id.* at 555–57.

95. *Id.* at 552.

96. *Id.* at 553.

97. *Id.* at 554.

98. *Id.* at 553.

99. Chad R. Brown, *In-House Counsel Responsibilities in the Post-Enron Environment*, 21 ACCA DOCKET 92, 96–97 (2003).

100. *Id.* at 97–98.

101. Jenny B. Davis, *Sorting Out Sarbanes-Oxley: Determining how to Comply with the New Federal Disclosure Law for Corporations won't be Easy*, 89 A.B.A. J. 44, 45 (2003).

102. DeMott, *supra* note 17, at 975 (citing Ashby Jones, *Under the Scope*, CORP. COUNS., Dec. 2004, at 78).

inside managers, independent directors seldom benefit from opportunistic behavior by insiders at the expense of the corporate entity. Recent developments have underscored that directors are the ultimate authority for assuring that corporations do not violate the law and that senior corporate managers do not breach their fiduciary duties to the corporation. As a practical matter, lawyers can no longer help keep directors in the dark about what senior corporate managers do. Independent directors have no incentive, and substantial disincentive, to allow the corporation's lawyers to behave in that way.

Recognition of these new circumstances has begun to filter into the entire corporate community. Even the recent Corporate Governance Recommendations of the ABA propose that the board of directors, and not the CEO, should approve the "selection, retention and compensation" of the general counsel.¹⁰³ Corporate governance experts are recommending that outside directors meet several times a year with the corporation's senior lawyers to discuss potential problems, without the corporation's senior executives being present.¹⁰⁴ Because independent directors have a tremendous stake in their reputations for integrity,¹⁰⁵ it would be foolish for them not to insist that the corporation's lawyers provide candid information to them, or to the lawyers that the directors designate to assist them with gathering and evaluating relevant information. Corporations, and not the independent directors themselves, will pay for these legal services, and there is every reason to expect that lawyers for the independent directors will do an excellent job. While lawyers as advocates are highly effective at managing facts and exploiting uncertainties in the law, lawyers have long demonstrated that when given the assignment they can also serve as exemplary advisors and fact-finders when their job is to help ensure compliance with the law. It is reasonable to expect that any corporate lawyers found to have kept information from the board and its compliance counsel can expect a short tenure with their corporation. Moreover, it should be increasingly difficult for any lawyers employed by the corporation to argue that their job is to filter or spin information reported to the board's compliance counsel. Independent directors should provide an excellent market for skillful compliance lawyers. As Professor John C. Coffee has observed, "[t]he outside corporate attorney is already trained, acculturated, and committed to the craft of 'due diligence.'"¹⁰⁶

103. *Id.* at 980 (citing Normal E. Vassey, *Separate and Continuing Counsel for Independent Directors*, 59 BUS. LAW. 1413, 1415-16 (2004)).

104. *Id.* (citing Bevis Longstreth, SEC Comm'r, Speech before the American Law Institute: The Corporate Bar as it Appears to a Retired Practitioner (May 17, 2005), *available at* <http://www.ali.org/ali/AM05Longstreth.htm>).

105. *See* David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1812 (2001).

106. COFFEE, *GATEKEEPERS*, *supra* note 8, at 231. Sarbanes-Oxley may not have generated as much new work for lawyers as for accountants, but it is certainly keeping corporate lawyers busy. Representing corporations in a manner that will please and reassure outside directors is likely to be quite profitable. Professor Coffee has written about how corporate lawyers in the pre-Sarbanes-Oxley era could collude as

Directors, and especially independent directors, are likely to follow their enlightened self-interest and should insist on complete and candid advice from all levels of corporate lawyers. As the recent *In re Walt Disney Company Derivative Litigation*¹⁰⁷ decision in Delaware has demonstrated, directors are most likely to face liability and embarrassment when they behave passively in the face of a known risk.¹⁰⁸ Passivity can be rather easily avoided if a committee of independent directors or, more likely, the lawyers that these directors retain to help them do their jobs actively question the corporation's lawyers to obtain relevant information. In the past, CEOs could use numerous outside law firms so that no one firm understood (or could be deemed to know) the full scope of corporate activities.¹⁰⁹ Directors can avoid this structural pitfall by requiring coordinated legal reporting, and they would be well-advised to do so.

Overwhelmingly, boards of directors want to, and try to, do the right thing, and their primary motivation is not the avoidance of litigation.¹¹⁰ Nevertheless, recent developments indicate that boards may increasingly face exposure to liability. Overly passive boards may not only face liability for state law fiduciary duties, but may also face liability under federal securities law. For example, in *In re WorldCom, Inc. Securities Litigation*, the underwriters were held liable because their outside counsel had done too little to help them establish a due diligence defense.¹¹¹ The same analysis would apply to corporate directors who should now insist on meaningful due diligence from the corporation's lawyers.¹¹²

Professor Coffee has suggested that the SEC should amend Rule 205 to require corporations to have a certified disclosure counsel to review the accuracy of all disclosures.¹¹³ While this would probably be a good thing, it is unlikely to occur and is really not necessary. Boards of directors can informally require lawyers to do this, and it is very much in the interest of the board to do so. The market for legal services will, therefore, be able to reward law firms that do this well. Professors Geoffrey Hazard and Edward B. Rock suggest that having something akin to a certified disclosure counsel is likely to occur.¹¹⁴ They suggest

a group to create "noise" about their role and avoid being gatekeepers. *Id.* at 229–31. Now that the gatekeeper duties have been clarified, lawyers can compete in a market in which boards of directors will be intelligent consumers.

107. 825 A.2d 275 (Del. Ch. 2003).

108. COFFEE, GATEKEEPERS, *supra* note 8, at 342–43.

109. *Id.* at 348–49 (discussing the need to avoid fragmentation of representation).

110. Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1253 (1999).

111. COFFEE, GATEKEEPERS, *supra* note 8, at 355–56 (discussing *In re WorldCom, Inc. Sec. Litig.*, 346 F. Supp. 2d 628 (S.D.N.Y. 2004)).

112. *Id.* at 356. The boards were not before the court in that case, but the same analysis would apply to them. *Id.*

113. *Id.* at 348.

114. Geoffrey C. Hazard, Jr. & Edward B. Rock, *A New Player in the Boardroom: The Emergence of the Independent Directors' Counsel*, 59 BUS. LAW. 1389, 1395 (2004).

that the current regulatory climate as affected both by Sarbanes-Oxley and recent developments in Delaware corporate law, require the hiring of independent directors' counsel, a different name for the same role.¹¹⁵

Whether or not lawyers are formally hired as independent directors counsel, or certified disclosure counsel, increasing the extent to which lawyers advise the board, and especially the independent directors, about legal compliance should be beneficial for corporate governance. Professor Adam Winkler, in a recent analysis of "progressive" corporate law, has suggested that if one tries to improve corporate law directly, such as when shareholder primacy restraints are lessened, in the interest of allowing greater fairness to corporate stakeholders, unfortunate unintended consequences may occur. For example, managers may well act opportunistically using their increased discretion not to treat other corporate constituents, like employees, suppliers, customers, and local communities more fairly, but instead to create less accountability for themselves.¹¹⁶ He, therefore, concludes that corporate law itself may be able to do little to protect corporate constituents, but the larger sphere of bodies of law regulating business can provide meaningful improvements.¹¹⁷ The post-Sarbanes-Oxley role of corporate lawyers can be important in helping to make this broad regulatory scheme more effective. Instead of increasing the discretion of senior corporate managers, lawyers assisting with the compliance regime would help boards to ensure that corporations and their senior officers are complying with all the laws that regulate business. These changes should reduce, rather than increase the opportunities for senior insiders to behave opportunistically.¹¹⁸

The Sarbanes-Oxley role for corporate lawyers, which I have been discussing in this essay, fits in very well with various leading theories of how corporate governance does or should function. Thus, whether one takes the Michael Jensen view that the primary purpose of corporate governance is to have managers seek to maximize long-term shareholder value while complying with the law,¹¹⁹ or one's view is more focused on the role of boards of directors, such as Bainbridge and Johnson's directors' primacy,¹²⁰ or if one supports the Blair and Stout Team

115. *Id.*

116. Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 *LAW & CONTEMP. PROBS.* 109, 126 (2004).

117. *Id.* at 127–30.

118. *Id.*

119. Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 14 *J. APPLIED CORP. FIN.* 8, 10 (2001) (stressing that a single, purposeful, objective function should permeate all levels of a corporation in order for the objective to function in a way that maximizes the corporation's total market value).

120. Bainbridge & Johnson, *supra* note 12, at 303 (defining directors' primacy as the model envisioned by state corporation laws in which the corporation is governed by a board of directors, and although the board may delegate substantial tasks to managers, it always retains the responsibility of oversight).

Production Model,¹²¹ which I personally favor, each one of these models would function more effectively by having corporate lawyers behave as Section 307 of Sarbanes-Oxley now requires.

IV. CONCLUSION

Sarbanes-Oxley Section 307 and Rule 205 represent a turning point in defining what it is that corporate lawyers should do. Lawyers representing corporations, both as employees and as outside counsel, can no longer justify their role as the loyal servants of powerful senior corporate managers. The Sarbanes-Oxley legislation clearly expresses the public recognition that the duties of all corporate lawyers includes using their critical intelligence to help ensure legal compliance and not to stand mute when senior corporate managers breach fiduciary duties or cause the corporation to violate the law. Thirty years ago the SEC made a futile attempt to establish that lawyers must not acquiesce when their clients violated federal securities laws. The organized bar fought back and managed to defeat the regulators by using the rhetoric of loyalty and confidentiality to effectively defeat any gatekeeper role. By 1993, Donald Langevoort, an expert on securities regulation, wrote that after cases like the egregious *Schatz v. Rosenberg*,¹²² in 1991, the SEC's view of a gatekeeper role for lawyers as expressed in the 1970s in *SEC v. National Student Marketing Corporation*¹²³ was becoming an "anachronism."¹²⁴

Now, after Sarbanes-Oxley, the law recognizes that corporate lawyers must be gatekeepers. This role also has a positive social meaning. As gatekeepers, they are watchdogs helping their large institutional clients to obey the law. Their

121. Peter C. Kostant, *Team Production and the Progressive Corporate Law Agenda*, 35 U.C. DAVIS L. REV. 667, 673 (2002). The Team Production Model recently developed by Margaret Blair and Lynn Stout describes:

[T]he modern public corporation as an entity in which the corporate constituents, or stakeholders, such as shareholders, managers, employees, suppliers, customers, and even local communities have made firm specific investments and have given the exclusive power to allocate outputs and resolve disputes to the board of directors. The board is an independent, non-stakeholder, mediating hierarch that must act in the best interests of the corporate entity. A key insight of Blair and Stout's TPM is that all stakeholders, including shareholders, give up control to the board, not for the benefit of the board but for their own benefit; because this is the most efficient way to govern a complex public corporation. The board acts as trustees; they hold in trust with the ultimate power to administer the combination of material and intellectual properties that stakeholders have contributed to the public corporation. TPM recognizes the board as an independent mediating hierarch that all stakeholders calculate will endeavor to treat them fairly. This reduces transaction costs that might interfere with the formation of complex productive organizations that involve long-term relationships.

Id.

122. 943 F.2d 485 (4th Cir. 1991); *see supra* note 44 and accompanying text.

123. 457 F. Supp. 682 (D.D.C. 1978).

124. Langevoort, *supra* note 29, at 89 n.54.

duties are to serve the independent boards of directors. As such, they are more akin to care providers protecting their clients than attack dogs in an adversarial system. One can only hope that future courts will no longer characterize the reports by lawyers of illegal schemes of corporate insiders as “tattle tales.”¹²⁵ There will likely be a strong market for such services because independent directors have an enormous incentive to hire lawyers in this beneficial role, and no real incentive not to do so. In addition to this economic carrot, after a period of nearly complete regulatory failure, the SEC now wields a big stick with which to ensure that corporate lawyers comply with the Sarbanes-Oxley Section 307 role. Finally, law has an enormous expressive function and, after decades in which the law governing lawyers did not express clearly that corporate lawyers must act as gatekeepers, Sarbanes-Oxley Section 307 and Rule 205 now demonstrate that they must play this role, and the SEC will hold them accountable if they do not.

125. *See supra* note 46 and accompanying text.