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"Up the Ladder" and Over: Regulating Securities Lawyers-Past, Present & Future

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"Up the Ladder" and Over: Regulating Securities Lawyers—Past, Present & Future

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I. Introduction

Over thirty years ago the Securities and Exchange Commission (SEC or the Commission) filed a complaint against two major law firms and charged them with violating the securities laws. 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.¹

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1. Accountants present an interesting contrary example. *See infra* notes 38–41 and accompanying text (noting that accountants must disassociate themselves from a statement that is no longer correct if the public may be relying on it).

Fast forward to summer 2002. In the face of a growing scandal of arguably unprecedented dimensions in the corporate and securities world, Congress made clear that both lawyers and accountants have duties beyond those owing to their immediate clients, and have obligations to their so-called "true clients," to borrow a phrase from the former Chairman of the SEC, Harvey Pitt.² In the law popularly known as "Sarbanes-Oxley," named for its primary sponsors, Congress further made clear that the SEC has both the power and the duty to police lawyers and accountants who practice before it.³ In an effort to illuminate the broader historical context in which this most recent regulation arose, this Article briefly reviews the events that have led the legal profession to become the subject of regulation by Congress and the SEC.

In late 2002, the Commission issued its proposed rules implementing Section 307 of the Sarbanes-Oxley bill.⁴ 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. The comments that the Commission received were numerous and impassioned. Whether the rules were wise or prudent—and whether the statute even authorized all of them—were addressed at length. Those comments, the additional coverage that the proposed rules attracted in the public sphere, and the changes made (and not made) to the adopted rules⁵—released in January 2003, and taking effect this summer—are the latest development in a long struggle of wills between the Commission and the organized Bar. They confirm that, at this critical time, the dialogue is as robust as ever.

2. See *infra* notes 46–49 and accompanying text (discussing the passing of historic corporate reform legislation); see also 15 U.S.C.S. § 7245 (Law. Co-op. Supp. 2003) (authorizing the SEC to promulgate rules "setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission"). See generally Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745.

3. See *infra* notes 51–68 and accompanying text (discussing new obligations of lawyers who practice before the SEC and the SEC's power to punish them if they breach those obligations).

4. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670 (proposed Dec. 2, 2002 (originally released Nov. 21, 2002)) (to be codified at 17 C.F.R. pt. 205) [hereinafter Proposed Rules].

5. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296 (Feb. 6, 2003 (originally released Jan. 29, 2003)) (to be codified at 17 C.F.R. pt. 205) [hereinafter Adopted Rules]. These rules are described herein as merely "adopted" chiefly because the Commission simultaneously proposed an additional rule for comment that may also be adopted by the time these rules take effect. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6324 (proposed Feb. 6, 2003) (to be codified at 17 C.F.R. pts. 205, 240, 249).

The authors do not necessarily applaud regulation of the legal profession by any government entity, much less the national government, when historically (and for good reason) the legal profession has not been subject to regulation at any official level. Clearly, lawyers often stand to protect the rights of many people and institutions whose freedom and property are threatened by the government; sometimes that threat is for good reasons, sometimes for bad reasons. However, as will be apparent from our discussion, there are times when the profession itself has failed to act responsibly and, as a result, arguably bad law has filled the void. This is not to justify the result. Rather, we hope to provide some insight into the events that led to this regulation of the legal profession not only by the SEC, but also by other governmental entities that can likewise act when members of the profession fail to act as they should.⁶

II. *How We Got Here: Some History*

The legislative history of the securities laws demonstrates that the legal profession has long been at the forefront of helping clients commit securities fraud. As Justice Douglas (a former Chairman of the SEC) noted in 1934, quoting a popular columnist of the day:

But just as a fine, natural football player needs coaching in the fundamentals and schooling in the wiles of the sport, so, too, it takes a corporation lawyer with a heart for the game to organize a great stock swindle or income tax dodge and drill the financiers in all the precise details of their play.

Otherwise, in their natural enthusiasm to rush in and grab everything that happens not to be nailed down and guarded with shotguns they would soon be caught offside and penalized, and some of the noted financiers who are now immortalized as all-time all-American larcenists never would have risen beyond the level of the petty thief or short-change man.⁷

6. See Theodore Sonde, *Professional Responsibility—A New Religion, or the Old Gospel?*, 24 EMORY L.J. 827, 833–36 (1975) (discussing concept of "independence" as applied to legal and accounting professions); *id.* at 833 ("This author believes that the Commission is not seeking to establish new principles or new standards of conduct, but to establish professional independence by both accountants and lawyers, consistent with both professions' public responsibilities . . ."). Given these recent changes in the law, the then-recent admonition included in that article—"if confidence in the profession continues to wane, the public will demand an alternate and perhaps Draconian system of control by forces outside the profession"—also rings true today. *Id.* at 843 (quoting Irving R. Kaufman, *Attacking Anomie in the Legal Profession*, 1 LITIG. 5, 6 (1975)).

7. William O. Douglas, *Directors Who Do Not Direct*, 47 HARV. L. REV. 1305, 1329 n.65 (1934).

In his own writings, Justice Stone found the root of this problem in the principle that "a man cannot serve two masters."⁸ Further, "[Justice Stone] recognized that, in the separation of ownership from management, there exists an inherent conflict—a conflict that often has resulted in the ignoring of responsibilities by those who nominally serve as trustees."⁹ And in his view, that departure from fiduciary principles did not "usually occur without the active assistance of some member of our profession."¹⁰

With this guidance in mind, the SEC in 1972 did something nevertheless unheard of in the history of securities regulation: it sued two large law firms for securities fraud.¹¹ Further, the SEC claimed, as it had never done before, that both of those law firms had a professional obligation not only to stop the consummation of a fraudulent merger, but, when their clients failed to heed what would have been sound legal advice under the circumstances, the firms had an additional obligation to report the fraudulent nature of the transaction to the shareholders of the two companies or to the SEC.¹² Although unprecedented, the theory of the complaint in that case, *SEC v. National Student Marketing*,¹³ did not seem so remarkable.

Indeed, the Bar's existing ethical rule on point precluded the conduct at *National Student Marketing's* heart. At the time, the ABA Model Code of Professional Responsibility provided thus:

A lawyer who receives information clearly establishing that

8. Harlan Fiske Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 8 (1934).

9. Theodore Sonde, *The Responsibility of Professionals Under the Federal Securities Laws—Some Observations*, 68 NW. L. REV. 1, 8 (1973).

10. *Id.* at 9. These observations now seem prescient, largely because no one has ever done much to heed them; to the extent that some have tried in any large-scale way, they have mostly been rebuffed. See *infra* notes 16–19, 30 and accompanying text (discussing the Bar's adverse reaction to cases finding lawyers liable when they remained silent in the face of client wrongdoing); see also Sonde, *supra* note 9, at 7–8 (quoting Stone, *supra* note 8, at 8, and Douglas, *supra* note 7, at 1329 n.65, for the proposition that lawyers must assume responsibility for acts of corporations they represent).

11. See Compl. of the SEC ¶¶ 48, 52, 60, *SEC v. Nat'l Student Mktg. Corp.*, [1971–1972 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,360 (D.D.C. 1972) (charging lawyers and their law firm with violation of the Securities Act of 1933 and the Securities Exchange Act of 1934).

12. *Id.* ¶ 48. One of the authors, Mr. Sonde, was one of the principal draftsmen of the SEC's complaint in *National Student Marketing* and principal trial counsel throughout that proceeding. At the same time, as in most SEC enforcement actions, the "blame" or "credit" for the case justly needs to be shared with many other staff members who were also instrumental in causing the Commission to take that step. These include Alan Levenson, Richard Rowe, and David Belkin, to name just a few.

13. Compl. of the SEC, *SEC v. Nat'l Student Mktg. Corp.*, [1971–1972 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,360 (D.D.C. 1972).

- (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, he shall reveal the fraud to the affected person or tribunal
- (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.¹⁴

The Commission's theory in the case was consistent with this duty, as well as with the historical exemption of crime or fraud from attorney-client communications that enjoy a privilege at all.¹⁵

Yet as the case moved forward, the court noted that the litigation had "generated significant interest and an almost overwhelming amount of comment within the legal profession on the scope of a securities lawyer's obligations to his client and to the investing public."¹⁶ Consequently, the court recognized, "this action . . . has provided a necessary and worthwhile impetus for the profession's recognition and assessment of its responsibilities in this area."¹⁷

After watching the litigation continue for more than five years, the Bar's "comment" and "assessment" culminated in—anti-climactically, if to no great

14. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(B) (1983).

15. This had been the rule in American law for at least one hundred years, though, as a practical matter, it was never enforced against large law firms, as in *National Student Marketing*. See ABA CANONS OF PROF'L ETHICS Canon 37 (1928) ("The announced intention of a client to commit a crime is not included within the confidences which [the attorney] is bound to respect."); ABA CANONS OF PROF'L ETHICS Canon 41 (1908) (proclaiming that a lawyer "should endeavor to rectify" fraud or deception, independent of client confidentiality); see also *Nix v. Whiteside*, 475 U.S. 157, 167–68 (1986) (stating that these rules "articulate centuries of accepted standards of conduct"); *Queen v. Cox*, 14 Q.B.D. 153, 168 (1884) (noting that a client's avowed intention to commit fraud is not a privileged communication), cited with approval in *Clark v. United States*, 289 U.S. 1, 15 (1932). In fact, in 1969, when the conduct at issue in *National Student Marketing* occurred, the somewhat stricter Canon 37 remained the law in most states. See *Sonde*, *supra* note 6, at 829–30 (noting that both the legal and accounting professions adopted new codes of professional responsibility in the late 1960s and early 1970s, partly in response to *National Student Marketing*).

16. *SEC v. Nat'l Student Mktg. Corp.*, 457 F. Supp. 682, 714 (D.D.C. 1978); see also, e.g., *The Troubled Professions*, BUS. WEEK, Aug. 16, 1976, at 126 (stating that with *National Student Marketing*, the SEC "loosed a thunderbolt," spawned "fears that the SEC would make [lawyers] responsible for the securities violations of their clients," and began expecting lawyers to become the "corporate conscience"). Over ten years later, the then-General Counsel of the SEC remarked, almost wryly, that *National Student Marketing* "had the effect of crystallizing the bar's awareness of its relations with the Commission and the Commission's expectations of counsel's function." Edward F. Greene, *Lawyer Disciplinary Proceedings Before the Securities and Exchange Commission, Remarks to the New York County Lawyers' Association* (Jan. 13, 1982), in 14 *Sec. Reg. & L. Rep.* (BNA) 168, 168–69 (Jan. 20, 1982).

17. *Nat'l Student Mktg. Corp.*, 457 F. Supp. at 714.

surprise—the functional evisceration of the ethical rule on its books. By the decade's end, lawyers purportedly no longer needed to disclose information "protected as a privileged communication,"¹⁸ even if that information was perpetrating an unrectified fraud.¹⁹ This move turned *National Student Marketing*, and of course, the historical rule, on their heads.

With this change, the legal profession reacted to *National Student Marketing* with unabashed denial. Rather than accept any form of public responsibility, the organized Bar proceeded to weaken its ethical rules and provided its members with many confusing notions and no guidance on how to act. In fact, the Bar provided so much misdirection that it actually may have caused many members of the profession to lose sight of their professional obligations.

Direct linkage is unclear, but in 1978 the Commission brought *In re Carter & Johnson*,²⁰ charging that two more lawyers had concealed their knowledge of a client's true financial condition in order to ensure that a deal closed.²¹ Determining whether the respondents, again members of a prominent national firm, could continue practicing before the SEC, the Commission found no limits to the liability of lawyers per se.²² To the contrary, the "substantial assistance" element of aiding and abetting a securities law violation, one of the three bases on which practice privileges could be suspended, would be "generally satisfied" by nothing more than the routine practice of securities law in the context of a fraudulent or deceptive deal.²³ Almost always, the Commission recognized, the attorney "is inevitably deeply involved in his client's disclosure activities[,] often participates in the drafting of documents[,] . . . [and] does so knowing that he is participating in the preparation of disclosure documents—that is his job."²⁴

The Commission also addressed whether these lawyers had engaged in "unethical or improper conduct," a standard it had not specifically defined before.²⁵ On that front, the SEC "perceive[d] no unfairness whatsoever in holding . . . professionals . . . to generally recognized norms of professional conduct, *whether or not such norms had previously been explicitly adopted or endorsed by the Commission.*"²⁶ In other words, the SEC recognized as a rule

18. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(B)(1) (1983).

19. *See id.* (excepting privileged communications from disclosure).

20. *In re Carter & Johnson*, 47 S.E.C. 471 (1981).

21. *Id.* at 481–500.

22. *See id.* at 503–04 (finding that lawyers could be liable for aiding and abetting if they knowingly were involved in activity that was illegal).

23. *Id.* at 503.

24. *Id.*

25. *Id.* at 511–12.

26. *Id.* at 508 (emphasis added).

of decision a principle that otherwise lacked formal force and effect, without advance notice that it would do so.²⁷ This was as aggressive a position as it appears—and indicates how determined the SEC was at the time to keep lawyers in line, recognizing their crucial role in preserving marketplace integrity when the nation's primary bar association would not. The Commission acknowledged the division, but was not restrained by it:

While precise standards have not yet emerged, it is fair to say that there exists considerable acceptance of the proposition that a lawyer must, in order to discharge his professional responsibilities, make all efforts within reason to persuade his client to avoid or terminate proposed illegal action. Such efforts could include, where appropriate, notification to the board of directors of a corporate client. . . .

[In this case,] management . . . use[d the lawyers] as a shield to avoid the pressures exerted by the banks toward disclosure. Such a role is a perversion of the normal lawyer-client relationship, and no lawyer may claim that, in these circumstances, he need do no more than stubbornly continue to suggest disclosure when he knows his suggestions are falling on deaf ears.²⁸

27. Noting that at the time of the conduct in question (more than five years before the SEC's opinion) the current ethical rules did not "unambiguously cover" the attorneys' work, the Commission did not actually sanction them in that case. *Id.* at 471. Yet it was firm about its plans moving forward:

When a lawyer with significant responsibilities in the effectuation of a company's compliance with the disclosure requirements of the federal securities laws becomes aware that his client is engaged in a substantial and continuing failure to satisfy those disclosure requirements, his continued participation violates professional standards unless he takes prompt steps to end the client's noncompliance.

Id. at 511. Reflecting this philosophy, the Commission brought a series of cases against lawyers in this era. *See, e.g.,* SEC v. Coven, 581 F.2d 1020, 1025–26 (2d Cir. 1978) (discussing whether attorney aided and abetted several violations of the securities laws); SEC v. Spectrum, Ltd., 489 F.2d 535, 541–42 (2d Cir. 1973) ("The legal profession plays a unique and pivotal role in the effective implementation of the securities laws . . . [T]he smooth functioning of the securities markets will be seriously disturbed if the public cannot rely on . . . attorney[s]."); *In re* Fields, Securities Act Release No. 5404, [1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,407, at 83,173–74 (Jun. 18, 1973) (finding that the SEC has the power to disqualify attorneys from practicing before it); *see also* Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190, 1194–95 (2d Cir. 1974) (recognizing that a lawyer may reveal confidential information to defend himself from an accusation of wrongful conduct). Even the SEC's investigation of the controversial financier Robert Vesco encompassed three lawyers at another large New York firm, who were also named in the SEC's complaint. They eventually settled. *See* SEC Litigation Release No. 8413 (May 23, 1978), 1978 SEC LEXIS 1506 (announcing settlement of the SEC's civil action against Robert Vesco).

28. *In re* Carter & Johnson, 47 S.E.C. 471, 509–11 (1981). The Commission expressly reserved "the additional question of when a lawyer, aware of his client's intention to commit

The Commission went on, invoking at length the

[s]ignificant public benefits [that] flow from the effective performance of the securities lawyer's role. The exercise of independent, careful and informed legal judgment on difficult issues is critical to the flow of material information to the securities markets In the course of rendering securities law advice, the lawyer is called upon to make difficult judgments, often under great pressure and in areas where the legal signposts are far apart and only faintly discernible.

If a securities lawyer is to bring his best independent judgment to bear on a disclosure problem, he must have the freedom to make innocent—or even, in certain cases, careless—mistakes without fear of legal liability²⁹

Notwithstanding these platitudes, however, *Carter & Johnson* appeared to embody a redoubling of the Commission's efforts to hold lawyers accountable for their roles in the securities transactions of their clients.

The Bar could not help but take notice, and did not do so quietly. When the SEC subsequently sought comments on a proposed rule formalizing the *Carter & Johnson* opinion, the ABA submitted a lengthy criticism of the SEC's position.³⁰ The SEC backed off. Not only did it never finalize the rule, but also within a year its then-General Counsel announced a substantial change in the Commission's official view.

In an important speech to the New York County Lawyers' Association, Edward Greene minimized the usefulness of the ethical standards promulgated by the ABA or any state disciplinary authority, and asserted that the SEC itself "ha[d] neither the time [n]or the expertise to fashion an appropriate code of conduct."³¹ As had the undertones of *Carter & Johnson*, Greene invoked the undesirability of "[l]awyers . . . view[ing] the Commission's disciplinary actions as requiring them to divide their loyalties"; the risk that "their clients may perceive that the threat of disciplinary actions interferes with effective representation"; and "the valuable function that counsel provides by vigorous

fraud or an illegal act, has a professional duty to disclose that fact either publicly or to an affected third party," although it tacitly endorsed that the duty might stem from "other existing standards of professional conduct." *Id.* at 512 n.78 (citing MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(B) (1969)).

29. *Id.* at 504.

30. See ABA, Minutes of the Board of Governor's Meeting 9–10 (Nov. 20–21, 1981).

31. Greene, *supra* note 16, at 170. In his remarks, Greene incorrectly stated that, in *National Student Marketing*, the Commission eventually withdrew its charge that the lawyers should have "blown the whistle" on their client. *Id.* at 168. The Commission did no such thing. Indeed, it took three published opinions issued over five years to resolve just those charges against all of the lawyers in the case. See *SEC v. Nat'l Student Mktg. Corp.*, 457 F. Supp. 682, 686 n.1 (D.D.C. 1978) (detailing the procedural history of the litigation).

advocacy of differing positions before the Commission."³² Greene, however, qualified the *Carter & Johnson* position, announcing his intent to "generally limit" SEC primary proceedings against attorneys "to those instances that pose the most direct threat of harm."³³ This unfortunate position brought any momentum of the Commission on this front to an abrupt halt.³⁴

At about the same time as these developments, the ABA was again revising its ethical standards, enacting the Model Rules of Professional Conduct, and continuing to narrow the circumstances under which its members must "come clean" of their knowledge of their clients' nefarious designs. The new Rule 1.6(b) provides:

A lawyer may reveal [information relating to representation of a client] to the extent the lawyer reasonably believes necessary:

- (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm³⁵

In two key ways, this rule constituted a substantial departure from even the relaxed rules adopted a decade before. First, any disclosure was left solely to the discretion of the lawyer involved (i.e., "may reveal"). Second, it imposed a tremendous limitation on the occasions in which a lawyer could even confront the dilemma, eschewing the possibility unless the client was (a) poised to commit a *criminal act*; (b) certain consequences of that act were not merely possible, but *likely to result*; and (c) those consequences would be either *imminent death or substantial bodily harm*.³⁶ For the securities lawyer, a

32. Greene, *supra* note 16, at 170.

33. *Id.* at 171.

34. Interestingly, however, other federal agencies attempted to pick up the SEC's baton. In the savings and loan scandals of the 1980s, both the Federal Deposit Insurance Corporation (FDIC) and the Office of Thrift Supervision (OTS) sued national law firms, asserting breaches of professional obligations. The Supreme Court rebuffed the former of these efforts, holding that the FDIC's receivership of a failed bank meant that it was unable to hold that bank's lawyers accountable for conduct that the bank itself could not. See *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994) (indicating that "the FDIC as receiver 'steps into the shoes' of the failed S & L"). But the OTS was markedly more successful in other cases. See *In re Fishbein*, No. 92-24, 1992 OTS DD LEXIS 174, at *15 (March 11, 1992) (stating that the case was settled for \$41 million); Rita Hanley Jensen, *Jones Day: Behind the Settlement*, NAT'L L.J., July 5, 1993, at 1 (reporting \$51 million settlement); see also *Lincoln Savs. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 919 (D.D.C. 1990) ("What is difficult to understand is that with all the professional talent involved [in this case], why at least one [person] . . . would not have blown the whistle . . .").

35. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (1983).

36. *Id.* In 2001 the ABA again refused to allow disclosure of conduct "reasonably certain to result in substantial injury to the *financial interests or property* of another." Conference

single client situation will almost never present all three of these attributes. Suffice it to say, this observation did not escape the drafters of the rule.³⁷

III. Some Precedent: Accountants

In contrast to this resistance by attorneys, accountants have long embraced a professional responsibility to disclose client misdeeds, particularly concerning the preparation of restatements. The surprising origin of restatements is the literature and guidance that the accounting profession has voluntarily provided—in marked contrast to the organized Bar—to its own members.³⁸ Although the accounting profession has been justly criticized for

Report, 17 Laws. Man. on Prof. Conduct (ABA/BNA) 492, 492 (Aug. 15, 2001) (emphasis added). A recent task force report, however, recommends that the Bar reconsider this position. See *infra* notes 71–75 and accompanying text (discussing the task force's recommendations, including mandatory disclosure of securities fraud in some cases).

37. To like effect, if somewhat less restrictive, is Section 67 of the *Restatement of the Law Governing Lawyers*, which puts the continued confidentiality of client information at the lawyer's discretion whenever the lawyer knows that his services will be used in the commission of a future crime or fraud, or, if the crime or fraud has already occurred, whenever disclosure can "prevent, rectify, or mitigate" the loss. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 67(1)-(2) (2000). More restrictively, however, this provision requires the lawyer to first, "if feasible, make a good faith effort to persuade the client not to act," or "advise the client to warn the victim or to take other action to prevent, rectify, or mitigate the loss." *Id.* § 67(3). The Restatement also requires a disclosing lawyer to, "if feasible, . . . advise the client of the lawyer's ability to use or disclose information . . ." *Id.*

38. See, e.g., American Institute of Certified Public Accountants, AICPA PROF'L STANDARDS, § 561.08, at 953 (1988) (requiring accountants to notify each director if the client refuses to make appropriate disclosures and to take steps to prevent reliance upon the audit report). When an accountant's client declines to restate its earnings, this provision provides:

[T]he auditor should take the following steps to the extent applicable:

- (a) Notification to the client that the auditor's report must no longer be associated with the financial statements.
- (b) Notification to regulatory agencies having jurisdiction over the client that the auditor's report should no longer be relied upon.
- (c) Notification to each person known to the auditor to be relying on the financial statements, that his report should no longer be relied upon.

Id. It proceeds to recognize that:

In many instances, it will not be practicable for the auditor to give appropriate individual notification to stockholders or investors at large, whose identities ordinarily are unknown to him; notification to a regulatory agency having jurisdiction over the client will usually be the only practicable way for the auditor to provide appropriate disclosure. Such notification should be accompanied by a request that the agency take whatever steps it may deem appropriate to accomplish the necessary disclosure. The Securities and Exchange Commission and the stock exchanges are appropriate agencies for this purpose as to corporations within their jurisdictions.

failing to fulfill many of its professional obligations in the last few years, one of the principles for which it can clearly take credit is the notion that accountants must professionally *disassociate* themselves from any statement that might be attributed to them or to which they might be professionally connected, if they know that the statement is no longer correct, and that the public may still be relying on it.³⁹ An earlier series of court cases placed this duty in the "common law," as summarized in the important decision of *Fischer v. Kletz*:⁴⁰

The common law has long required that a person that has made a representation must correct that representation if it becomes false and if he knows people are relying on it. This duty to disclose is imposed regardless of the interest of defendant in the representation and subsequent nondisclosure.⁴¹

Out of these principles, it is generally recognized—and almost universally accepted—that issuers' restatements stem from an established legal obligation. Indeed, there is no appreciable body of law even challenging that proposition.

Congress codified these notions in 1995 when it added Section 10A to the Securities Exchange Act of 1934. That provision, enacted as part of the Private Securities Litigation Reform Act,⁴² mandates that issuers' outside auditors work in compliance with standards issued by the SEC in addition to Generally Accepted Accounting Principles; that the auditors report all but the

Id.

39. See Compl. of the SEC ¶ 48(h), *SEC v. Nat'l Student Mktg. Corp.*, [1971–1972 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,360 (D.D.C. 1972) (claiming that an accounting firm failed to insist upon revision of misleading financial statements). After failing to "refuse to issue their opinions" about the actual transaction at hand, as well as failing to "insist that [their clients'] financial statements be revised and shareholders be resolicited" in light of the fraudulent deal, the lawyers named in the complaint allegedly violated the law by not "ceas[ing] representing their respective clients and, under the circumstances, notify[ing] the plaintiff Commission" what their clients had done. *Id.* ¶ 48(i). On the other hand, the case against the accountants was more concrete, as the complaint asserted that they breached "*their professional obligation* to insist that the [clients'] financial statements be revised . . . , and, failing that, to withdraw from the engagement and to come forward and notify plaintiff Commission *or the [clients'] shareholders*" about the fraud. *Id.* ¶ 48(h) (emphasis added).

40. *Fischer v. Kletz*, 266 F. Supp. 180 (S.D.N.Y. 1967).

41. *Id.* at 188; see also *Int'l Mortgage Co. v. John P. Butler Accountancy Corp.*, 223 Cal. Rptr. 218, 227 (Cal. Ct. App. 1986) ("We hold an independent auditor owes a duty of care to reasonably foreseeable plaintiffs who rely on negligently prepared and issued unqualified financial statements."), *overruled by Bily v. Arthur Young & Co.*, 834 P.2d 745, 766–67 n.15 (Cal. 1992); *Rosenblum, Inc. v. Adler*, 461 A.2d 138, 153 (N.J. 1983) (stating that an auditor has a duty to reasonably foreseeable plaintiffs that rely on the financial statements); *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931) (discussing an accountant's duty to conduct an audit free of fraud or recklessness).

42. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, 109 Stat. 737.

most inconsequential illegal acts to the audit committees of the issuers' boards of directors; and that the auditors resign, notifying the SEC of both the resignation and the reasons for it, if the issuer refuses to cease its illegal activity.⁴³ In some ways, Section 307 of Sarbanes-Oxley is Section 10A's logical extension to lawyers.⁴⁴

IV. Back to the Future: Section 307

A series of major corporate collapses over the last two years—Enron, WorldCom, Adelphia, and Xerox, to name some of the largest—has redirected a spotlight on the function of professional services in business, and presented the securities laws with a number of new challenges.⁴⁵ As a result of these events (and others), the investing public did not just come down from the booming market of the few years before, but crashed among reports of cooked books and renegade corporate officials. Lawyers inevitably were involved and may have even aided the execution of their clients' frauds. To date, the entirety of the facts has not yet been made public. These events led to Sarbanes-Oxley.⁴⁶

43. 15 U.S.C. § 78j-1 (2000).

44. To some extent, the ABA addressed these principles when it established standards guiding a "noisy withdrawal": although a noisy withdrawal is permitted when a lawyer knows her work is involved in a client's current or future commission of a fraud, it is prohibited if the fraud has ceased. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-366 (1992).

45. Since *Carter & Johnson*, the SEC has brought very few cases against lawyers. One of the few was *SEC v. Fehn*, No. CV-S-92-946-HDM(RLH), 1994 U.S. Dist. LEXIS 8204, at *1 (D. Nev. Apr. 1, 1994), in which the Commission sued an attorney for his role in filing incomplete quarterly reports, noting that "[a] lawyer, no more than others, can escape liability for fraud by closing his eyes to what he saw and could readily understand," and endorsing the *National Student Marketing* view that "[l]awyers are not free to ignore the commercial substance of a transaction which could obviously be misleading to stockholders and the investing public." *Id.* at *34-35 (citing and quoting *SEC v. Frank*, 388 F.2d 486, 488 (2d Cir. 1968), and *SEC v. Nat'l Student Mktg. Corp.*, 402 F. Supp. 641, 647-48 (D.D.C. 1975)). In another, the Commission affirmed an administrative law judge's finding that a prominent partner at a large New York firm was responsible for his client's failure to file a disclosure statement in accordance with law. See *In re Kern*, 50 S.E.C. 596, 597 (1991) (affirming finding of liability); see also *In re Gutfreund*, 51 S.E.C. 93, 113 (1992) (stating that legal officers who learn of misconduct by their employer or co-worker are "obligated to take affirmative steps to ensure that appropriate action is taken to address the misconduct"). As these suits waned, an SEC commissioner opined that guiding principles on these questions remained "elusive" and "hard to come by." Norman A. Johnson, *Suits Against Lawyers*, Remarks to ABA Federal Securities Law Committee (Nov. 8, 1996), available at <http://www.sec.gov/news/speech/speecharchive/1996/spch137.txt>.

46. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

As the statute was being developed, a group of law professors proposed that Congress finally settle the ongoing dispute between the Commission and the Bar. Senator John Edwards proposed the addition of what is now Section 307, requiring the Commission to issue rules on the professional obligations of attorneys who practice before it.⁴⁷ In so doing, Senator Edwards noted:

[I]t is time to remind corporate lawyers of their legal and moral obligations—as members of the bar, as officers of the courts, as citizens of this country. The American Bar Association ought to take a leading role here, something they have not done thus far.⁴⁸

After its enactment (a total of three votes were cast against it, all in the House of Representatives), then-Chairman Pitt endorsed that purpose: "[T]he underlying principle of Sarbanes-Oxley is unassailable—attorneys must be vigilant in protecting the interests of their true clients" the shareholding public.⁴⁹

The rules subsequently proposed by the SEC—and the final rules, as revised after the period for public comment—reflect a continuing debate. In large measure, the Commission's effort parallels the common law duties lawyers have arguably had for ages, even if the Bar has not always agreed.⁵⁰ Yet the Commission attempted to go much further, evoking strong reactions from the legal community.

As originally proposed, the Commission's rules would have obliged lawyers for issuers to:

47. *Id.* § 307.

48. 148 CONG. REC. S5652 (daily ed. June 18, 2002) (statement of Sen. Edwards). Mr. Van Hoey has recognized essentially the same problem, and outlined how the Commission might alternatively utilize theories of "causing" liability in this regard. *See generally* Gregory Van Hoey, Note, *Liability for "Causing" Violations of the Federal Securities Laws: Defining the SEC's Next Counterattack in the Battle of Central Bank*, 60 WASH. & LEE L. REV. 249 (2003) (analyzing "causing liability" as a potential SEC tool in regulating attorney conduct). With Sarbanes-Oxley, Congress has endorsed the inclusion of law practice in the Commission's domain, putting Van Hoey's hypothesis on even firmer ground.

49. Rachel McTague, *Pitt Lauds Principle of New Mandate for Lawyers to Report Securities Violations*, 34 Sec. Reg. & L. Rep. (BNA) 1374, 1374 (Aug. 19, 2002) (reporting on August 12, 2002 ABA Business Law Section Meeting). In the same speech, Pitt also indicated that the SEC might use its new authority under Sarbanes-Oxley to require an attorney to disgorge fees when the attorney earned those fees in the course of an offending representation. *Id.* at 1375.

50. *See supra* note 15 (examining historical exception of fraud from privileged attorney-client communications). The primary precedent that the Commission cites for its actions is, of course, *Carter & Johnson*. *See Proposed Rules, supra* note 4, at 71,671–72 (discussing *Carter & Johnson* and the controversy regarding appropriate ethics rules for securities lawyers).

- (1) report evidence of "a material violation of the securities laws, a material breach of fiduciary duty, or a similar material violation,"⁵¹ all the way "up the ladder"—to the company's chief counsel or the CEO, and, if those officials do not "appropriately respond to the evidence,"⁵² to the audit committee or, ultimately, to the full board of directors;⁵³
- (2) report the same violations to the Commission directly, if disregarded by all pertinent representatives of the client,⁵⁴ and
- (3) effectuate, under some circumstances, a so-called "noisy withdrawal," whereby the lawyer publicly disaffirms his clients' submissions to the SEC.⁵⁵

51. Proposed Rules, *supra* note 4, § 205.2(i), at 71,704.

52. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307(2), 116 Stat. 745.

53. Proposed Rules, *supra* note 4, § 205.3(b), at 71,704-05. In preliminary reports, the Commission indicated that this duty would instead be triggered when a lawyer "reasonably believes" that a material violation of law has occurred, is occurring, or is about to occur. *SEC Proposes Rules to Implement Sarbanes-Oxley Act Provisions Concerning Standards of Professional Conduct for Attorneys*, 2002 SEC NEWS DIGEST 215 (Nov. 6, 2002), at <http://www.sec.gov/news/digest/11-06.txt> [hereinafter *SEC Proposes Rules*]. The Proposed Rules point out that either standard is more demanding than the parallel ABA rule, Model Rule 1.13, "applicable only when the attorney *knows* that a violation is occurring or going to occur." Proposed Rules, *supra* note 4, at 71,682. According to the Commission, this "appears to set too high a standard for reporting." *Id.*

54. Proposed Rules, *supra* note 4, § 205.3(d), at 71,705-06. This requirement assumes that the securities violation at issue "is ongoing or is about to occur and is likely to result in substantial injury to the financial interest or property of the issuer or investors." *Id.* Other than the vague contemplation of "rules[] in the public interest and for the protection of investors," the statute itself does not authorize this particular requirement. Sarbanes-Oxley Act § 307. The proposed rules candidly acknowledge this, but the Commission justifies the addition as an "important component[] of an effective 'up the ladder' reporting system." Proposed Rules, *supra* note 4, at 71,673 ("[T]he proposed rule incorporates several corollary provisions that are not explicitly required by Section 307 . . ."). As discussed herein, the Commission has, at least for the moment, backed off. See *infra* notes 58-63 and accompanying text (stating that lawyers' reporting obligations are largely confined to notifying the issuer-client).

55. Proposed Rules, *supra* note 4, § 205.3(d), at 71,705-06. Although not all withdrawals would have entailed the disclosure of client information, the proposed rules indicated that those that did entail disclosure would not breach the attorney-client privilege. See *id.* § 205.3(d)(3), at 71,706 ("The notification to the Commission prescribed by this paragraph (d) does not breach the attorney-client privilege."); *id.* § 205.3(e), at 71,706 (allowing an attorney representing an issuer to reveal confidential information to the SEC under certain circumstances). The proposed rules also required that a reporting attorney "take steps reasonable under the circumstances to document the report[s] and the response[s] thereto and . . . retain such documentation for a reasonable time." *Id.* § 205.3(b)(2), at 71,705. The proposed rules contemplated that third parties—specifically, the Commission itself—may review this documen-

The Commission desired that all lawyers who "appear[] and practic[e] before the Commission"⁵⁶ would be subject to these rules, and initially defined that term with extraordinary breadth. Not only did the original standard reach all attorneys who deal with the Commission directly, it also encompassed those who "prepar[e], or participat[e] in the process of preparing," to whatever extent, any material that the attorney has "reason to believe" will appear in any communication, oral or written, to the SEC or its staff.⁵⁷

The adopted rules retreat somewhat from these terms, contending that "[t]he thoughtful and constructive suggestions" of the commenters resulted in "significant[] modifi[cations]" to the proposed rule.⁵⁸ First and foremost, however, the adopted rules continue to focus on compelling so-called "up the ladder" reporting—requiring an issuer's lawyer, inside or outside, to report evidence of "a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law" to the client's general counsel; then to its CEO; and, potentially, to its full board of directors.⁵⁹ Failure to comply with these provisions can result in civil penalties and the pursuit of other remedies by the Commission.⁶⁰

tation. *See id.* at 71,764 (stating that "documentation will protect the attorney in the event his or her compliance with the proposed rule is put in issue in some future proceeding"). The adopted rules withdrew these provisions, in part realizing their potential to "imped[e] open and candid discussions between attorneys and their issuer clients." Adopted Rules, *supra* note 5, at 6306; *see also id.* (summarizing concerns that "the documentation requirement has the potential to create a conflict of interest between the lawyer and his or her client"). On the other hand, it is hard to believe that most attorneys will not document in some way these types of events, with or without an SEC requirement.

56. Sarbanes-Oxley Act § 307.

57. Proposed Rules, *supra* note 4, § 205.2(a)(4), at 71,704; *Sarbanes-Oxley Act Question of the Week*, 17 BNA'S CORP. COUNSEL WKLY. 281, 285 (2002). The proposed rules ascribed somewhat different duties to in-house counsel than they did to outside lawyers, exhibiting the Commission's view that "attorneys employed by an issuer face greater potential obstacles to compliance, and [that] the personal cost of compliance to an attorney employed by the issuer is greater." *SEC Proposes Rules*, *supra* note 53; *compare, e.g.*, Proposed Rules, *supra* note 4, § 205.3(d)(1)(i), at 71,706 (requiring an attorney retained by the issuer to undertake a "noisy withdrawal") *with id.* § 205.3(d)(1)(ii), at 71,706 (requiring an attorney employed by the issuer to notify the SEC and to disaffirm the relevant documents and opinions).

58. Adopted Rules, *supra* note 5, at 6296.

59. Adopted Rules, *supra* note 5, § 205.2(i), at 6321. "Evidence of a material violation" is defined in the final rule as "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur." *Id.* § 205.2(e), at 6321. The Commission makes clear that this standard is more demanding than actual knowledge. *See id.* at 6302 (rejecting the "actual belief" standard as too low).

60. *See id.* § 205.6, at 6323 (providing for civil penalties and disciplinary measures).

The Commission has clarified that it will not additionally support private lawsuits, at least not directly.⁶¹

For now, the rules largely limit a lawyer's reporting obligation to within the issuer-client.⁶² In addition, when the lawyer believes that these individuals have not made an "appropriate response within a reasonable time," then the lawyer must explain to them his or her reasons for that belief.⁶³

In the adopted rules, the Commission continues to express an interest in lawyers disclosing suspicions that their clients may have engaged in improper conduct. The adopted rules do not "require" noisy withdrawals, as such. However, they continue to permit lawyers to come to the Commission when "reasonably necessary" to prevent financial fraud, perjury in a Commission proceeding, or to rectify the actual or potential consequences of those acts.⁶⁴ Unlike the rules as proposed, the adopted rules decline to assert that these disclosures somehow will not waive the attorney-client privilege, although the rules remain clear that attorneys may make disclosures without the client's consent.⁶⁵

61. *See id.* § 205.7, at 6323 (stating that the Adopted Rules do not create or intend to create a private right of action). When these Section 307 rules are violated, "the Commission intends to proceed . . . as it would against other violators of the federal securities laws and, when appropriate, to initiate proceedings under this rule seeking an appropriate disciplinary sanction." *Id.* at 6314.

62. *See id.* § 205.3(b), at 6321–22 (requiring "up the ladder" reporting of material violations to an issuer's chief legal officer and, possibly, to the audit committee or the full board of directors). Accordingly, for the moment, the adopted rules omit the proposed rules' most controversial aspect: circumstances under which a lawyer must withdraw completely from the representation of a client, notify the Commission of that withdrawal, and disaffirm the SEC filing that the lawyer had a role in preparing. Yet, at the same time it announced these adopted rules, the Commission proposed a modified requirement for so-called "noisy withdrawal." That rule would require issuers to inform the SEC whenever their attorneys resign on the basis of suspected wrongdoing. *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6324, 6336 (proposed Feb. 6, 2003 (originally released Jan. 29, 2003)) (to be codified at 17 C.F.R. pts. 205, 240, 249) (requiring issuers to report within two days the withdrawal of an attorney because of professional considerations).

63. Adopted Rules, *supra* note 5, § 205.3(b)(9), at 6322. What constitutes an appropriate response "will be measured against a reasonableness standard . . . [,] permit[ing] attorneys to exercise their judgment." *Id.* at 6298. Likewise, "[t]he term 'reasonably believes' . . . allow[s] the attorney to take into account, and the Commission to weigh, all attendant circumstances." *Id.* at 6300.

64. *Id.* § 205.3(d)(2), at 6323.

65. *See id.* (permitting an attorney to reveal confidential information "without the issuer's consent" in enumerated circumstances). The adopted rules acknowledge that "some courts might not adopt the Commission's analysis of [the waiver] issue, and that this could lead to adverse consequences for the attorneys and issuers who disclose information to the Commission." *Id.* at 6312.

The proposed rules introduced a new entity called a "qualified legal compliance committee" (QLCC), comprising certain members of an issuer's board of directors. The proposed rules provided that if a company had previously established a QLCC, then the company's lawyers would gain the option of making any required reports directly to the QLCC instead of "up the ladder."⁶⁶ The adopted rules retain the QLCC concept and terminate a lawyer's reporting obligation after going to the QLCCs of their clients. The adopted rules clarify that all QLCC members must be independent of the issuer and shift the duty to report from the attorney to the members of the QLCC.⁶⁷

The proposed rules also included extensive requirements for attorney documentation and recordkeeping, and plainly contemplated Commission access to those papers. The documentation requirement has been "withdrawn," although it remains likely that many lawyers will document their compliance with the rules.

Finally, the adopted rules have circumscribed the range of lawyers who are subject to Section 307's terms at all. The proposed rules suggested that some very attenuated relationships to issuer-clients or minimal levels of involvement with even the most routine SEC filings could bring a lawyer within the rules' ambit. That reach has been diminished to encompass only those lawyers who have reason to know that their work will actually appear in a submission to the SEC, and specifically excludes non-appearing foreign attorneys and individuals who may assist in a securities filing outside of a formal attorney-client relationship.⁶⁸

V. What It All Means and What Might Come

The additional duties codified by Sarbanes-Oxley are significant in light of the current model ethical rules, in that they are largely independent of the

66. See Proposed Rules, *supra* note 4, § 205.3(c)(1), at 71,705 (stating that an attorney may satisfy the obligation to report a material violation by reporting it to a QLCC).

67. Adopted Rules, *supra* note 5, §§ 205.2(k)(1), 205.3 (c)(1), at 6321-22. The Commission estimates that only 20% of issuers will establish a QLCC. *Id.* at 6316. Under the proposed rules, that guess would probably have been too low, as establishing a QLCC would have protected an issuer from public reports by its lawyers. Under the adopted rules, the added value of a QLCC is unclear, with the Commission relegated to suggesting that "[i]t may also produce broader synergistic benefits" to the issuer. *Id.* at 6309.

68. See *id.* § 205.2(a)(2), at 6320 (restricting the scope of the definition of "appearing and practicing" as used in the adopted rules). The commentary accompanying the adopted rules confirms that this is essentially a notice requirement. See *id.* at 6298 ("[A]n attorney must have notice that a document he or she is preparing or assisting in preparing will be submitted to the Commission to be deemed to be 'appearing and practicing' under the revised definition.").

potential consequences of a violation, as well as of the probability that those consequences might occur. It appears that, with the passage of Sarbanes-Oxley, at last Congress has lost its patience with the Bar; with its self-serving (and misleading) rules, the same is assuredly true of the Commission as well.⁶⁹ As the president of the District of Columbia Bar already has observed, Section 307 is truly a "wake-up call to the profession."⁷⁰

To its credit, the ABA has recently formed a "Task Force on Corporate Responsibility," which, about the time Sarbanes-Oxley emerged, issued its preliminary report.⁷¹ In the main, this task force was charged with "examin[ing] the framework of laws and regulations and ethical principles governing the roles of lawyers."⁷² The report recognized the need to "significantly enhance corporate governance practices and ethical principles."⁷³ And that report has made firm proposals in that regard, including proposed amendments to Rule 1.6 and three other related Rules of Professional Conduct. Encouraging the ABA to finally "permit[] disclosure to prevent or rectify the consequences of a crime or fraud in which the client had used or was using the lawyer's services," the task force

further recommends . . . mak[ing] disclosure mandatory, rather than permissive, in order to prevent client conduct known to the lawyer to involve a crime, including violations of federal securities laws and regulations, in furtherance of which the client has used or is using the lawyer's services, and which is reasonably certain to result in substantial injury to the financial interests or property of another.⁷⁴

69. See George W. Jones, Jr., *Federal Regulation of the Practice of Law: Unthinkable?*, WASH. LAWYER, Oct., 2002, at 6. This "wake-up call" will have the valuable practical benefit of harmonizing ethical standards across jurisdictions, especially those in which there is a substantial securities practice. Prominently, New York has forbidden conduct required in New Jersey—a state that has, on its own initiative, rejected the limits of the ABA's recommended rules. Compare N.J. RULES OF PROF'L CONDUCT R. 1.6(b) (2000) (stating that lawyers "shall disclose") with N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.33(b)(1) (2001) (stating that lawyers "shall . . . [not] reveal"). As a result, as Mr. Jones also points out, "Section 307 . . . suggests that federal preemption of legal ethics rules is no longer unthinkable." Jones, *supra*, at 6. Although a fascinating and important topic (and another one the SEC would be wise to consider in the months ahead), a long discussion of the consequences of a federal common law of ethics is beyond the scope of this Article.

70. Jones, *supra* note 69, at 6.

71. ABA TASK FORCE ON CORP. RESPONSIBILITY, PRELIMINARY REPORT (2002), available at http://www.abanet.org/buslaw/corporateresponsibility/preliminary_report.pdf.

72. *Id.* at 1.

73. *Id.* at 10.

74. *Id.* at 31–32.

These recommendations condemn the current rules as "more out of step" with public policy than ever before, and herald a "public demand that lawyers play a greater role in promoting corporate responsibility."⁷⁵

This task force report is a sign of progress. As this Article has detailed, the Bar has a long track record of simply ignoring efforts by the SEC (or less frequently, other government agencies or organizations) to prod its members to accept standards of conduct that not only fellow professions have long assumed they have, but that are in fact not as unfamiliar to lawyers as they often have thought. Perhaps Section 307 has reduced some negotiating room the Bar had in the past, somewhat forcing the Bar's hand.

Regardless, life under Section 307, and the Commission's regulations under that authority, will sharply test the Bar's resolve. These developments put both the Bar and the Commission at a crossroads, and the reaction of both will be telling. Will the Bar again "defend itself against the emerging trends by reliance upon old shibboleths and axioms"?⁷⁶ Will, perhaps, "doing nothing seem[] the least imperfect course"?⁷⁷ Will the Bar embrace, and perhaps even expand, the principles of Sarbanes-Oxley? Or will it resist them at every turn?

To be sure, the Commission has obligations as well. Will it administer its rules judiciously? Will it, as it promises, ensure that its rules neither "impair zealous advocacy" nor "discourage issuers from seeking and obtaining effective and creative legal advice"?⁷⁸ Some provisions remaining in the adopted rules too lightly consider their effect on how privilege can be maintained; it is not easy to reconcile this complicated concept with the tone of the Commission's initial proposals. Whether the SEC's approach can avoid inhibiting a free and trusting attorney-client relationship will remain an open—and critically important—question for some time to come.

Such persistent issues ensure that this saga will not soon end. The obligations of attorneys promise to remain a topic for continuing heated debate in and about the business community. Without a doubt, the judgment and discretion of the SEC and its staff will be critical to any meaningful step forward.

75. *Id.* at 32–33. In this vein, the task force also recommends that the prohibition against lawyers "knowingly" assisting criminal or fraudulent behavior include a "reasonably should know" standard as well. *Id.* at 33–35.

76. A.A. Sommer, *The Emerging Responsibilities of the Securities Lawyer*, Speech (Jan. 1974), in [1973–1974 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,631, at 83,691 (Feb. 6, 1974). Sommer characterized this response as "serious error," and predicted at the time that "[s]ociety will not stand for it." *Id.*

77. FED. SEC. CODE § 1804 cmt. 10 (1980).

78. Proposed Rules, *supra* note 4, at 71,673.

ARTICLES
