Monday, October 19
9:00 am–10:30 am

101 Whose Ethics Are They Anyway? Storytellers Required

Andrew Perlman
Professor of Law
Suffolk University School of Law

Miriam Smolen
Associate General Counsel
Fannie Mae

Stacey Sovereign
Associate General Counsel
Marine Spill Response Corporation

Gretchen Winter
Executive Director
Center for Professional Responsibility in Business and Society

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Faculty Biographies

Andrew Perlman

Andrew M. Perlman is a professor at Suffolk University Law School, where he teaches professional responsibility, civil procedure, and federal courts. He has authored a number of articles about legal ethics, including articles on the inadvertent disclosure of privileged information, the constitutionality of bar admission rules, and the implications of social psychology for professional responsibility.

Prior to joining the Suffolk faculty, Professor Perlman was an associate-in-law at Columbia Law School, where he conducted research on professional responsibility issues and taught legal research and writing. Professor Perlman also clerked for a federal district court judge in Chicago and practiced as a litigation associate with the Chicago firm of Schiff Hardin & Waite.

Professor Perlman co-authored the widely used book, Regulations of Lawyers: Statutes and Standards (with Stephen Gillers and Roy Simon). He is also a co-author of a forthcoming civil procedure case book and a co-contributor to a legal ethics blog, www.legalethicsforum.com, which was recently named for the second time as one of the top 100 law-related blogs in the country by the American Bar Association Journal.

Professor Perlman is a graduate of Yale College and Harvard Law School. He received his LLM from Columbia Law School.

Miriam Smolen
Associate General Counsel
Fannie Mae

Stacey Sovereign

Stacey L. Sovereign is one of two in-house attorneys for the Marine Spill Response Corporation (MSRC), a national oil spill and emergency response company headquartered in Herndon, Virginia with sites nationwide. Ms. Sovereign handles a variety of legal matters, including internal investigations, compliance with environmental, health and safety, security, transportation, and employment-related laws and regulations, personnel issues, supervising litigation, contract drafting and negotiation, drafting and reviewing all corporate policies and procedures, and benefits issues. For two years, Ms. Sovereign was the vice president of human resources, managing all aspects of human resources.

Before working at MSRC, Ms. Sovereign was an assistant counsel with the Department of Justice's Office of Professional Responsibility, investigating allegations of attorney misconduct. Ms. Sovereign laid the foundation for this position by serving as an assistant U.S. attorney in the Office of the U.S. Attorney for the District of Columbia. Ms.

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Sovereign began her career as a law clerk to then-Judge Kenneth Starr on the U.S. Court of Appeals for the D.C. Circuit.

Ms. Sovereign is a graduate of the University of Virginia and Stanford Law School.

Gretchen Winter

Gretchen Winter is the executive director of the Center for Professional Responsibility in Business and Society at the College of Business at the University of Illinois at Urbana-Champaign (the "Center"). Her office is located in Chicago.

Prior to joining the Center, she worked at Baxter International Inc. serving for more than a decade as vice president and counsel for its award-winning Business Practices/Ethics and Compliance program. Ms. Winter also held legal and management roles in labor and employment, employee relations, training and development, and reengineering and she served on the editorial board of the company's annual sustainability report. Ms. Winter also has worked as an attorney with the firm of Seyfarth, Shaw, Fairweather and Geraldson in Chicago and as a legislative analyst with the State of Illinois.

Ms. Winter chaired the Ethics and Compliance Officer Association Board of Directors and the Conference Board's Council on Global Business Conduct, and she has been on ethics committees for the American Bar Association and DePaul University. She serves on the Board of Visitors for the University of Illinois at Chicago College of Liberal Arts and Sciences and has served on other Illinois higher educational boards. Ms. Winter also has chaired boards and committees for a wide variety of statewide and local community organizations. She is a frequent speaker for a variety of ethics, corporate social responsibility, and legal programs.

Ms. Winter received her bachelor’s degree from the University if Illinois at Chicago and her JD from the University of Chicago.

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Whose Ethics Are they Anyway?

Table of Contents

Model Rules of Professional Conduct:

- Rule 1.6 Confidentiality of Information
- Rule 1.7 Conflict of Interest: Current Clients
- Rule 1.13 Organization as Client
- Rule 5.2 Responsibilities of a Subordinate Lawyer
- Rule 8.3 Reporting Professional Misconduct

Comply and Conform Materials:

- Perlman, Andrew M., "Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology," Legal Studies Research Papers Series, Research Paper 08-15, May 1, 2008.

Sarbanes Oxley Materials:

- The Basics on Sarbanes-Oxley Regulations
- Van Asdale v. Int'l Game Technology, No. 07-16597, Aug. 13, 2009 (9th Cir.).
- In House Counsel Standards Under Sarbanes-Oxley, ACC InfoPAC, Section VII
- Sarbanes-Oxley Section 1107, 18 U.S.C. § 1513(e) Retaliation Against Informants

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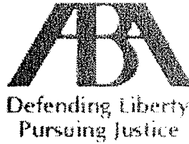

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Center *for* Professional Responsibility

Model Rules of Professional Conduct

Client-Lawyer Relationship
Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation 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;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

Comment | Table of Contents | Next Rule

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Center *for* Professional Responsibility

Model Rules of Professional Conduct

Client-Lawyer Relationship
Rule 1.7 Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Comment | Table of Contents | Next Rule

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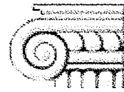

Center *for* Professional Responsibility

Model Rules of Professional Conduct

Client-Lawyer Relationship

Rule 1.13 Organization As Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) 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 that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

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

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out

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of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment | Table of Contents | Next Rule

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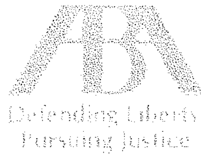

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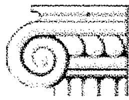

Center *for* Professional Responsibility

Model Rules of Professional Conduct

Law Firms And Associations
Rule 5.2 Responsibilities Of A Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment | Table of Contents | Next Rule

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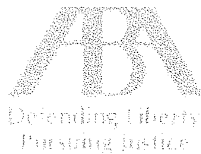

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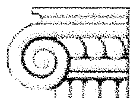

Center *for* Professional Responsibility

Model Rules of Professional Conduct

Maintaining The Integrity Of The Profession
Rule 8.3 Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Comment | Table of Contents | Next Rule

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LEGAL STUDIES RESEARCH PAPER SERIES
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Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology

Andrew M. Perlman
Associate Professor of Law, Suffolk University Law School

This paper can be downloaded without charge from the Social Science Research Network:
http://ssrn.com/abstract=1127685

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120 Tremont Street, Boston, MA 02108-4977 | www.law.suffolk.edu

UNETHICAL OBEDIENCE BY SUBORDINATE ATTORNEYS: LESSONS FROM SOCIAL PSYCHOLOGY

*Andrew M. Perlman**

I. INTRODUCTION

Consider the plight of a lawyer—fresh out of law school with crushing loan debt and few job offers—who accepts a position at a medium-sized firm. A partner asks the young lawyer to review a client's documents to determine what needs to be produced in discovery. In the stack, the associate finds a "smoking gun" that is clearly within the scope of discovery and spells disaster for the client's case. The associate reports the document to the partner, who without explanation tells the associate not to produce it. The associate asks the partner a few questions and quickly drops the subject when the partner tells the associate to get back to work.

We would like to believe that the young lawyer has the courage to ensure that the partner ultimately produces the document. We might hope, or expect, that the lawyer will report the issue to the firm's ethics counsel, if the firm is big enough to have one, or consult with other lawyers in the firm, assuming that she has developed the necessary relationships with her colleagues despite her junior status.

In fact, research in the area of social psychology suggests that, in some contexts, a subordinate lawyer will often comply with unethical

* Associate Professor of Law, Suffolk University Law School. B.A., Yale College; J.D., Harvard Law School; LL.M., Columbia Law School. Several friends and colleagues have given me valuable suggestions for this Article, including Lisa Aidlin, Thomas Blass, Robert Keatinge, Sung Hui Kim, Jeffrey Lipshaw, and John Steele. I also benefited enormously from the assistance of research librarian Ellen Delaney and from comments and questions during presentations at Cumberland and Suffolk Law Schools and at the Hofstra Legal Ethics Conference. I also received very useful insights from several students in my professional responsibility classes at Suffolk.

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instructions of this sort.[1] This basic, but crucial, insight into human behavior suggests that there is often a significant gap between what the legal ethics rules require and how lawyers will typically behave. Indeed, lawyers will too often obey obviously unethical or illegal instructions or fail to report the wrongdoing of other lawyers.[2]

This Article explores what lessons we can learn from social psychology regarding a lawyer's willingness to comply with authority figures, such as senior partners or deep-pocketed clients, when they make unlawful or unethical demands. Part II reviews some of the basic literature in social psychology regarding conformity and obedience, much of which emphasizes the importance of context as a primary factor in predicting people's behavior.[3]

Part III contends that lawyers frequently find themselves in the kinds of contexts that produce high levels of conformity and obedience and low levels of resistance to illegal or unethical instructions. The result is that subordinate lawyers, like the attorney in the initial example, will find it difficult to resist a superior's commands in circumstances that should produce forceful dissent.

Part IV proposes several changes to existing law in light of these insights, including giving lawyers the benefit of whistleblower protection, strengthening a lawyer's duty to report the misconduct of other lawyers,[4] and enhancing a subordinate lawyer's responsibilities upon receiving arguably unethical instructions from a superior.[5] These proposals, however, are ultimately less important than the insights that underlie them. Namely, by gaining a deeper understanding of social psychology, the legal profession can more effectively prevent and deter attorney misconduct.

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1. *See infra* Parts II and III. Although there is limited research on whether lawyers tend to obey authority figures, there is no reason to think that attorneys are somehow immune from the pressures that lead to obedience. *See, e.g.*, *infra* note 80.

2. *See* MODEL RULES OF PROF'L CONDUCT R. 5.2(a)-(b) (2007) (subjecting subordinates to the Rules of Professional Conduct unless the supervisory lawyer's instructions reflect a "reasonable resolution of an arguable question of professional duty"); MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2007) (requiring a lawyer to report another lawyer's misconduct if that conduct "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer").

3. As explained in more detail in Part II, social context plays a significant role in human behavior. *See* LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION xiv (1991) ("[W]hat has been demonstrated through a host of celebrated laboratory and field studies is that manipulations of the immediate social situation can overwhelm in importance the type of individual differences in personal traits or dispositions that people normally think of as being determinative of social behavior.").

4. MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2007).

5. MODEL RULES OF PROF'L CONDUCT R. 5.2(b) (2007).

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II. BASIC LESSONS FROM SOCIAL PSYCHOLOGY ABOUT CONFORMITY AND OBEDIENCE

Studies on conformity and obedience suggest that professionals, whom we would ordinarily describe as "honest," will often suppress their independent judgment in favor of a group's opinion or offer little resistance in the face of illegal or unethical demands.[6] These studies demonstrate that we ascribe too much weight to personality traits like honesty,[7] and that contextual factors have far more to do with human behavior than most people recognize.[8] Social psychologists have called this tendency to overemphasize individual personality differences and underestimate the power of the situation "the fundamental attribution error."[9] Indeed, a number of experiments have amply demonstrated that situational forces are often more powerful predictors of human behavior than dispositional traits like honesty.

A. *Foundational Studies on Conformity*

The importance of context is apparent from a number of experiments related to conformity, the most celebrated of which is a 1955 study by Solomon Asch.

Asch wanted to determine how often a group member would express independent judgment despite the unanimous, but obviously mistaken, contrary opinions of the rest of the group.[10] To make this determination, Asch designed a study involving two cards similar to those shown on the next page.[11]

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6. Although there is a growing legal ethics literature that draws on social psychology, there is surprisingly little scholarship that draws on social psychology to explain the particular problem of wrongful obedience among lawyers. For a few notable exceptions, see MILTON C. REGAN, JR., EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER 307, 323-24 (2004); David J. Luban, *The Ethics of Wrongful Obedience*, *in* ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 94, 95 (Deborah L. Rhode ed., 2000); Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel As Gatekeeper*, 74 FORDHAM L. REV. 983, 1001-26 (2005).

7. *See generally* JOHN M. DORIS, LACK OF CHARACTER: PERSONALITY AND MORAL BEHAVIOR (2002) (arguing that context explains far more about human behavior than individual differences in character traits). For a detailed examination of the importance of context in determining lawyer behavior, see REGAN, *supra* note 6, at 4-6, 10, 294-95, 302-04.

8. ROSS & NISBETT, *supra* note 3, at 4.

9. *Id.* (citation omitted); *see also* DORIS, *supra* note 7, at 93.

10. Solomon E. Asch, *Opinions and Social Pressure*, SCI. AM., Nov. 1955, at 31, 32.

11. *Id.* This image appears at http://en.wikipedia.org/wiki/Image:Asch_experiment.png (last visited Jan. 20, 2008).

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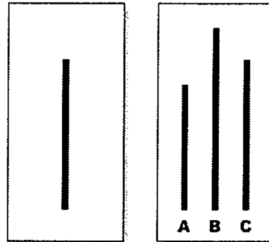

In one version of the study, the experimenter told the subject that he was about to participate in a vision test and asked the subject to sit at a table with four other individuals who were secretly working with the experimenter.[12]

All five people were shown the two cards and asked to identify which line in the card on the right (A, B, or C) was the same length as the line shown in the card on the left.[13] Each person was asked his opinion individually and answered out loud,[14] with the subject of the experiment going near the end.[15] After each person had answered, a new set of cards was produced, and the participants were once again asked their opinions.[16]

During the initial rounds, all of the confederates chose the obviously right answer.[17] Not surprisingly, under this condition, the subject also chose the right answer.[18]

In some subsequent rounds, however, Asch tested the subject's willingness to conform by prearranging for the confederates to choose the same wrong answer.[19] Even though the four confederates were obviously mistaken, subjects of the experiment nevertheless provided

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12. Asch, *supra* note 10, at 32.
13. *Id.*
14. *Id.* All of the subjects were male college students. Subsequent work has revealed that women are, under certain circumstances, even more susceptible to conformity than men. *See, e.g.*, Alice H. Eagly & Carole Chrvala, *Sex Differences in Conformity: Status and Gender Role Interpretations*, 10 PSYCHOL. OF WOMEN Q. 203, 217 (1986).
15. Asch, *supra* note 10, at 32.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

the same wrong answer as the confederates 35.1% of the time,[20] with 70% of subjects providing the wrong answer at least once during the experiment.[21]

Most importantly, Asch found that the introduction of certain variables dramatically affected conformity levels. For example, Asch found that conformity fell quickly as the confederate group size dropped from three (31.8% of the answers were wrong) to two (13.6% were wrong) to one (3.6% were wrong), but did not increase much in groups larger than seven (maxing out at about 37%).[22] Moreover, conformity fell by more than 50% in most variations of the experiment when one of the confederates dissented from the group opinion.[23]

Not surprisingly, other studies have shown that conformity levels increase when (as is true in the law) the answer is more ambiguous. For example, in studies pre-dating Asch's, Muzafer Sherif placed a subject in a dark room and asked the person to look at a projected spot of light and guess how far it moved.[24] Notably, the light did not move at all, but only appeared to move due to an optical illusion called the autokinetic effect.[25] The precise extent of the perceived movement was thus impossible for subjects to determine objectively.[26]

In one variation of the experiment, a subject gave individual assessments and was subsequently put in a room with a confederate, whose opinion intentionally varied from the subject's.[27] As expected, the subject's assessments quickly came into line with the confederate's or (when the subject was placed in a group) with the group's.[28] Thus, Sherif found that questions with ambiguous answers tended to produce more conformity, because people were understandably less certain of their original assessments.

The Asch and Sherif studies offer compelling evidence—also supported by more recent experiments—that a group member's opinion

20. *Id.* at 35.

21. PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL 263 (2007). Some subjects always went along with the wrong answer, while other subjects never chose the wrong answer. Still others chose the wrong answer occasionally. Overall, though, the "wrong" answer was given thirty-five percent of the time. Asch, *supra* note 10, at 33, 35.

22. Asch, *supra* note 10, at 35.

23. *Id.* at 34-35.

24. MUZAFER SHERIF, THE PSYCHOLOGY OF SOCIAL NORMS 95-96 (1973).

25. *Id.* at 91-92.

26. *Id.* at 92.

27. *Id.* at 93.

28. *Id.* at 100-08; *see also* Muzafer Sherif, *A Study of Some Social Factors in Perception*, *in* 27 ARCHIVES OF PSYCHOLOGY 5, 32-41 (R.S. Woodworth ed., 1935).

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is easily affected by the group's overall judgment.[29] Critically, the studies also reveal that this effect varies considerably, depending on situational variables, such as the level of ambiguity in the assigned task, the number of people in the group, the status of the person in the group (e.g., high status people feel more comfortable offering a contrasting view), and the existence of dissenters.[30] The situation, in short, has a powerful effect on human behavior.

B. *Foundational Studies on Obedience*

Not long after Asch's provocative study, Stanley Milgram focused on a different but related question: When will people follow the unethical or immoral orders of an authority figure?[31]

The answer turned out to be both surprising and alarming. Milgram found that, under the right conditions, an experimenter could successfully order more than sixty percent of people to administer painful and dangerous electric shocks to an innocent, bound older man with a heart condition, despite the man's repeated pleas to be let go.[32]

These results came out of Milgram's brilliantly staged and oft-cited experiment. It typically[33] began with a subject and a secret accomplice of the experimenter drawing lots to determine who would be a "teacher" and who would be a "learner" in a study that the subject believed to be about the learning process.[34] In fact, the experiment had nothing to do with learning theory, and the drawing was "rigged so that the subject was always the teacher and the accomplice always the learner."[35]

The teacher (the subject) and the learner (the accomplice) were then taken to another room where the teacher watched the experimenter connect electrical wires to the learner.[36] The experimenter explained that

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29. ROSS & NISBETT, *supra* note 3, at 33 (explaining that "studies [have] demonstrated again and again that arbitrarily constructed groups, even ones that hold no long-term power to reward conformity or punish dissent, can exert potent conformity pressures").

30. *Id.* at xiv (noting that "what has been demonstrated through a host of celebrated laboratory and field studies is that manipulations of the immediate social situation can overwhelm in importance the type of individual differences in personal traits or dispositions that people normally think of as being determinative of social behavior").

31. For a discussion of the differences between conformity and obedience, see *infra* Part III.

32. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 55-57, 60 (1974).

33. Milgram conducted many versions of this experiment, but the variation described here is among the most commonly described.

34. MILGRAM, *supra* note 32, at 18-19.

35. *Id.* at 19.

36. *Id.*

the teacher was soon going to have to ask the learner a series of questions and that, after each wrong answer, the teacher was going to have to administer an electric shock through the attached wires using a generator in another room.[37]

After the experimenter applied a gel that was supposed to help the electrical current flow to the learner without causing blistering or burning,[38] the learner (in one version of the study) informed the experimenter and the teacher that he had a heart condition.[39] The experimenter explained that, although the shocks might be painful, they would not be dangerous.[40] While in the teacher's presence, the experimenter then strapped the learner to a chair to ensure that he could not break free.[41] The teacher/subject was subsequently brought back to the original room and placed in front of the electric shock generator.[42]

The experimenter instructed the teacher to ask the learner questions through an intercom (the subject could not see the learner in this variation of the experiment) and to shock the learner for each wrong answer, starting with 15 volts.[43] With every additional wrong answer, the experimenter explained that the teacher had to increase the shock by one increment on the generator, with each increment producing an extra 15 volts of electricity.[44] The generator, which was clearly marked, went as high as 450 volts.[45] At 375 volts, the generator read: "Danger: Severe Shock," and between 435 and 450 volts, the generator's label simply indicated "XXX."[46]

Unbeknownst to the teacher, the learner was not actually attached to the generator and was instructed to provide numerous wrong answers through a nearby key pad.[47] Milgram's objective was to measure how long the teachers would continue to follow the experimenter's orders to apply the shocks.[48]

In the initial stages, nearly all of the subjects/teachers willingly applied the lowest level of shocks on the generator. But as the

37. *Id.* at 19-21.
38. *Id.* at 19.
39. *Id.* at 55-57.
40. *Id.* at 56.
41. *Id.* at 19.
42. *Id.* at 3.
43. *Id.* at 20-21, 28.
44. *Id.* at 20-21.
45. *Id.* at 28.
46. *Id.*
47. *Id.* at 19-20, 22.
48. *Id.* at 23-24, 26.

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experiment continued, the learner/confederate produced increasingly loud and forceful objections to the experiment, including (as time went on) requests to be let out of the experiment and complaints about heart pain.[49] Eventually, the learner refused to answer and became ominously silent.[50] The subject, of course, had no idea that these objections and protests were pre-recorded and played at precise points during the experiment.

Despite the learner's pleas to be released, his complaints about heart pain, his refusals to answer, and his eventual silence, Milgram found that the majority of subjects complied with the experimenter's instructions fully, including repeated applications of the 450 volt shock lever. A startling sixty-five percent of subjects obeyed the instructions to the bitter end in this scenario.[51]

Critically, Milgram, like Asch and Sherif before him, found that context was essential. Obedience varied a great deal depending on a number of situational factors, such as whether the learner was in the same room as the teacher,[52] whether the person issuing the orders was in the same room as the teacher,[53] whether subjects assisted a confederate with the shocks instead of administering the shocks themselves,[54] and whether someone dissented (such as when the experiment occurred in a group setting).[55]

Milgram's findings have been replicated throughout the world, with similar results in both genders, different socioeconomic groups, and different countries.[56] Moreover, because of new ethics guidelines that make Milgram's work difficult to reproduce today,[57] his work still stands as one of the most significant contributions to our understanding of human obedience to authority. We know from his work that, given the

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49. *Id.* at 22-23, 56-57.
50. *Id.* at 23.
51. *Id.* at 60. In fact, compliance levels varied and were even higher in other versions of the experiment. *Id.* at 35, 60-61, 119.
52. *Id.* at 34-36.
53. *Id.* at 59-60, 62.
54. *Id.* at 119, 121-22.
55. *Id.* at 118-21.
56. *Id.* at 5, 170 (socioeconomic groups), 62-63 (gender), 170-71 (international replications).
57. SHELLEY E. TAYLOR ET AL., SOCIAL PSYCHOLOGY 228 (11th ed. 2003). There are also other reasons to expect that a similar experiment could not be fully replicated today, including the increasing sophistication of subjects and the expense of such work. *See* David J. Luban, *Milgram Revisited*, 9 RESEARCHING L. (Am. B. Found., Chi., Ill.), Spring 1998, at 1, 6. Nevertheless, a partial replication was recently conducted and produced results very similar to Milgram's. Jerry Burger, *Replicating Milgram*, APS OBSERVER, Dec. 2007, *available at* http://www.psychologicalscience.org/observer/getArticle.cfm?id=2264.

right situation, most people will follow orders that they would ordinarily consider blatantly immoral.

C. *The Power of the Situation*

The basic point of these studies is not that people are social conformists, mindless followers of authority, or latent sadists. Indeed, the studies do not suggest that "people are disposed to obey authority figures unquestioningly."[58] Rather, the point is that "manipulations of the immediate social situation can overwhelm in importance the type of individual differences in personal traits or dispositions that people normally think of as being determinative of social behavior."[59] As a result, "subtle features of . . . [the] situation . . . prompt[] ordinary members of our society to behave . . . extraordinarily."[60]

The importance of context is clear. Asch's studies showed that a single variable, such as reducing the number of people in the group or introducing a dissenting group member, could dramatically reduce conformity levels.[61] Milgram also found that the existence of a dissenter could reduce obedience and that other factors, such as placing the experimenter outside of the room or moving the "learner" into the same room as the subject, produced a similar effect.[62] Social psychologists, in short, have found that conformity and obedience are heavily context-dependent and that social forces play a much greater role—and dispositional traits a much weaker role—in determining human behavior than most people assume.

III. SITUATIONAL CONFORMITY AND OBEDIENCE: IMPLICATIONS FOR LAWYER BEHAVIOR

Conformity and obedience are different in subtle but important ways. According to Milgram, "[o]bedience to authority occurs within a hierarchical structure in which the actor feels that the person above has the right to prescribe behavior. Conformity regulates the behavior among those of equal status . . . ."[63] So, for example, the discovery hypothetical primarily implicates issues of obedience, because a superior is issuing an

58. ROSS & NISBETT, *supra* note 3, at 58.
59. *Id.* at xiv.
60. *Id.* at 56.
61. *See supra* notes 10-30 and accompanying text.
62. MILGRAM, *supra* note 32, at 34-36, 59-60, 62.
63. *Id.* at 114.

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order to a subordinate. The hypothetical would implicate conformity if the young lawyer saw her colleagues at the firm concealing "smoking guns" and consequently followed their lead without being instructed to do so. Despite the differences in the two concepts, both of them can exist in many law practice settings.

A. *Situational Factors that Produce Conformity in Law Practice*

Recall that numerous factors contribute to conformity, including the size of the group, the level of unanimity, the ambiguity of the issues involved, group cohesiveness, the strength of an individual's commitment to the group, the person's status in the group, and basic individual tendencies, such as the desire to be right and to be liked.[64]

Many of these factors frequently exist in law practice.[65] For instance, lawyers often have to tackle problems that contain many ambiguities of law and fact. Even questions that, at first, seem to have well-settled answers are often susceptible to an analysis that can make the answers seem unclear. Indeed, law students are trained to perform this particular art of legal jiu jitsu.[66]

Given the uncertainty of many legal answers and lawyers' expertise in identifying (or manufacturing) those uncertainties, lawyers are especially susceptible to the forces of conformity. For example, the subordinate in the initial discovery hypothetical may review the discovery rules and find language that could theoretically (though implausibly) support the partner's position, particularly if she perceives that other lawyers at the firm are engaging in similar behavior.[67] Thus, despite her initial belief about the document's discoverability, she might begin to believe that her original view was either a product of inexperience or a failure to appreciate fully all of the nuances about how discovery works in practice.[68] She might consequently come to think that

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64. *See supra* notes 22-30 and accompanying text.

65. Obviously, law practice occurs in a wide range of environments, and each setting produces its own constraints and social forces that profoundly influence attorney behavior. *See generally* Andrew M. Perlman, *A Career Choice Critique of Legal Ethics Theory*, 31 SETON HALL L. REV. 829 (2001). Thus, the analysis offered here is not universally applicable.

66. *See, e.g.*, Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 595-96 (1982).

67. Again, obedience and conformity are related, but distinct, forces. Technically, conformity is an effect that occurs in groups, whereas the original hypothetical primarily concerns obedience. *See supra* note 63 and accompanying text.

68. One recent study suggests that the social forces that produce conformity actually affect one's subjective perception of a situation and do not simply push someone to conform for the sake

her initial view was wrong, even though it was quite clearly right. And if the document's discoverability fell into an area that was even slightly grey instead of black and white, the tendency to conform would be even greater.[69]

The hierarchical structure of lawyering also makes conformity more likely. Studies suggest that strong conformity forces exist even in "arbitrarily constructed groups . . . that hold no long-term power to reward conformity or punish dissent."[70] Lawyers, however, work in groups that are *not* arbitrarily constructed and actually *do* hold long-term power to reward conformity or punish dissent. Attorneys typically work in settings where other group members, such as senior partners or corporate executives (e.g., in-house counsel jobs), control the professional fates of subordinates, a condition that increases the likelihood of conformity.[71] So, for example, the young lawyer in the initial hypothetical would feel a powerful, though perhaps unconscious, urge to conform, especially given that she had trouble finding a job and faced significant financial burdens.

Social status also affects conformity. There is evidence that people with more social prestige feel more comfortable deviating from the prevailing opinion.[72] By contrast, a person with a lower status, such as the junior law firm associate in the hypothetical, will be more likely to conform to protect her more vulnerable position.

Unanimity also encourages conformity, and unanimity is common among lawyers who are working together on the same legal matter. Studies have shown that zealous advocacy tends to make lawyers believe that the objectively "correct" answer to a legal problem is the one that just so happens to benefit the client.[73] This tendency causes teams of

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of fitting in with the group. Gregory S. Berns et al., *Neurobiological Correlates of Social Conformity and Independence During Mental Rotation*, 58 BIOLOGICAL PSYCHIATRY 245, 251 (2005). For a useful summary of the experiment, see ZIMBARDO, *supra* note 21, at 264-65. The study implies that the associate may truly believe that the partner is right and will not consciously recognize that she is engaging in an act of conformity.

69. *See, e.g.*, Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054 (Wash. 1993).

70. ROSS & NISBETT, *supra* note 3, at 33.

71. *See* Perlman, *supra* note 65, at 834-39; *see also* Kim, *supra* note 6, at 1005-06, 1008 (describing the particularly strong social forces that act on in-house counsel).

72. *See, e.g.*, Cass R. Sunstein, *Conformity and Dissent* 12 (Univ. of Chi. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 34, 2002), *available at* http://www.law.uchicago.edu/academics/publiclaw/resources/34.crs.conformity.pdf; *see also* Sherif, *supra* note 28, at 42.

73. *See, e.g.*, Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry Into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 95-111 (1993).

lawyers to agree on many issues, making it even more difficult for dissenting voices to be heard. So in the discovery example, the absence of a dissenting voice would make the subordinate more likely to assume that her initial position was incorrect or, at the very least, not worth pursuing.

The point here is not that lawyers will always conform to the views of superiors or colleagues. Plenty of lawyers express their own beliefs, even under very difficult circumstances.[74] The claim is that powerful social forces exist in many law practice settings that make conformity more likely than most people would expect.

B. *Situational Factors that Produce Obedience in Law Practice*

Law practice also tends to produce excessive obedience. To understand why this happens, consider just a few of the key variables that affected obedience in Milgram's experiments: (1) the existence of a plausible legitimate reason for the wrongful conduct (in Milgram's experiment, it was to study the learning process); (2) the use of positive language to describe the negative behavior (e.g., the shocks help the person to learn); (3) the presentation of rules that, on their face, seem benign (e.g., hit the lever when the learner gives a wrong answer); (4) the creation of some kind of verbal or contractual obligation to help (e.g., the experimenter asked participants to agree to follow certain procedures before starting the experiment); (5) the assignment of specific roles (e.g., teacher/learner); (6) the physical separation of the person carrying out the orders and the victim (e.g., the learner being in an adjoining room); (7) the close proximity of the person issuing the orders and the person following them (e.g., the experimenter being in the same room as the subject); (8) the blurring of responsibility or the assignment of responsibility to someone else (e.g., when a subject asked the experimenter who was responsible for the fate of the bound man, the experimenter told the subject that the experimenter, not the subject, was

74. *See, e.g.*, Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190, 1192-93 (2d Cir. 1974) (describing a junior associate who resigned from his job and reported his firm's misconduct to the Securities and Exchange Commission); Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, NEW YORKER, Feb. 27, 2006, at 32, 32 (describing Alberto Mora's defiance of his superiors in an attempt to stop the torture of detainees at the Guantanamo Bay prison); Douglas McCollam, *The Trials of Jesselyn Radack*, AM. LAW., July 1, 2003, at 19-21 (describing Jesselyn Radack's defiance of superiors in the Justice Department regarding the Department's tactics in questioning John Walker Lindh, the so-called American Taliban).

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responsible); (9) the incremental nature of the experiment (e.g., starting with only fifteen volts and increasing the shocks by small increments); (10) the social prestige of the setting (e.g., Milgram's initial experiment occurred in a laboratory at Yale University);[75] and (11) the elimination of dissent (e.g., Milgram found that, when the experiment was done in groups, the presence of a dissenter dramatically reduced obedience).[76]

Many of these factors exist in law practice. First, lawyers can usually frame unethical or illegal requests in ways that fit the first and second factors. For example, the partner who requested the withholding of the smoking gun document could articulate a legitimate reason for the request, such as "it's not within the scope of discovery" or "it's arguably privileged," even though neither statement is objectively accurate. The partner could also explain that withholding the document will produce the salutary effect of promoting zealous advocacy and advancing the client's cause. In these ways, the authority figure—in this case, a partner—could give the subordinate a seemingly plausible explanation for refusing to disclose the document and argue that it promotes a positive outcome (factors one and two respectively).

The partner could also frame the instruction as part of litigation's unwritten "rules of the game" (factor three).[77] In this way, the demand appears entirely benign. Moreover, the consequences may also appear inconsequential. Unlike Milgram's experiments, where obedience resulted in painful electric shocks to a man with a heart condition,

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75. Obedience levels dropped when Milgram moved the experiment to a rundown office building unaffiliated with Yale. MILGRAM, *supra* note 32, at 66-70 (noting a reduction in obedience from sixty-five percent to forty-eight percent when the study was moved from Yale to a rundown office building that had no apparent ties to the University). Although Milgram's particular results were not statistically significant, subsequent studies reveal that the status of the authority figure is a factor that influences obedience. ZIMBARDO, *supra* note 21, at 275-76.

76. Social psychologists have offered many explanations for Milgram's results, but the explanations described here are some of the most common. *See* ZIMBARDO, *supra* note 21, at 273-75. For a slightly different list, see Philip G. Zimbardo, *A Situationist Perspective on the Psychology of Evil: Understanding How Good People Are Transformed into Perpetrators*, *in* THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL 21, 27-28 (Arthur G. Miller ed., 2004).

77. *See, e.g.*, Wash. State Physicians Ins. Exch. & Assoc. v. Fisons Corp., 858 P.2d 1054, 1074-85 (Wash. 1993) (remanding the case for the imposition of sanctions on attorneys who had abused the judicial process by failing to disclose a smoking gun document in discovery); *see also* Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631, 718-19, 724 (2005) (concluding from her study of large law firm litigators that they frequently "view zealous advocacy as an affirmative moral obligation" and view the ideal of litigation as "a game well-played").

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compliance in many (but not all)[78] lawyering contexts produces far less dire consequences. For instance, in the discovery example, the lawyer is "merely" withholding a document as part of the discovery "game" that all lawyers play,[79] not causing somebody physical pain or risking someone's life. The seemingly benign nature of the request can enhance the subordinate's willingness to obey.

This factor is likely to have more weight if the subordinate has little litigation experience and does not have the necessary expertise to question the partner's authority. In contrast, if the subordinate has handled numerous document productions and has a strong experiential basis to know that the partner's request is impermissible, the subordinate is less likely to give the partner's demand a benign gloss. Of course, even when it is absolutely clear that the partner's behavior is unethical or illegal, the subordinate may still comply if some of the other factors favoring obedience are present.[80]

Factors four (an agreement to help the authority figure) and five (the presence of assigned roles) also frequently exist in law practice. The lawyer-client relationship itself is essentially an agreement to help clients achieve their goals (factor four). When combined with the common perception that a lawyer's morality is distinct from individual morality (i.e., role differentiation),[81] lawyers are more apt to view

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78. *See, e.g.*, Balla v. Gambro, 584 N.E.2d 104, 107 (Ill. 1991) (describing the firing of an in-house counsel after he warned the company's president that one of the company's products could cause "death or serious bodily harm to patients").

79. Discovery is a "game" in both an academic and layman's sense. From an academic perspective, discovery has an interesting game theory dimension. For a very nice discussion of game theory's implications for discovery in the context of a subordinate lawyer, see David McGowan, *Politics, Office Politics, and Legal Ethics: A Case Study in the Strategy of Judgment*, 20 GEO. J. LEGAL ETHICS 1057, 1071-75 (2007). But discovery is also a game in the more ordinary sense of the word. Namely, lawyers frequently think of the process not so much as a method for discovering the truth, but as a game that needs to be won. *See generally* Robert L. Nelson, Essay, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 FORDHAM L. REV. 773, 794-95 (1998).

80. For a recent real world illustration of this effect, see Qualcomm Inc. v. Broadcom Corp., No. 05cv1958-B, 2008 WL 66932, at *13 n.10 (S.D. Cal. Jan. 7, 2008); *see also* REGAN, *supra* note 6, at 4-6, 294, 323-24 (emphasizing the role that social context played in a lawyer's failure to disclose pertinent information); Lawrence J. Fox, *I'm Just an Associate . . . At a New York Firm*, 69 FORDHAM L. REV. 939 (2000) (offering a realistic account of a subordinate who is asked to bury discovery documents); Luban, *supra* note 6, at 95-96 (describing a subordinate's complicity with a partner's obvious perjury to a federal judge).

81. DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 104-47 (1988) (describing and criticizing this view); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 3-4 (1975) (same).

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arguably legal conduct as part of their job as an advocate (factor five). Thus, subordinates, such as the associate in the discovery example, will view the authority's instructions as part of the agreement to help the client, with the mindset of role-differentiation only adding to the belief that any moral consequences are not the subordinate's primary concern.[82]

The effect that role has on judgment is nicely illustrated by a study involving 139 auditors at major accounting firms. The auditors were given hypothetical accounting scenarios and asked to assess the accounting in each situation.[83] Roughly half of the accountants were asked to assume that they were retained by the firm that they were auditing, while the rest were supposed to assume that they had been hired by an outside investor who was considering making an investment in the company.[84] On average, the auditors were significantly more likely to find that the company's financial reports complied with generally accepted accounting standards when they played the role of the company's accountant than when they played the role of the investor's accountant.[85] Their assigned roles, in other words, heavily influenced their perspectives.

Another factor that contributes to obedience is that attorney misbehavior will typically affect victims who are more remote in time and place than the victims in Milgram's experiments (factor six). For example, the failure to produce a smoking gun document will affect an adverse party, but in a much more indirect way than the application of an electric shock. Similarly, assisting a company's financial fraud (e.g., the Enron scandal) will primarily harm shareholders and lower level employees, people with whom lawyers have little contact.[86] Because a

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82. *See generally* ZIMBARDO, *supra* note 21 (describing his well-known Stanford Prison Experiments, in which he demonstrated the substantial impact that social role has on behavior); *see also* Kim, *supra* note 6, at 1012 (making a similar point); David Luban, *Integrity: Its Causes and Cures*, 72 FORDHAM L. REV. 279, 292-93 (2003) (reviewing the social psychology literature, including Professor Zimbardo's work, that highlights the extent to which role influences behavior).

83. *Id.* at 1009-10 (citing Don A. Moore et al., *Conflict of Interest and the Unconscious Intrusion of Bias* (Harv. Bus. Sch. Negotiations, Orgs. & Mkts. Unit, Working Paper No. 02-40, 2002)).

84. *Id.* at 1009.

85. *Id.* at 1009-10; *see also* ROSS & NISBETT, *supra* note 3, at 72-75 (describing partisans' inability to view a given situation objectively); Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337, 1339-42 (1995) (finding that lawyers' assessment of the value of a case varies dramatically depending on which side they are assigned to represent); Langevoort, *supra* note 73, at 95-111.

86. Kim, *supra* note 6, at 1033 (making this point in the context of securities fraud).

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lawyer will perceive these harms to be less immediate and proximate than someone suffering painful electric shocks in an adjoining room, this factor favors obedience in the lawyering context even more strongly than what Milgram found in many of his experiments.

Not only will the victims of legal misconduct be relatively remote, but the person issuing the orders will be nearby. Milgram found that obedience increased when the authority figure and the subordinate were in the same room and decreased when the experimenter issued orders using a tape recorder or from another location.[87] For lawyers, the authority figure who issues the instruction will typically be a colleague or a client with whom the subordinate has a great deal of contact and who may exercise considerable power regarding the subordinate's future at the firm, thus further adding to the likelihood of obedience (factor seven).[88]

Subordinates may also discount their responsibility for their conduct (factor eight) by shifting moral responsibility to the person issuing the orders. Indeed, when Milgram's subjects asked who was responsible for what happened in the laboratory, the experimenter said that he (the experimenter) was ultimately responsible for any harm to the learner.[89] This shifting of responsibility is especially likely in the legal ethics context, where Model Rule 5.2(b) states that "[a] subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."[90] Given the ambiguity of so many legal and ethical duties, subordinates will frequently find that a supervisory lawyer's instructions reflect a "reasonable resolution of an arguable question of professional duty."[91] Thus, subordinate lawyers are likely to believe that responsibility for their actions ultimately lies with superiors.

Another significant factor that contributed to obedience in Milgram's subjects was the incremental nature of the experiment (factor nine).[92] Each new shock was only modestly larger than the last, making it difficult for subjects to distinguish morally what they were about to do from what they had already done.[93] This phenomenon of justifying past

87. MILGRAM, *supra* note 32, at 59-62.
88. Kim, *supra* note 6, at 1003-04, 1011 (making a similar observation).
89. MILGRAM, *supra* note 32, at 7-8.
90. MODEL RULES OF PROF'L CONDUCT R. 5.2(b) (2007).
91. *See* Luban, *supra* note 57, at 5 (making a similar point).
92. MILGRAM, *supra* note 32, at 20-21.
93. *Id.* at 149; *see also* Luban, *supra* note 57, at 8.

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actions in a way that makes conduct of a similar type in the future seem ethical is known as cognitive dissonance.[94] In Milgram's experiment, it meant that obedience was more likely at higher voltages because subjects had already complied with shocks at lower voltages.[95]

In one of the few articles to describe in detail the implications of Milgram's work for legal ethics, Professor David Luban contends that the incremental nature of the experiment offers the best explanation for the obedience that Milgram observed.[96] Luban explains that "[b]y luring us into higher and higher level shocks, one micro-step at a time, the Milgram experiments gradually and subtly disarm our ability to distinguish right from wrong."[97]

Professor Luban is clearly right that obedience in Milgram's experiments occurred, in part, because the experimenter made seemingly benign initial requests followed by gradually larger requests for punishment.[98] Nevertheless, the incremental nature of the experiment probably did not play the decisive role that Luban suggests. Although each step up on the shock generator was only fifteen volts, subjects did not experience each step in precisely the same way. In fact, some of the shocks were meaningfully different from the shocks that had come before. For example, the learner eventually requested to be let go at 150 volts, making any additional shocks quite different in effect. Indeed, when subjects resisted Milgram's commands, more did so at this point in the experiment than at any other time.[99] Moreover, the learner's complaints about heart pain and his subsequent ominous silence made additional shocks clearly distinguishable from the shocks that the subjects had already administered. Thus, cognitive dissonance and the incremental nature of the experiment were important, but clearly not the only—or even the primary—factors.

In fact, Professor Luban offers an example that illustrates the limited explanatory force of increments. In the famous *Berkey-Kodak*

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94. Luban, *supra* note 57, at 8.

95. MILGRAM, *supra* note 32, at 149.

96. Luban, *supra* note 6, at 103.

97. *Id.* Professor Luban also pointed out how this force can affect law practice, such as in the discovery context. He explained that an initial attempt to avoid producing a document can lead to more and increasingly problematic attempts to resist the production of relevant information, leading ultimately to the type of situation described in the initial hypothetical. *Id.* at 106.

98. MILGRAM, *supra* note 32, at 20-21.

99. *Id.* at 35-37 (noting that in this version of the experiment, five of the fifteen people who disobeyed the experimenter did so at 150 volts, the point at which the "learner" demanded to be let go); *see also* DORIS, *supra* note 7, at 50 (making a similar observation).

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case, an associate failed to report the blatant lying of a respected senior colleague.[100] Luban contends that the associate's obedience reflected the kind of incremental "corruption-of-judgment" that produced obedience in Milgram's experiments.[101] Namely, the associate's loyalty to his lying superior was the "end of a slippery slope, beginning with lawful adversarial deception and culminating with lies, perjury, and wrongful obedience."[102]

The problem is that, even if a contentious discovery process had preceded the lying, there is quite a leap from engaging in contentious discovery to helping a partner lie to a federal judge. The *Berkey-Kodak* case, according to Professor Luban's own account, involves a large jump on the legal ethics equivalent of the shock generator from a small shock to a potentially lethal one. Such a jump is not consistent with Luban's contention that subordinates follow orders as a result of a gradual corruption of judgment. Of course, increments play a role in excessive obedience, but such obedience can readily occur in cases like *Berkey-Kodak* without increments, assuming other forces are present.[103]

Social prestige (factor ten) is another of those forces.[104] Many law firms, especially larger firms, are held in high esteem among lawyers. These firms are thus likely to produce the same social forces that Yale University produced in Milgram's subjects.[105] Moreover, smaller firms

100. Luban, *supra* note 57, at 4.

101. *Id.* at 9.

102. *Id.*

103. Professor Luban also argues that "[t]he Achilles' heel of situationism is explaining why anyone deviates from the majority behavior." Luban, *supra* note 6, at 101; Luban, *supra* note 82, at 295-96 (making a similar point). In fact, this Achilles' heel can only be found on a straw man version of situationism. Situationists do not claim that context fully explains all human behavior or that everyone will act the same way in the same situation. DORIS, *supra* note 7, at 25 (asserting that neither he nor any situationist he knows of maintains that "correlations between measurable dimensions of situations and single behaviors typically approach 1.0"); *id.* at 46 (acknowledging that dispositional differences provide a partial explanation for why some people did not comply with the experimenter's commands in Milgram's experiments). Rather, situationists make more modest claims, such as that dispositional traits are far less important than most people realize and that context is a much more significant determinant of human behavior than people typically believe. *Id.* at 24-25.

104. MILGRAM, *supra* note 32, at 66-70 (noting a reduction in obedience from sixty-five percent to forty-eight percent when the study was moved from Yale to a rundown office building that had no apparent ties to the University). *But see supra* note 75.

105. MILGRAM, *supra* note 32, at 66-70.

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can also produce the same effect, especially if the superior is an experienced and respected partner.[106]

Finally, the partner in the example is the only person to offer an opinion, so the subordinate has not heard any dissent regarding the partner's interpretation. The absence of dissent (factor eleven) is yet another force that favors obedience.[107]

In addition to the factors that contributed to obedience in Milgram's experiment, there is one factor that favors obedience in the lawyer situation that did not exist for Milgram: professional and financial self-interest.[108] In Milgram's experiments, subjects were told that they could keep the modest amount of money that they had been given, even if they refused to continue with the experiment.[109] Moreover, their professional fortunes were in no way affected by whether they complied. In contrast, a subordinate lawyer has a lot to lose by refusing to obey: a job. The subordinate's concern for her job, particularly a junior lawyer who may have had few other professional opportunities, is likely to be substantial. Thus, this factor also weighs heavily in favor of compliance and suggests that lawyers might be even more likely to comply than the subjects of Milgram's experiments.

There is, however, one factor that weighs against the hypothetical lawyer's compliance: obedience could lead to monetary sanctions or disbarment. If the lawyer believes that she faces a real chance of discipline, she arguably would be more likely to resist the partner's demands. The powerful concern for professional survival might trump the other social forces that favor obedience and conformity and make compliance *less* likely than in Milgram's experiments, where subjects had no equivalent incentive to dissent.

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106. Luban himself offers a nice description of this phenomenon in the context of the *Berkey-Kodak* case, see Luban, *supra* note 6, at 95-96, though he does not ultimately identify it as a force that could impact the associate's behavior independently of his corruption of judgment theory.

107. *See, e.g.*, Kim, *supra* note 6, at 1021 (making this point in the in-house counsel context); *see also* ROSS & NISBETT, *supra* note 3, at 41 (explaining why people who witness, or find themselves in, a potentially dangerous situation will fail to act if other people also fail to do so). There are, of course, many other forces that contribute to obedience that were not part of Milgram's experiment. For example, a superior can increase obedience by demeaning the intended victim. MILGRAM, *supra* note 32, at 9. Thus, the common tendency among lawyers to demonize an opponent or the opponent's lawyers makes it more likely that a subordinate will carry out an unethical command that adversely affects that opponent.

108. Kim, *supra* note 6, at 1027 (describing this self-serving bias).

109. *See* MILGRAM, *supra* note 32, at 14-15 (showing the newspaper announcement that was used to recruit subjects).

There are three problems with this view. First, it assumes that the subordinate will recognize that the partner's demands implicate her ethical duties. The reality is that, given the forces at work, she may easily begin to question her initial opinion and view the partner's opinion as, at the very least, justifiable.[110] This tendency to interpret the situation so that it does not implicate one's ethical or moral responsibility is sometimes called ethical fading.[111] Specifically, the actor reinterprets the situation in such a way that the ethical nature of the situation fades from view. If the subordinate does not even identify the ethics issue, the concern for professional survival cannot override the social forces favoring conformity and obedience.

Second, even if the subordinate recognizes the ethical dilemma, she is not likely to be terribly concerned about discipline. Rule 5.2 only imposes discipline if the superior's instructions were clearly unethical. So unless the instruction is blatantly impermissible, the subordinate is not likely to fear any disciplinary consequences.

Third, even if the instruction *is* blatantly unethical or illegal, a lawyer may still not fear discipline, at least in the discovery context. Bar discipline for this sort of misconduct occurs rarely, and sanctions are usually far below what would be necessary to discourage this sort of behavior.[112]

The case of *Washington State Physician Insurance Exchange & Associates v. Fisons Corp.* is illustrative.[113] The original plaintiff in that case was a child who had suffered seizures and permanent brain damage after taking medicine that Fisons manufactured.[114] The plaintiff's discovery requests called for all documents related to a particular

110. Luban, *supra* note 6, at 95-96 (describing this phenomenon in the context of the *Berkey-Kodak* case).

111. Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223, 224-25 (2004); *see also* Kim, *supra* note 6, at 1026-29 (citing additional studies that have reached a similar conclusion); Luban, *supra* note 82, at 280 (observing that "hundreds of experiments reveal that when our conduct clashes with our prior beliefs . . . our beliefs swing into conformity with our conduct, without our ever noticing").

112. *See* John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 572-73 (2000) (noting the general reluctance of courts to refer discovery violations to disciplinary authorities); Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 90 (1995) (citing COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 36 (1991)). It is too early to tell whether the recent sanctions for discovery abuses in the recent high profile case of *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B, 2008 WL 66932, at *13 n.10 (S.D. Cal. Jan. 7, 2008), will have any impact on lawyers' behavior.

113. 858 P.2d 1054 (Wash. 1993).

114. *Id.* at 1058.

ingredient in the medicine and any information that Fisons had about that ingredient's dangerousness in children.[115] Despite these requests, the defense lawyers relied on a contorted and frivolous rationale for not turning over documents that proved that Fisons knew about the ingredient's toxicity in children.[116]

After an anonymous copy of the smoking gun emerged, the trial court considered and rejected any sanctions against the company or its lawyers.[117] The trial court relied heavily on the notion that "the conduct of the drug company and its counsel was consistent with the customary and accepted litigation practices of the bar of [the county] and of [Washington] state."[118] The Washington Supreme Court reversed that determination,[119] but the ultimate sanction for the lawyers was an out-of-court settlement of a mere $325,000,[120] a small fraction of the fees that the firm had generated from the case. Put simply, the defense lawyers received a slap on the wrist for a rather blatant discovery violation that was similar to the one in the initial hypothetical.

Finally, the risks of sanctions and discipline are no higher (and may be lower) than the risks associated with making the report. Many lawyers in this circumstance would be concerned not only about losing their current jobs, but about whether a report of this sort might make it difficult to get jobs in the future once they were labeled as whistleblowers.

To summarize, the hypothetical associate faces considerable pressures to conform and obey and few risks from compliance and obedience. Even if the misconduct is uncovered, a risk that may be rather small, she is unlikely to face any punishment that will adversely affect her career. The ultimate and disturbing result is that she is prone to obey the partner who has issued the unethical and illegal command.

IV. IMPLICATIONS FOR THE LAW OF LAWYERING

The challenge for legal ethicists is to counter the social forces that contribute to excessive conformity and obedience. In one of the few efforts to address that challenge, Professor Luban has suggested that, by educating lawyers about their own tendencies to obey authorities, they

115. *Id.* at 1080-83.
116. *Id.* at 1079-84.
117. *Id.* at 1074-75.
118. *Id.* at 1078.
119. *Id.* at 1085.
120. Stuart Taylor, Jr., *Sleazy in Seattle*, AM. LAW., Apr. 1994, at 5, 5.

might be better able to resist an order to commit illegal or unethical conduct.[121] Unfortunately, there is little evidence that this so-called "enlightenment effect" holds much promise, at least in this particular context.[122]

There are some steps, however, that might make a difference in some cases. Rather than offering an exhaustive list of potential remedies, the following proposals are illustrations of how social psychology could play a more active role in debates about professional regulation.[123]

A. *Providing Whistleblower Protections for Attorneys*

Currently, some states do not offer whistleblower protections for lawyers.[124] In those jurisdictions, lawyers who are fired after disclosing illegal conduct have no legal recourse against their employers. This lack of whistleblower protection is unwise, given that it reinforces the already strong social forces that weigh against defiance in such circumstances.[125]

The problem is amply illustrated by the well-known Illinois case, *Balla v. Gambro, Inc.*,[126] in which Gambro's general counsel, Mr. Balla, learned that his company was selling dialyzers for dialysis machines that were not within federal specifications and that could cause potentially serious medical complications.[127] After Balla unsuccessfully urged

121. Luban, *supra* note 6, at 116 ("Perhaps the best protection [for lawyers against the forces described in Milgram's experiments] is understanding the . . . insidious way [those forces] work on us."); *see also* Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 47 (1992) (suggesting that exposure to Milgram's work might help law students avoid unethical behavior).

122. Thomas Blass, *The Milgram Paradigm After 35 Years: Some Things We Now Know About Obedience to Authority*, *in* OBEDIENCE TO AUTHORITY: CURRENT PERSPECTIVES ON THE MILGRAM PARADIGM 35, 50-53 (Thomas Blass ed., 2000) (drawing on several studies and concluding that "[b]eing enlightened about the unexpected power of authority may help a person stay away from an authority-dominated situation, but once he or she is *already* in such a situation, knowledge of the drastic degree of obedience authorities are capable of eliciting does not necessarily help free the individual from the grip of the forces operating in that concrete situation"). Despite this lack of evidence, I share Professor Luban's intuition that enlightening lawyers about this tendency is worthwhile. I show my students a video of the Milgram experiments on the last day of class in the hope that it might make some difference at some point in their professional lives.

123. For an excellent analysis of social psychology's implications for the regulation of lawyers who represent publicly traded companies, see Kim, *supra* note 6, at 1034-75.

124. *See, e.g.*, Balla v. Gambro, Inc., 584 N.E.2d 104, 107 (Ill. 1991).

125. Kim, *supra* note 6, at 1042-44, 1064-71 (arguing that securities lawyers should receive whistleblower protection under the Sarbanes-Oxley Act for reasons similar to those described here); Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 BRANDEIS L.J. 199, 257 (2007) (arguing in favor of whistleblower protection for lawyers).

126. *Balla*, 584 N.E.2d at 104.

127. *Id.* at 106.

Gambro not to put the dialyzers on the market, Gambro fired Balla.[128] Balla subsequently revealed the defects to the Federal Food and Drug Administration and sued for retaliatory discharge under the state's whistleblower statute.[129]

The Illinois Supreme Court rejected Balla's claim, explaining that whistleblower statutes exist to protect employees who might otherwise be reluctant to report corporate malfeasance.[130] The court's primary rationale was that, since lawyers in Illinois already had an ethical obligation to report misconduct like the selling of the defective dialyzers, Mr. Balla did not need whistleblower protection.[131]

On its face, the Illinois Supreme Court's logic is sound. If the whistleblower statute is unclear regarding its application to lawyers and if the purpose of the statute would not be furthered by applying it to attorneys, Balla should not receive protection.

The problem is that the court's opinion rested on a flawed assumption about human behavior. Social psychology suggests that lawyers in Balla's situation would find it difficult to disclose information of the sort described in the opinion, especially without whistleblower protection. First, lawyers like Balla are unlikely to put much stock in the ethical obligation that the court referenced. The rule is ambiguous, and the various forces described earlier can lead a lawyer to interpret the rule as not requiring disclosure. Moreover, there are very few instances where lawyers have been disciplined for failing to disclose information under similar circumstances. Thus, any fear of discipline would be overshadowed by what the lawyer had to lose (i.e., a job) by reporting the misconduct and by other situational forces, such as Balla's distance from the prospective victims, his proximity to his bosses, the hierarchical structure of a corporation, and the presumptive absence of dissent.

Balla's refusal to comply given these variables was notable (and one of the reasons the case is so widely reported), but there is no reason to think that his response was typical. Given similar circumstances, lawyers will face considerable pressure to conceal a client's harmful conduct and to develop legal justifications for that concealment. The reality, in other words, is that lawyers—like most people—face significant social pressures that make it difficult to resist a client's

128. *Id.*
129. *Id.*
130. *Id.* at 108.
131. *Id.* at 108-09.

insistence on harmful and potentially illicit courses of conduct, even if a duty to report exists. Justice Freeman, in his dissent, stated this point convincingly:

> [T]o say that the categorical nature of ethical obligations is sufficient to ensure that the ethical obligations will be satisfied simply ignores reality. Specifically, it ignores that, as unfortunate for society as it may be, attorneys are no less human than nonattorneys and, thus, no less given to the temptation to either ignore or rationalize away their ethical obligations when complying therewith may render them unable to feed and support their families.
>
> I would like to believe, as my colleagues apparently conclude, that attorneys will always "do the right thing" because the law says that they must. However, my knowledge of human nature, which is not much greater than the average layman's, and, sadly, the recent scandals involving the bench and bar of Illinois are more than sufficient to dispel such a belief. Just as the ethical obligations of the lawyers and judges involved in those scandals were inadequate to ensure that they would not break the law, I am afraid that the lawyer's ethical obligation to "blow the whistle" is likewise an inadequate safeguard for the public policy of protecting lives and property of Illinois citizens.
>
> As reluctant as I am to concede it, the fact is that this court must take whatever steps it can, within the bounds of the law, to give lawyers incentives to abide by their ethical obligations, beyond the satisfaction inherent in their doing so. We cannot continue to delude ourselves and the people of the State of Illinois that attorneys' ethical duties, alone, are always sufficient to guarantee that lawyers will "do the right thing." In the context of this case, where doing "the right thing" will often result in termination by an employer bent on doing the "wrong thing," I believe that the incentive needed is recognition of a cause of action for retaliatory discharge, in the appropriate case.[132]

Justice Freeman got it exactly right. The court should have acknowledged how human beings are likely to behave, discounted the ethical obligation to disclose, and affirmed the value of whistleblower protection. Of course, the existence of whistleblower protection will not ensure that all lawyers reveal information about a client's illicit actions, but such protection could make a difference in some cases by weakening the significant psychological forces that weigh against such disclosures.

132. *Id.* at 113 (Freeman, J., dissenting).

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B. *Enforcing the Duty to Report Misconduct*

Most states impose on attorneys a duty to report another lawyer's misconduct if the misconduct implicates the lawyer's trustworthiness, honesty, or fitness to practice law.[133]

The problem with the rule is that most lawyers, especially subordinates, are not eager to report the misconduct of other attorneys. For instance, the associate in the discovery example may find it difficult to report the partner, even if she were convinced that the partner had engaged in an intentional and egregious discovery violation that reflected on the partner's trustworthiness or honesty.[134] As Part III explained, the subordinate is likely to feel considerable pressure to obey the authority figure and to be complicit in the authority's misconduct. It would take an unusual subordinate to not only resist that temptation, but to take the next step of reporting the superior to the bar.[135]

Part of the problem is that Rule 8.3, like the disclosure duty in Illinois, is rarely enforced. The vast majority of states do not have a single reported case where a lawyer was disciplined under this rule.[136] As a result, lawyers are willing to run the very negligible risk of discipline in order to avoid having to report another attorney to the bar.

One potential solution is to increase enforcement of the rule so that lawyers perceive a greater threat to their own professional well-being if they fail to report the misconduct of other attorneys under Model Rule 8.3. Indeed, Illinois's experience with this rule suggests that modest increases in enforcement can have a discernable effect on reporting. After the Illinois Supreme Court issued an opinion that disciplined a lawyer under Rule 8.3,[137] Illinois's bar disciplinary authorities observed a substantial increase in Rule 8.3 reports.[138]

The increase in Illinois implies that the fear of discipline can prompt lawyers to report misconduct that they otherwise would have

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133. MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2007).

134. *See, e.g.*, Luban, *supra* note 6, at 95 (describing an associate's failure to report a partner's obvious perjury in a well-known case).

135. *See* Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190, 1192-93 (2d Cir. 1974) (describing the actions of a junior associate who resigned from his firm and reported the firm's misconduct to the Securities and Exchange Commission).

136. *See* Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 999 & n.134 (2002) (noting the lack of enforcement of this rule).

137. *In re* Himmel, 533 N.E.2d 790, 794-95 (Ill. 1988).

138. Leonard E. Gross, *Legal Ethics for the Future: Time to Clean Up Our Act?*, 77 ILL. B.J. 196, 198 n.26 (1988).

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swept under the rug.[139] Thus, increased enforcement of Rule 8.3 can also help to weaken the social forces that would ordinarily encourage lawyers, especially subordinate lawyers, to ignore perceived misconduct.

C. *Strengthening the Responsibilities of Subordinate Lawyers*

Another Model Rule that impacts the conduct of subordinate lawyers is, unsurprisingly, the rule written specifically for subordinate lawyers—Rule 5.2. That rule states that "[a] subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."[140] The rule essentially permits a lawyer to carry out a superior's orders as long as those orders constitute a reasonable interpretation of the relevant ethical obligation.

On its face, the rule makes sense. After all, why should a lawyer face discipline for following the arguably ethical and legal orders of a superior?

But as with the *Balla* decision, the rule rests on a questionable assumption about human behavior. By allowing a lawyer to avoid responsibility for "reasonable resolutions of an arguable question of professional duty," the rule opens the door to interpreting a wide range of instructions as "arguably" ethical. For example, the subordinate in the discovery example is likely to understand her ethical obligations through the distorted prism of what the partner wants, leading her to construe the discovery issue as "arguable" and the partner's resolution of it as "reasonable." This tendency, referred to earlier as ethical fading,[141] suggests that the typical subordinate attorney will conclude that Rule 5.2 applies and that she can carry out the partner's commands without fear of professional discipline.[142]

One possible solution is to repeal Rule 5.2(b) to make it clear that subordinates have an independent duty to assess whether a particular course of action is ethical and legal.[143] Of course, the "just following

139. Mary T. Robinson, *A Lawyer's Duty to Report Another Lawyer's Misconduct: The Illinois Experience*, 2007 Symp. Issue PROF. LAW. 47, 49-50 (observing an increase in reporting after *Himmel*); Patricia A. Sallen, *Combating* Himmel *Angst*, 2007 Symp. Issue PROF. LAW. 47, 49-50 (describing a similar phenomenon in Arizona).

140. MODEL RULES OF PROF'L CONDUCT R. 5.2(b) (2007).

141. *See supra* note 111 and accompanying text.

142. *See* Luban, *supra* note 57, at 5 (making a similar point).

143. *See* Carol M. Rice, *The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers*, 32 WAKE FOREST L. REV. 887, 931-34 (1997) (making a similar proposal). *But see* Richmond, *supra* note 125, at 213 (endorsing Rule 5.2(b)).

orders" defense could still be raised as a mitigating factor when determining the appropriate punishment.[144] But it should not allow a lawyer to avoid discipline entirely. Indeed, such a defense is generally rejected in most other contexts.[145] Moreover, by putting subordinates on notice that they have an independent duty to question a superior's orders, subordinates would be less likely to assume that a superior's actions are permissible and more likely to offer resistance to unethical or illegal commands.[146]

V. CONCLUSION

More than forty years of research into social psychology has revealed that, under certain conditions, we will conform to group opinions and obey authorities who issue illegal instructions. If a majority of people are willing to apply dangerous electric shocks to a bound older man with a heart condition just because someone with a lab coat says so, there is every reason to believe that lawyers will frequently obey their superiors when instructed to perform unethical or illegal tasks.

By drawing on a tiny fraction of social psychology research, this Article suggests some steps that the profession can take to weaken the social forces that produce excessive obedience and conformity. These suggestions, however, have important limitations, such as the problem of ethical fading.[147] Nevertheless, they hint at a much broader project, one that draws on the very rich literature in social psychology to address various causes of attorney misconduct.

144. *See* Rice, *supra* note 143, at 889 n.5, 912-14; *see also* Richmond, *supra* note 125, at 212.

145. *See* Rice, *supra* note 143, at 904-14.

146. Of course, this approach cannot counter the ethical fading phenomenon. A lawyer will only consider reporting another lawyer if she recognizes the ethical issue.

147. *See supra* note 111 and accompanying text.

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The Basics on Sarbanes-Oxley Regulations

Lawyers are subject to the regulations if they "appear[] and practice[e] before the Commission." This means:

(i) Transacting any business with the Commission, including communications in any form;

(ii) Representing an issuer in a Commission administrative proceeding or in connection with any Commission investigation, inquiry, information request, or subpoena;

(iii) Providing advice in respect of the United States securities laws or the Commission's rules or regulations thereunder regarding any document that the attorney has notice will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission, including the provision of such advice in the context of preparing, or participating in the preparation of, any such document; or

(iv) Advising an issuer as to whether information or a statement, opinion, or other writing is required under the United States securities laws or the Commission's rules or regulations thereunder to be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission...

17 C.F.R. §§ 205.2(a)

A lawyer has duties under the SEC regulations upon discovering "evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer." Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer ("Standards of Professional Conduct"), 17 C.F.R. §§ 205.1, 205.3(b) (2004).

"Evidence" of a material violation means "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. Standards of Professional Conduct, 17 C.F.R. § 205.2(e) (2004).

A "material" violation is one where there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *See, e.g., Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988).

The term "reasonably likely" means "more than a mere possibility, but it need not be 'more likely than not.'" Implementation, 68 Fed. Reg. 6296, 6302 (Feb. 6, 2003).

If the lawyer has evidence of a material violation, the lawyer must report "up-the-ladder" within the company, often to general counsel. Appropriate responses by the company include: (1) a finding after investigation that, in fact, no material violation exists; (2) the company is taking remedial measures; or (3) the company has been advised by an attorney that the company has a

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colorable defense to the conduct. If the company does not make an appropriate response, the lawyer must report to the company's audit committee. Although there was an initial proposal to the contrary, the SEC, so far, does not require the attorney to report to the SEC if the company fails to comply.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SHAWN VAN ASDALE; LENA VAN ASDALE, *Plaintiffs-Appellants,* v. INTERNATIONAL GAME TECHNOLOGY, *Defendant-Appellee,* v. BARRY F. IRVIN; KIRKLAND & ELLIS, *Third-party-defendant.*	No. 07-16597 D.C. No. CV-04-00703-RAM OPINION

Appeal from the United States District Court
for the District of Nevada
Robert A. McQuaid, Magistrate Judge, Presiding

Argued and Submitted
March 12, 2009—San Francisco, California

Filed August 13, 2009

Before: J. Clifford Wallace, Sidney R. Thomas, and
Jay S. Bybee, Circuit Judges.

Opinion by Judge Bybee

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COUNSEL

Margo Piscevich (argued), Mark J. Lenz, Piscevich & Fenner, Reno, Nevada, for the plaintiffs-appellants.

Richard G. Campbell Jr. (argued), Lance P. Maiss, Armstrong Teasdale LLP, Reno, Nevada, Gordon E. Krischer, Nathaniel L. Dilger, Mark W. Robertson, O'Melveny & Myers LLP, Los Angeles, California, for the defendant-appellee.

OPINION

BYBEE, Circuit Judge:

This case presents our first opportunity to examine the substantive requirements necessary to establish a claim under the whistleblower-protection provisions of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A. Plaintiffs Shawn and Lena Van Asdale appeal from the district court's summary judgment in favor of their former employer, International Game Technology ("IGT"), on their claim of retaliatory discharge in violation of § 1514A, as well as the district court's dismissal of their factually-related Nevada state-law claims. We conclude

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that the Van Asdales raised a genuine issue of material fact regarding the cause of their terminations and that summary judgment should not have been granted. We reverse the district court's summary judgment in favor of IGT on the Van Asdales' Sarbanes-Oxley claim and vacate the dismissal of their state-law claims.

I. FACTS AND PROCEEDINGS BELOW

IGT is a publicly-traded, Nevada-based company specializing in computerized gaming machines and similar products. The company hired Shawn and Lena[1] in January 2001 to work as in-house intellectual property ("IP") attorneys in Nevada. Both had previously worked for law firms in Chicago. During all periods relevant to this suit, neither plaintiff was admitted to practice law in any state other than Illinois.

Both Shawn and Lena were initially hired for the position of Associate General Counsel. In September 2002, Shawn was promoted to Director of Strategic Development, a position in which he was generally responsible for overseeing IGT's IP litigation. Similarly, Lena was promoted in the Spring of 2003 to Director of IP Procurement, and was responsible for the transactional side of IGT's IP division, which included managing IGT's patents, trademarks, and copyrights. After their promotions, both Shawn and Lena reported directly to IGT's General Counsel. When Shawn and Lena began their employment with IGT, that position was held by Sara Beth Brown; Brown was replaced by David Johnson in November 2003.

In 2001, IGT began merger negotiations with Anchor Gaming ("Anchor"). The gist of this lawsuit is that the Van Asdales contend they were terminated for reporting possible shareholder fraud in connection with that merger. We provide

[1]We will refer to each individual plaintiff by their first name, but the plaintiffs collectively as the Van Asdales.

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some general facts surrounding the merger as background. We emphasize that our discussion of *possible* fraud is based on concerns the Van Asdales held and that they allegedly shared with their supervisors; our account should not be taken as proof of any actual fraud. Indeed, the success, or failure, of the Van Asdales' lawsuit does not depend on their ability to show any actual fraud, only that they reasonably believed that fraud had occurred. *See* Part II.B.1.a *infra*.

In September 2001, prior to Anchor's merger with IGT, Bally Gaming ("Bally"), one of Anchor's competitors, began advertising a new "Monte Carlo" slot machine featuring a "bonus wheel." Two high-level Anchor employees, Mark Hettinger, the head of Anchor's IP Department, and T.J. Matthews, Anchor's CEO, asserted that the Monte Carlo machine infringed on a particular patent owned by Anchor known as the "wheel" patent. Bally argued, however, that the wheel patent was invalidated by prior art, specifically, Bally's vintage 1970's Monte Carlo machine. By all accounts the wheel patent was a very valuable part of Anchor's holdings.

According to Shawn, as part of his department's due diligence in connection with the proposed IGT-Anchor merger, he investigated this dispute by arranging to purchase a vintage Monte Carlo machine in Chicago and sending it to IGT's outside patent litigation counsel so that counsel could assess the impact of the machine on Anchor's patent. Shawn subsequently met with outside counsel to discuss the possibility that the wheel patent could be redrafted. After IGT's inner circle had discussed the issue, the company decided to go forward with the merger, a decision in which Shawn evidently concurred.

In August 2003, well after Anchor and IGT had merged, the U.S. Patent and Trademark Office issued IGT a new patent. In anticipation of pending litigation against Bally, IGT's outside litigation counsel Barry Irwin contacted Hettinger to discuss defenses to patent infringement claims Bally

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had previously raised. Hettinger responded that Bally had sent written materials outlining such defenses to Joe Walkowski, Anchor's patent prosecution counsel prior to that company's merger with IGT. Irwin contacted Walkowski, who found the written materials, including an "Australian Flyer"—which described an Australian version of the Monte Carlo machine —and emailed them to Irwin and Lena. Shawn reviewed the materials and he and Irwin subsequently agreed that the Australian Flyer had the effect of invalidating the 2003 patent and undermining IGT's claims against Bally. Potentially, if Anchor's wheel patent was invalid, the benefits of the merger may have been overvalued.

Shawn spoke with Brown, IGT's General Counsel at the time. He informed her of his view that litigation against Bally could not go forward. Surprised by this news, Brown called IGT's merger counsel to see if the Australian Flyer had been included in the due diligence files provided to IGT prior to the merger. In a follow-up meeting, Shawn expressed concern that the Australian Flyer had not been disclosed to IGT prior to the merger; Brown told him that the matter warranted investigation and promised to look into it. Around the same time, Shawn also brought the issue to the attention of Rich Pennington, IGT's Vice President of Product Development.

In the meantime, management had changed at IGT after the merger with Anchor. Matthews was named CEO, and he asked Johnson to replace Brown as IGT's General Counsel. Johnson had previously served as General Counsel at Anchor during the months surrounding Anchor's merger with IGT.

Shawn and Lena both met with Johnson on November 24. The parties sharply dispute what occurred during this meeting. Shawn, Lena, and Johnson all agree that Shawn and Lena raised the subject of the Australian Flyer and its impact on the August 2003 patent. According to Johnson, however, the three only discussed the topic to address the possibility that

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Bally would assert a defense of fraud on the Patent Office in pending litigation against IGT.[2]

Within a few months of this meeting, both Shawn and Lena were terminated. According to Johnson, he decided sometime around Thanksgiving of that year—just three days after his meeting with Shawn and Lena—that he did not believe Shawn should continue in his current position. Johnson planned to deliver this news to Shawn around that time but he was unable to schedule a meeting—initially because Shawn was on a business trip overseas and later because Shawn contracted cancer. Upon Shawn's return to IGT in January 2004, Johnson told him that he and other IGT executives felt that he should be removed from his position. Although Johnson evidently expressed some hope in January that Shawn could continue at the company in a different capacity, Shawn was formally terminated on February 11.

Johnson testified that at the time he terminated Shawn he had no similar plans to end Lena's employment. However, Johnson claimed that, within weeks of Shawn's termination, he received complaints from the Engineering Department that Lena's demeanor "had become very odd" and "that she had

[2]As we discuss in Part II.B.1, this factual dispute is complicated by the manner in which this issue was litigated in the district court. After Shawn, Lena, and Johnson completed their deposition testimony in this case, IGT filed a motion for summary judgment. It construed Shawn and Lena's deposition testimony as alleging only that they informed Johnson of a possible fraud on the Patent Office, and asserted that this type of disclosure was not protected conduct under § 1514A. Shawn then submitted a sworn declaration in which he stated that he had "consistently told [his] supervisors of two possible frauds, the first a general fraud on IGT (including [Shawn] and other IGT shareholders) arising out of the omissions by Anchor during due diligence affecting the value of its Wheel patents, and the second, a specific fraud against the U.S. Patent Office arising out of the non-disclosure of what have been called the 'Trask-Britt documents.' " Shawn stated in his declaration that, in questioning him at the deposition, IGT's counsel had focused on only the second possible type of fraud, and that, had he been asked, he would have also testified about the first type.

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become extremely difficult and extremely unfriendly." A different IGT employee also learned in early 2004 that Lena had twice requested access to allegedly sensitive information related to "Class 2" gaming. Johnson terminated Lena shortly thereafter.

On December 1, 2004, the Van Asdales brought the present action in the United States District Court for the District of Nevada. The complaint sought relief under the whistleblower protection provisions of Sarbanes-Oxley; both plaintiffs also brought state-law claims for tortious discharge and intentional interference with contractual relations. Lena brought a separate state-law claim for retaliation and Shawn brought a separate state-law claim for intentional infliction of emotional distress.

IGT moved for summary judgment on November 22, 2006. On June 13, 2007, the district court issued a published decision granting IGT's motion for summary judgment. *Van Asdale v. Int'l Game, Tech.*, 498 F. Supp. 2d 1321 (D. Nev. 2007). After the district court denied the Van Asdales' motion for reconsideration, the Van Asdales timely appealed to this court.

II. ANALYSIS

We review the district court's grant of summary judgment de novo. *Evanston Ins. Co. v. OEA, Inc.*, 566 F.3d 915, 918 (9th Cir. 2009). In doing so, "[w]e must determine, viewing the evidence in the light most favorable to [the Van Asdales] . . . whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law." *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004).

A. *Attorney-Client Privilege*

In addition to defending the district court's summary judgment on the Van Asdales' Sarbanes-Oxley claim, IGT argues

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that we should affirm the district court's judgment because (1) the Van Asdales are prohibited from maintaining the action under their ethical obligations as Illinois-licensed attorneys and (2) notwithstanding the particular requirements of Illinois law, we should not permit this case to go forward because the Van Asdales cannot establish their claim without using attorney-client privileged information. Although the district court rejected both of these arguments, "[w]e may affirm on any ground supported by the record, even if it differs from the district court's rationale." *S. Cal. Painters & Allied Trades, Dist. Council No. 36 v. Rodin & Co., Inc.*, 558 F.3d 1028, 1034 n.5 (9th Cir. 2009) (internal quotation marks omitted) (alteration in original). We address each argument in turn.

First, IGT argues that the Van Asdales, as Illinois-licensed attorneys, cannot maintain this action because to do so would violate state rules of professional conduct. *See* ILL. RULES OF PROF'L CONDUCT R. 8.5(b)(2)(I) ("[I]f the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction.").

[1] IGT relies on *Balla v. Gambro, Inc.*, 584 N.E. 2d 104 (Ill. 1991), for support, but this case is distinguishable. In that case, the Illinois Supreme Court held that "in-house counsel do not have a claim under the tort of retaliatory discharge." *Id.* at 108. However, the court in Balla further explained that it "base[d its] decision as much on the nature and purpose of the tort of retaliatory discharge, as on the effect on the attorney-client relationship that extending the tort would have." *Id.* The court then offered a detailed analysis of the purposes served by the Illinois tort of retaliatory discharge.

[2] We have found no cases, and IGT cites none, where *Balla* has been applied to bar suits by in-house attorneys based on non-Illinois law. Indeed, it appears that federal courts in Illinois have uniformly declined to apply *Balla* to claims based on federal law. *See, e.g.*, *Stinneford v. Spiegel Inc.*, 845 F. Supp. 1243, 1246-47 (N.D. Ill. 1994) (holding

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that in-house counsel may bring suit under the Age Discrimination in Employment Act); *Rand v. CF Indus., Inc.*, 797 F. Supp. 643, 645 (N.D. Ill. 1992) (same); *Hoskins v. Droke*, No. 94 C 5004, 1995 WL 318817, at *3 (N.D. Ill. May 24, 1995) (holding that in-house counsel may pursue a retaliation claim under Title VII against his former employer). We thus reject this argument.

IGT next argues that, irrespective of the specific rules applicable to Illinois-licensed attorneys, the Van Asdales should not be permitted to maintain their Sarbanes-Oxley claim because doing so requires use of attorney-client privileged information. IGT reasons that the Van Asdales' only evidence of protected activity consists of a conversation the two had with Johnson regarding a pending litigation matter involving the company.

[3] There are few federal circuit court cases addressing the right of in-house counsel to use attorney-client privileged information in a retaliation suit. In *Willy v. Administrative Review Board*, 423 F.3d 483 (5th Cir. 2005), an in-house attorney brought suit against his former employer, alleging retaliation as a result of a report he had written; it was undisputed that the contents of the report were covered by the attorney-client privilege. *Id.* at 494 n.48. The Fifth Circuit allowed the suit to go forward, rejecting the notion "that the attorney-client privilege is a *per se* bar to retaliation claims under the federal whistleblower statutes, i.e., that the attorney-client privilege mandates exclusion of all documents subject to the privilege." *Id.* at 500. However, *Willy* involved a claim before an administrative law judge and the Fifth Circuit expressly reserved the question of whether its holding would apply to "a suit involving a jury and public proceedings." *Id.* at 500-01.

Similarly, in *Kachmar v. SunGard Data Systems, Inc.*, 109 F.3d 173 (3d Cir. 1997), the Third Circuit held that a former in-house attorney could maintain a Title VII suit for retalia-

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tory discharge; the Third Circuit reasoned that "concerns about the disclosure of client confidences in suits by in-house counsel" did not alone warrant dismissal of the plaintiff 's action. *Id.* at 181. Rather, the Third Circuit suggested that a district court should "balanc[e] the needed protection of sensitive information with the in-house counsel's right to maintain the suit," while considering any protective measures that might be taken at trial to safeguard confidential information. *Id.* at 182.

[4] Although neither case is precisely on point, we agree with the careful analysis of the Third and Fifth Circuits and hold that confidentiality concerns alone do not warrant dismissal of the Van Asdales' claims. As a threshold matter, it is not at all clear to us to what extent this lawsuit actually requires disclosure of IGT's confidential information. Shawn and Lena allege that they raised claims of shareholder fraud at their November 24, 2003 meeting with Johnson and that they were terminated in retaliation for these allegations. There is no reason why the district court cannot limit any testimony regarding this meeting to these alleged disclosures, while avoiding testimony regarding any litigation-related discussions that also took place. To the extent this suit might nonetheless implicate confidentially-related concerns, we agree with the Third Circuit that the appropriate remedy is for the district court to use the many "equitable measures at its disposal" to minimize the possibility of harmful disclosures, not to dismiss the suit altogether. *Id.* at 182.

We also note that the text and structure of the Sarbanes-Oxley Act further counsel against IGT's argument. Section 1514A(b) expressly authorizes any "person" alleging discrimination based on protected conduct to file a complaint with the Secretary of Labor and, thereafter, to bring suit in an appropriate district court. Nothing in this section indicates that in-house attorneys are not also protected from retaliation under this section, even though Congress plainly considered the role attorneys might play in reporting possible securities fraud.

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See, e.g., 15 U.S.C. § 7245. We thus agree with the district court that dismissal of the Van Asdales' claims on grounds of attorney-client privilege is unwarranted.

B. *Sarbanes-Oxley Act*

We now address whether the district court correctly granted IGT summary judgment on the Van Asdales' Sarbanes-Oxley claim. We observe at the outset that there are no published cases in this circuit setting forth the substantive elements of a Sarbanes-Oxley claim. The text of the statute and regulations promulgated by the Department of Labor, however, set forth the general framework governing such actions.

[5] Section 1514A(a)(1) of Title 18 prohibits employers of publicly-traded companies from "discriminat[ing] against an employee in the terms and conditions of employment" for "provid[ing] information . . . regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders."

[6] Section 1514A(b)(2) further specifies that § 1514A claims are governed by the procedures applicable to whistleblower claims brought under 49 U.S.C. § 42121(b). Section 42121(b)(2)(B), in turn, sets forth a burden-shifting procedure by which a plaintiff is first required to make out a prima facie case of retaliatory discrimination; if the plaintiff meets this burden, the employer assumes the burden of demonstrating by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the plaintiff 's protected activity. We first address whether the Van Asdales have made out a prima facie showing of retaliatory discrimination.

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1. Prima Facie Case

[7] Regulations promulgated by the Department of Labor set forth four required elements of a prima facie case under § 1514A: (a) "[t]he employee engaged in a protected activity or conduct"; (b) "[t]he named person knew or suspected, actually or constructively, that the employee engaged in the protected activity"; (c) "[t]he employee suffered an unfavorable personnel action"; and (d) "[t]he circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action." 29 C.F.R. § 1980.104(b)(1)(i)-(iv). We address each element in turn.

a. Protected Activity

[8] In *Platone v. FLYi, Inc.*, 25 IER Cases 278, 287 (Dep't of Labor Sept. 19, 2006), the Administrative Review Board of the Department of Labor ("ARB") held that, to constitute protected activity under Sarbanes-Oxley, an "employee's communications must 'definitively and specifically' relate to [one] of the listed categories of fraud or securities violations under 18 U.S.C.[ ] § 1514A(a)(1)." The three circuits that have addressed the issue have all agreed with the ARB's interpretation, *see Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009) ("The employee must show that his communications to the employer specifically related to one of the laws listed in § 1514A."); *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008) ("[A]n employee must show that his communications to his employer definitively and specifically relate to one of the laws listed in § 1514A.") (internal alteration and quotation marks omitted); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008) ("We agree with the ARB's legal conclusion that an employee's complaint must definitively and specifically relate to one of the six enumerated categories found in § 1514A.") (internal quotation marks omitted), and we similarly defer to the ARB's reasonable interpretation of the statute.

[9] We agree with the district court that Shawn's conversations with Brown and Pennington satisfy this "definitively and specifically" standard. According to Brown's deposition testimony, Shawn told her that Hettinger and Mathews "knew more than they were saying," that they were aware of the Australian Flyer and had not disclosed it prior to the merger, and that "there's a possibility it could go to the top." Brown testified that it was her impression after the meeting that Shawn believed that IGT had been misled regarding Anchor's value prior to the merger.

With respect to Shawn's conversation with Pennington, Pennington testified that Shawn told him that documents received from Walkowski contained prior art that Anchor knew or should have known about prior to the merger but did not disclose. In his deposition testimony, Pennington indicated that his recollection was that Shawn merely intimated that the omission was a mistake but conceded that it was possible Shawn suggested at that meeting that the omission was intentional. Shawn, for his part, asserts that Pennington told him that he believed Matthews had intentionally concealed the Australian Flyer and that the merger never would have happened if the Flyer had been disclosed.

[10] To be sure, Brown testified that she did not believe Shawn used the words "fraud," "fraud on shareholders," or "stock fraud" and she could only say that Shawn "may have" used the term "Sarbanes-Oxley" or "SOX"; the record similarly contains no evidence that Shawn used any such language in his conversation with Pennington. However, as the Fourth Circuit has recognized, "[a]n employee need not cite a code section he believes was violated" to trigger the protections of § 1514A. *Welch*, 536 F.3d at 276 (internal quotation marks omitted). It is clear to us that, taking the facts in the light most favorable to the Van Asdales, Shawn's statements to both Brown and Pennington reported conduct that definitively and specifically related to shareholder fraud. That is all that § 1514A requires.

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The parties also dispute whether the Van Asdales similarly engaged in protected conduct during their November 24, 2003 meeting with Johnson. As noted above, IGT asserts that the meeting only involved discussions of a potential fraud on the Patent Office defense in pending litigation and the district court accepted this argument.

We agree with the district court that if IGT's characterization of the Van Asdales' meeting with Johnson is taken as true, the conversation did not involve activity protected under § 1514A. The Van Asdales' theory of shareholder fraud concerns the possibility that Anchor harmed IGT's shareholders by intentionally withholding information from IGT in late 2001. By contrast, the parties agree that any discussion of fraud on the Patent Office concerned a *defense* Bally might assert in future litigation, a defense that would be based upon IGT's admitted failure to disclose the same information to the Patent Office in 2003. This latter topic has nothing to do with shareholder fraud and is certainly not "definitively and specifically" related to it. However, this was not the uncontroverted evidence before the district court.

Johnson executed a sworn declaration stating that neither Shawn nor Lena made any suggestion to him regarding a potential fraud on the shareholders; however, this declaration directly contradicted Shawn's affidavit. Typically, of course, such a stark factual dispute must be decided by a fact finder and cannot be resolved on summary judgment. In this case, however, the district court disregarded the portion of Shawn's declaration in which he said that he raised concerns of shareholder fraud with Johnson, because the district court viewed this portion of the declaration as contradicting Shawn's deposition testimony.

"The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991). Every circuit has some form of

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"sham affidavit" rule similar to our own. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806-07 (1999) (collecting cases).

The Supreme Court has explained that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (internal quotation marks omitted). Some form of the sham affidavit rule is necessary to maintain this principle. This is because, as we have explained, "if a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Kennedy*, 952 F.2d at 266 (quoting *Foster v. Arcata Assocs., Inc.*, 772 F.2d 1453, 1462 (9th Cir. 1985)).

At the same time, however, it must be recognized that the sham affidavit rule is in tension with the principle that a court's role in deciding a summary judgment motion is not to make credibility determinations or weigh conflicting evidence. Aggressive invocation of the rule also threatens to ensnare parties who may have simply been confused during their deposition testimony and may encourage gamesmanship by opposing attorneys. We have thus recognized that the sham affidavit rule "should be applied with caution." *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1264 (9th Cir. 1993); *see also Nelson v. City of Davis*, ___ F.3d ___ (9th Cir. 2009).

More specifically, we have fashioned two important limitations on a district court's discretion to invoke the sham affidavit rule. First, we have made clear that the rule "does not automatically dispose of every case in which a contradictory affidavit is introduced to explain portions of earlier deposition testimony," *Kennedy*, 952 F.2d at 266-67; rather, "the district

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court must make a factual determination that the contradiction was actually a 'sham.' " *Id.* at 267. Second, our cases have emphasized that the inconsistency between a party's deposition testimony and subsequent affidavit must be clear and unambiguous to justify striking the affidavit. Thus, "the non-moving party is not precluded from elaborating upon, explaining or clarifying prior testimony elicited by opposing counsel on deposition [and] minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an opposition affidavit." *Messick v. Horizon Indus.*, 62 F.3d 1227, 1231 (9th Cir. 1995).

[11] In the present case, neither of these two conditions are satisfied. As to the first, the district court simply asserted that, "[b]ecause [the relevant] portion of [Shawn's] declaration contradicts [his] deposition testimony it must be disregarded." 498 F. Supp. 2d at 1331. This statement is directly contrary to the rule set forth in *Kennedy* that the sham affidavit "rule does not automatically dispose of every case in which a contradictory affidavit is introduced to explain portions of earlier deposition testimony." 952 F.2d at 266-67. The district court did not make a specific factual finding that the affidavit was a sham as it was required to do prior to striking it.

[12] If this were the only defect in the district court's analysis of Shawn's affidavit, we would simply remand this case to allow the district court to make the necessary factual findings. *See, e.g., id.* at 267 ("At the time the district court found Kennedy's later declaration to be an attempt to create a 'sham issue of fact,' we had not yet made clear that [the sham affidavit rule] does not apply to every instance when a later affidavit contradicts deposition testimony . . . . Accordingly we remand this case to the district court so that it may make that necessary determination."). We decline to do so, however, because we conclude that the minor conflicts between Shawn's earlier deposition testimony and subsequent declaration, if there are any, do not justify invocation of the sham affidavit rule.

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[13] Contrary to the district court's determination, nothing in Shawn's declaration "flatly contradicts," *id.*, his earlier deposition testimony. Shawn's declaration clarifies that at the November 24, 2003 meeting with Johnson, he raised allegations of shareholder fraud *in addition to* a specific fraud on the Patent Office defense. This statement does not contradict his earlier deposition testimony. At the deposition, IGT's counsel began by asking Shawn about the content of any discussion regarding "deliberate nondisclosure of [the Australian Flyer and related] documents." Shawn claimed that he told Johnson "[t]hat it at least appears suspicious and there is a potential of fraud." In response to a subsequent question, Shawn made clear that he did not remember Johnson saying "anything in response to that statement." Only *after* IGT's counsel asked him if he recalled any "other statements" did Shawn begin discussing the need to investigate defenses Bally might assert in any future patent prosecution. Because of the line of questioning pursued by IGT's counsel, Shawn "provided only cursory testimony" regarding his initial statements to Johnson regarding fraud, *see SEC v. Phan*, 500 F.3d 895, 910 (9th Cir. 2007); his subsequent declaration was a legitimate attempt to "explain[ ] or clarify[ ] prior testimony elicited by opposing counsel on deposition." *Messick*, 62 F.3d at 1231.

A close examination of Shawn's deposition testimony offers at least three additional reasons why it is otherwise consistent with his subsequent declaration. First, at one point in Shawn's deposition testimony, Shawn stated that he and Johnson discussed Hettinger's claim that he had not previously seen the Australian Flyer. Although Hettinger's possible prior knowledge of the Australian Flyer might have some tangential relevance in a discussion about Bally's possible legal defenses in a patent prosecution, it would seem to be *precisely* the sort of subject one would expect to come up in a discussion about possible fraud in connection with the IGT-Anchor merger. Second, after IGT's counsel asked about the "deliberate nondisclosure of Trask-Britt documents," Shawn responded by

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stating that he told Johnson the nondisclosure "appear[ed] suspicious." Again, it seems strange that Shawn would take the drastic step of characterizing a co-employee's actions as "suspicious" if the discussion was merely aimed at analyzing possible legal defenses of a potential opposing party. Finally, the Van Asdales' interpretation is consistent with deposition testimony regarding Shawn's earlier conversations with Pennington and Brown, in which he appears to have clearly suggested that Matthews and Hettinger had wrongfully withheld the Flyer during the merger process.[3]

[14] The analysis above is not intended as an endorsement of the factual account provided in Shawn's declaration. A jury could find Shawn's account not credible and thus conclude that the meeting with Johnson did not qualify as protected activity under § 1514A. But it is not our place to make this determination. Shawn's declaration suffices to raise a genuine issue of material fact regarding the nature of the Van Asdales'

[3]IGT also points to two occasions in which, according to them, "the Van Asdales candidly admit that they made conscious decision *not* to blow the whistle." The first example is Lena's deposition testimony that she raised no complaints about "shareholder fraud," or "Sarbanes-Oxley violations," and her rationalization that "obviously, if any of that occurred, we may have been accusing our boss at the time, who was T.J. Matthews." However, these comments concerned a much larger meeting with upper management, not the later meeting with Johnson. Moreover, in this testimony Lena was referring to everyone in attendance at the meeting, not herself personally.

IGT also points to Shawn's statement that he did not "want to go out and just start saying that T.J. committed fraud on shareholders to the tune of 1.4 billion without having more to rely on." However, this deposition testimony concerned Shawn's statements at his August meeting with Pennington; moreover, the testimony surrounding this statement indicates that Shawn and Pennington were discussing the possibility that Matthews had unlawfully withheld the Flyer. The statement quoted by IGT thus appears to simply indicate that Shawn was concerned about raising such serious allegations prematurely; this is perfectly consistent with a claim that Shawn felt the issues should be raised in a private meeting with Johnson three months later.

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disclosures to Johnson, and the district court should not have disregarded it. We thus conclude that, taking the facts in the light most favorable to the Van Asdales, their meeting with Johnson involved disclosures "definitively and specifically" related to shareholder fraud.

[15] This conclusion, as well as our analysis of Shawn's meetings with Brown and Pennington, do not settle the question of whether the statements constituted protected activity under § 1514A. As noted above, § 1514A prohibits discriminating against an employee for "provid[ing] information . . . regarding any conduct which the employee reasonably believes constitutes a violation of" a listed law. The plain language of this section, as well as the statute's legislative history and case law interpreting it, suggest that to trigger the protections of the Act, an employee must also have (1) a subjective belief that the conduct being reported violated a listed law, and (2) this belief must be objectively reasonable. *See Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009); *Day*, 555 F.3d at 54; *Welch*, 536 F.3d at 275; *Allen*, 514 F.3d at 477 ("We agree that an employee's reasonable belief must be scrutinized under both a subjective and objective standard."); S. Rep. No. 107-146, at 19 (2002) ("[S]ubsection (a)(1) . . . is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts.").

[16] We first address whether the circumstances in which the Van Asdales found themselves permitted them to form an objectively reasonable belief that the apparent failure to disclose the Australian Flyer to IGT prior to the merger constituted shareholder fraud. We agree with the First Circuit that, "[t]o have an objectively reasonable belief there has been shareholder fraud, the complaining employee's theory of such fraud must at least approximate the basic elements of a claim of securities fraud." *Day*, 555 F.3d at 55. The Supreme Court has explained that a private action for securities fraud "resembles, but is not identical to, common-law tort actions for

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deceit and misrepresentation," and that its elements include a material misrepresentation or omission, scienter, a connection with the purchase or sale of a security, reliance, economic loss, and loss causation. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005). Similarly, we have held that, in order to prove securities fraud under Rule 10b-5, a plaintiff must demonstrate "(1) a material misrepresentation or omission of fact, (2) scienter, (3) a connection with the purchase or sale of a security, (4) transaction and loss causation, and (5) economic loss." *In re Daou Sys., Inc.*, 411 F.3d 1006, 1014 (9th Cir. 2005).

[17] We conclude that the Van Asdales' theory of fraud approximates a securities fraud claim. It seems clear that the wheel patent was an important asset that Anchor brought to the merger with IGT. Matthews stated in his declaration that the "Wheel Patents, and the machines that are covered by the patents, generate a substantial portion of IGT's total income." Johnson, for his part, testified that "the wheel patent is of such importance to IGT that it utterly eclipses the relative importance of any . . . other claimed accomplishments. It's [sic] wheel is the Crown Jewel of IGT's intellectual property portfolio." Moreover, Shawn testified that Pennington told him that the merger would not have occurred if IGT had been made aware of the Flyer. Given the potential importance of the Australian Flyer and related documents, the top management positions at IGT occupied by several former Anchor officials, and their alleged financial motives favoring nondisclosure, we hold that it was objectively reasonable for Shawn and Lena to suspect that the non-disclosure of the Flyer prior to the merger could have been deliberate.

[18] In reaching this conclusion, we wish to make absolutely clear that we are not suggesting that former Anchor officials *actually did* engage in wrongdoing prior to the merger with IGT. As IGT points out, there is no evidence that anyone at Anchor instructed the company's outside counsel not to disclose the Australian Flyer prior to the merger. It is

also possible that the Australian Flyer and related documents were, in any event, not as important to the validity of the wheel patent as the Van Asdales claim, though IGT has not pressed this argument on appeal. It is not critical to the Van Asdales' claim that they prove that Anchor officials actually engaged in fraud in connection with the merger; rather, the Van Asdales only need show that they reasonably believed that there might have been fraud and were fired for even suggesting further inquiry. To encourage disclosure, Congress chose statutory language which ensures that "an employee's reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories is protected." *Allen*, 514 F.3d at 477. We think that the Van Asdales have met this minimal threshold requirement.

We also conclude that the Van Asdales had a subjective belief that the conduct that they were reporting violated a listed law. The legislative history of Sarbanes-Oxley makes clear that its protections were "intended to include all good faith and reasonable reporting of fraud, and [that] there should be no presumption that reporting is otherwise, absent specific evidence." 148 Cong. Rec. 57420 (daily ed. July 26, 2002) (statement of Sen. Leahy). In this case, there is no evidence that Shawn's various complaints were made in bad faith and IGT does not suggest otherwise.

By contrast, the district court held that no reasonable jury could find that Lena subjectively believed that shareholder fraud had occurred. The testimony on which the district court appeared to rely in support of this conclusion went as follows:

> Q Prior to retaining [legal counsel], did you have any personal belief that a fraud had been perpetrated on the shareholders of IGT?
>
> A I had a belief that something had happened in the due diligence with Anchor and IGT and that an

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investigation needed to be conducted to see if a fraud had occurred.

Q So you didn't have a specific belief that a fraud had occurred or not?

A I had a belief that an investigation needed to occur.

Q So you hadn't reached a conclusion one way or another as to fraud?

A No, because we were not allowed to do an investigation.

Q Okay. But you had a strong belief that an investigation needed to be done?

A Yes.

The district court's conclusion that this testimony precluded Lena from claiming protection under the Sarbanes-Oxley Act is contrary to the language of § 1514A. Although Lena acknowledged that she "hadn't reached a conclusion" as to whether fraud had occurred, the context of this statement was Lena's discussion of the need for an investigation. Moreover, in passing the Sarbanes-Oxley Act, Congress noted the existence of "a culture, supported by law, that discourage[s] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally." S. Rep. No. 107-146, at 5 (2002). Requiring an employee to essentially prove the existence of fraud before suggesting the need for an investigation would hardly be consistent with Congress's goal of encouraging disclosure.

[19] We thus conclude that, taking the facts in the light most favorable to the Van Asdales, as we must for the purposes of summary judgment, Shawn's communications with

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Brown and Pennington, as well as the Van Asdales' meeting with Johnson, involved activities protected by § 1514A.

b. Knowledge of Decision-Maker

To establish a prima facie case under § 1514A, the Van Asdales also must establish that "[t]he named person knew or suspected, actually or constructively, that the employee engaged in the protected activity." 29 C.F.R. § 1980.104(b)(1)(ii).[4] This language is hardly a model of clarity (for example, it is not at all clear to us how one can constructively suspect someone of engaging in protected activity) but under any interpretation this element is satisfied here. As we have stated above, taking the Van Asdales' deposition testimony and Shawn's sworn declaration as true, the Van Asdales engaged in protected activity during the November 24, 2003 meeting with Johnson, as well as with Brown, and Pennington. It is undisputed that these persons have "supervisory authority" over the Van Asdales. 18 U.S.C. § 1514A(a)(1)(c).

c. Unfavorable Personnel Action

IGT does not dispute that the Van Asdales satisfy this required element.

d. Contributing Factor

The final element of a prima facie case under § 1514A is that "[t]he circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action." 29 C.F.R. § 1980.104(b)(1)(iv). As the district court correctly observed, the Van Asdales have not put forth any direct evidence that their protected activity was a

[4]Section 1980.101, in turn, defines "named person" as "the employer and/or the company or company representative named in the complaint who is alleged to have violated the Act." 29 C.F.R. § 1908.101

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contributing factor to their termination. The primary evidence on this issue is circumstantial: the proximity of the Van Asdales' terminations to the November 24, 2003 meeting with Johnson.

[20] We conclude that the Van Asdales have raised a genuine issue of material fact regarding whether their protected activity was a contributing factor to their terminations. We have previously held that "causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002). In *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987), we held that causation could be inferred where the first adverse employment action took place less than three months after an employee's protected activity. We have since made clear that "a specified time period cannot be a mechanically applied criterion," and have cautioned against analyzing temporal proximity "without regard to its factual setting." *Coszalter v. City of Salem*, 320 F.3d 968, 977 (9th Cir. 2003).

In this case, Shawn was terminated approximately two and a half months after the November 24 meeting with Johnson, and Johnson acknowledged that he initially intended to terminate Shawn within three days of the meeting; Lena was fired several weeks after Shawn. Although we express no opinion on the merits of the Van Asdales' claims, we hold that a reasonable fact finder could find that the Van Asdales' alleged disclosures were a contributing factor in their terminations where, among other things, both Shawn and Lena were removed from their positions within weeks of their alleged protected conduct.

A closer examination of the "factual setting" of the Van Asdales' terminations also lends support to their theory of unlawful retaliation. Both Shawn and Lena were hired in January 2001; after observing Shawn's performance for eighteen months, he was promoted to a high-level position, and Lena

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was similarly promoted several months later. On November 10, 2003, Shawn received an exceptional performance review. Two weeks later, however, Shawn and Lena met with Johnson, where they allegedly accused high-level IGT executives who had previously worked at Anchor of intentionally withholding material information prior to the merger. Johnson had served as General Counsel for Anchor during the months prior to the merger and he had worked with Matthews and Hettinger; moreover, Matthews had also hired Johnson after taking over as CEO of IGT. A mere three days after this meeting, and only seventeen days after Shawn had received a positive performance review, Johnson had decided to terminate Shawn, a decision that was delayed only because Shawn subsequently became ill. Several weeks after that, Johnson terminated Lena as well.

For its part, IGT asserts that Shawn was terminated for poor job performance. Johnson testified that Matthews told him that Shawn's behavior and demeanor were causing difficulties among various departments. Johnson also claimed that conversations with several colleagues from other companies that worked with IGT raised similar concerns about Shawn's work and attitude. Matthews generally corroborated Johnson's assertions. This testimony, however, is in tension with other contemporaneous evidence of Shawn's strong performance at IGT, including his promotion to Director of Strategic Development and his strong evaluation from Brown just weeks prior to his termination.

To be sure, IGT's proffered reasons could be entirely legitimate; IGT appears to have been in a period of transition in late 2003 and Johnson was certainly not obligated to accept his predecessor's apparent belief that Shawn was performing his job well. However, given the close proximity of Shawn's termination to his alleged protected activity, his seemingly positive record at IGT, and the dearth of specific evidence in the record supporting Johnson's and Matthews's claims about

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his performance, a reasonable fact finder could find that Shawn's protected activity contributed to his termination.

Our analysis with respect to Lena's termination is similar. Like Shawn, Lena was promoted shortly after joining IGT in 2001, and the record is bereft of specific evidence that she was performing her job inadequately. In addition to claims that she had become "extremely difficult and extremely unfriendly," after Shawn's termination, IGT asserts that Lena was terminated because she twice requested access to sensitive information related to "Class 2" gaming, and IGT feared that she was attempting to obtain information that could benefit her husband. These attempts to access sensitive information may well have constituted serious breaches of protocol that were wholly beyond the scope of Lena's job duties. However, IGT simply declares in conclusory terms that Lena's conduct was improper, while Lena counters that she accessed this information in the normal course of her work. We are not in a position to resolve this dispute; on the current record, only a fact finder can. As with her husband's claim, a fact finder could reasonably determine that this asserted reason was simply a pretext for unlawful retaliation.

2. Burden-Shifting Analysis

[21] Because we conclude that the Van Asdales have made out a prima facie showing of retaliatory termination in violation of § 1514A, IGT cannot obtain summary judgment unless it shows by clear and convincing evidence that it would have terminated the Van Asdales even absent any protected activity. 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(2)(B). On appeal, IGT does not argue that it can satisfy this requirement. We thus hold that the district court erred in granting IGT summary judgment on the Van Asdales' Sarbanes-Oxley claim.

C. *State-Law Claims*

[22] After granting summary judgment to IGT on the Van Asdales' sole federal claim, the district court exercised its dis-

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cretion under 28 U.S.C. § 1367(c)(3) and declined to retain jurisdiction over their pendant state-law claims. Because we reverse the district court's grant of summary judgment on the Sarbanes-Oxley claim, we vacate its dismissal of the Van Asdales' state-law claims and remand for reconsideration.

III. CONCLUSION

The Van Asdales raised a genuine issue of material fact regarding whether they were wrongfully discharged in violation of § 1514A and we reverse the district court's decision to the contrary. In light of this disposition, we vacate the district court's dismissal of the Van Asdales' state-law claims and leave it to the district court on remand to address these claims in the first instance.

REVERSED, VACATED, and REMANDED.

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InfoPAK

In-house Counsel Standards Under Sarbanes-Oxley

Association of Corporate Counsel
1025 Connecticut Avenue NW, Suite 200, Washington, DC 20036,
ph: 202.293.4103 www.acca.com

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In-house Counsel Standards Under Sarbanes-Oxley

The following material is intended to provide useful information and resources to help attorneys navigate through the attorney standards mandated by the Sarbanes-Oxley Act of 2002 and the specific rules issued by the Securities and Exchange Commission ("SEC Rules") on January 23, 2003. By examining the key interpretations of 17 C.F.R. pt. 205 that apply to attorney conduct, this InfoPAK helps define the scope and potential applications of the law by identifying which lawyers are governed by the standards and exploring the type of corporate conduct likely to trigger the Act's new obligations. This information should not be construed as legal advice or legal opinion on specific facts, or representative of the views of ACC or any of its lawyers, unless so stated. This is not intended as a definitive statement on the subject but a tool, providing practical information for the reader.[1]

We hope that you find this material useful. Thank you for consulting with the Association of Corporate Counsel.

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Contents

I. **Introduction 5**

II. **Who is Affected by the Rules? 8**

A. Attorneys Governed by the Sarbanes-Oxley Act
B. Outside Counsel Versus In-house Attorneys: Are the Duties the Same?

III. **When Does the Duty Arise? 12**

A. Overview
B. When is the Duty to Report "Up the Ladder" Triggered?
C. Issues Presented

IV. **Reporting Obligations in the Event of Material Violation: Implementing the "Up the Ladder" Requirement 17**

A. Reporting Attorney's Duties
B. Supervisory Attorney's Duties
C. The Duties of the Chief Legal Officer ("CLO") & the Chief Executive Officer ("CEO")
D. Determining Whether the Response is "Appropriate"

V. **The Qualified Legal Compliance Committee (QLCC) Option ..22**

A. Function
B. Basic Structure of a QLCC
C. Responsibilities and Powers
D. Liability of QLCC Members
E. Issues Presented

VI. **Drafting a Company Policy 28**

VII. **Whistleblowers 29**

A. Protection for Whistleblowers
B. Whistle-blowing/Noisy Withdrawal
C. Preventative Measures

VIII. **Attorney-Client Privilege Issues 35**

A. Confidentiality & Model Rule 1.6
B. Reporting Up the Ladder: SEC Regulations and Model Rule 1.13
C. Impact on Attorney-Client Relations

IX. **Privately Held Companies and Non-Profits 38**

X. **Document Retention Procedures 41**

A. Introduction to Document Retention

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Contents

B. How Does the Sarbanes-Oxley Act Affect Companies' Document Retention Obligations?

XI. Sanctions and Other Standards of Professional Conduct 43

XII. Additional Resources 46

Other Resources

XIII. Sample Policies.. 48

A. Sample: Procedures For Complaints Regarding Accounting, Internal Accounting Controls Or Auditing Matters[102]
B. Sample: Whistle Blowing Policy and Procedures[103]
C. Sample "Up-the-ladder" Company Policy[104]
D. Up-The-Ladder-Chart Under Sarbanes-Oxley[105]

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Introduction

Congress introduced the Sarbanes-Oxley Act of 2002[2] during a flurry of corporate debacles and public controversy. Companies such as Enron and WorldCom faced unprecedented legal and accounting challenges when investors filed actions for securities fraud against the corporations and their executives. Corporate executive officers, accountants, and lawyers were among the named defendants indicted for concealing financial information, inflating the company stock and other accounting fraud.[3] Meanwhile, a central issue moved through the public landscape regarding the role of lawyers in such scandals and the possible failure of states to adequately regulate these concerns. In response, Congress passed a wide-ranging corporate governance and accounting oversight bill through both houses by an overwhelming majority.[4] Sarbanes-Oxley, as it is so called, affects accountants, corporate executives, shareholders, and lawyers alike. Importantly, Section 307 of the Act requires the Securities and Exchange Commission ("SEC" or "the Commission") to issue new standards for attorneys.[5]

The Securities and Exchange Commissions, pursuant to the Sarbanes-Oxley Act, adopted 17 C.F.R. pt. 205 ("SEC Rules") on January 29, 2003,[6] which prescribes standards of professional conduct for all attorneys who appear and practice before the SEC in the representation of public company issuers. Functionally, the SEC Rules, which became effective on August 5, 2003, provide standards and procedures for "up the ladder" reporting of corporate misconduct.

Prior to the Sarbanes-Oxley Act, the SEC possessed authority to discipline attorneys appearing before it that had a role in false and misleading statements; however, this power was rarely exercised. In early 2002, a group of professors urged the SEC to use this power to impose a rule on "up the ladder" requirements, but the SEC declined to do so on the basis that the ethical responsibility of attorneys was a matter for the state to regulate.[7] Traditionally, ethical standards involving the legal profession were a matter of state regulation, set forth by either the courts or state bar authorities. Today, it would seem that the SEC rules do not preempt state law entirely,[8] as the SEC has announced that states are free to impose more rigorous ethical standards for attorneys than those prescribed in the SEC Rules.[9] Yet, administrative law jurisprudence establishes that agency rules prevail when in conflict with state laws.[10] As such, even after reviewing the SEC rules and applicable state law, attorneys will need to judge for themselves whether the SEC's effort to override conflicting state rules is effective.

Historically, two relevant principles were reflected in the ABA Model Rules of Professional Conduct: (1) the duty to maintain client confidences, except in order to prevent death or substantial bodily harm[11] and (2) the lawyer for a corporation represents the corporation acting through its duly authorized constituents and not the Board members, directors or principals individually.[12] Thus, the traditional view regarding a lawyer's duty to take action where a lawyer knows of possible

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illegal activity could be interpreted to actually discourage such internal action. Although the ABA refused to modify the Model Rules of Professional Conduct in 2000 to include cases of economic harm as an "exception" to the confidentiality rule, the new 2002 ABA task force recommended these rules.[13] The ABA finally amended its rules in August of 2003 to codify this exception. Today, the new rules largely embody language similar to that contained in the SEC Rules.[14]

Lawyers are being hired for their business management experience and are being used to ensure that their employer is meeting the more stringent requirements of the Sarbanes-Oxley Act of 2002.[15]

In part because of the duty to report up-the-ladder and, if necessary, outside the organization, corporate attorneys necessarily have increased responsibility and obligations. In addition to the previous burdens associated with serving as in-house counsel, corporate attorneys must develop and demonstrate knowledge and independent leadership over regulatory compliance and internal codes of conduct. It should be expected that conflicts between the corporation's officers and lawyers may arise under the atmosphere inherent in the Sarbanes-Oxley and the ABA Model Rules requirements. Counsel, hired by management to advise and ultimately to aid the client to make business judgments, may now be seen as opposing the company's directors and officers! Management may fear that up-the-ladder and outside the organization reporting will lead to situations where the attorney undermines the client's decision by illuminating problematic situations that previously would be viewed as business decisions only. Similarly, counsel will perceive the additional reporting requirements as an impediment to the free flow of information between management and the legal counsel's office.

The rules promulgated by the SEC in light of Sarbanes-Oxley, along with Model Rule 1.13, will increase the obligations of corporate attorneys while potentially decreasing the access of in-house counsel to information necessary to meet those same obligations. On top of the SEC and Model rules, in-house attorneys should also look to applicable state law on attorney-client privilege, as the regulation varies in each state. To access the new ABA rules, see:

- ACCA Release, American Bar Association's Revised Model Rules of Professional Conduct 1.6 & 1.13 (August 20, 2003), at: http://www.acca.com/protected/comments/professionalconduct.pdf

For additional history on professional codes of conduct and industry self-regulation, see:

- Gretchen A. Winter, David J. Simon, Code Blue, Code Blue: Breathing Life into Your Company's Code of Conduct, ACCA Docket 20 v.10 (November/December 2002): 72-89, available at: http://www.acca.com/protected/pubs/docket/nd02/codeblue2.php

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- H. Barnes, An Economic History Of The Western World (1942).
- A. Black, Guilds And Civil Society In European Political Thought From The Twelfth Century To The Present (1983).
- R. Heilbroner, The Making Of Economic Society (1980).
- Kidder, Is Society Entering a New 'Age of Ethics'? Christian Science Monitor, October 19, 1987, at 19.
- Washington Metropolitan Area Corporate Counsel Association, Understanding the New SEC Attorney Responsibility Rules (February 6, 2003), available at: http://www.acca.com/chapters/program/wmacca/307rules.pdf.
- Practical Tips for Dealing with the New Attorney Responsibility Standards," Article Sidebar, ACC Docket 21, no. 5(May 2003): 40-55, available at http://www.acca.com/protected/pubs/docket/mj03/standard_tips.php.
- Steven N. Machtinger and Dana A. Welch, In-house Ethical Conflicts: Recognizing and Responding to Them, ACC DOCKET 22, no. 2 (February 2004).
- Dongju Song, The Laws of Securities Lawyering Under Sarbanes-Oxley, 53 Duke L.J. 257 (2003).
- Jenny E. Cieplak and Michael K. Hibey, Sarbanes-Oxley Regulations and Model Rule 1.13: Redundant or Complimentary, GEOJLE (Summer 2004).
- Jay K. Musoff and Adam S. Zimmerman, Ethics and Off-Switches: What Next? The Tyco Mess Offers an Opportunity to Look and the Changing Role of the GC, Legal Times, vol. 27, no. 38 (September 20, 2004).

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II. Who is Affected by the Rules?

The Sarbanes-Oxley Act regulates corporate governance by setting minimum standards of professional conduct in the interest of protecting investors. As mentioned in the above section, Section 307 of the Act applies directly to attorneys, as it directs the Commission to establish professional standards that govern attorneys "appearing and practicing" before the SEC on behalf of their company clients. The SEC Rules, which took effect on August 5, 2003, require attorneys to report evidence of certain material violations including, but not limited to, breach of fiduciary duty committed by their corporate client, "up the ladder" within the organization. The SEC rules were meant to supplement standards of professional conduct developed by the individual states. Rather than limit the states from imposing additional regulations (so long as they were not inconsistent with the SEC rules). Where state standards conflict with SEC regulations though, the SEC rule will preempt the state standard.[16]

A. Attorneys Governed by the Sarbanes-Oxley Act

In broad terms, the Sarbanes-Oxley Act requires the SEC to regulate the conduct of attorneys "appearing and practicing before the Commission in any way in the representation of the issuers."[17] The SEC now expects attorneys, whether in-house or outside counsel to serve as "gatekeepers in maintaining fair and honest markets."[18]

Fortunately, the SEC has provided more detail on the scope of the law and its application to attorneys in adopting 17 C.F.R. pt. 205.[19] The definitions reveal that the scope is wider than it may appear on its face:

- **Attorneys**: Any person licensed or otherwise qualified to practice law in any jurisdiction with the exception of "non-appearing" foreign attorneys.[20]

- **Issuer:** A person who issues (or proposes to issue) registered securities under the Securities Act of 1933,[21] OR is required to file with the SEC under the Act,[22] OR that files or has filed a registration statement that has not yet become effective under the Act AND that has not been withdrawn.[23] According to the SEC rule, the term "issuer" also includes any person controlled by an issuer, such as a subsidiary, when provided at the behest, or for the benefit of, the issuer even if the attorney is not employed or retained by the issuer.[24] It is unclear from the rule as to when an attorney representing a subsidiary would be deemed to be acting for the issuer.[25] "Issuer" excludes a foreign government issuer.

- **Appears and practices before the SEC in any way:** Under §§ 205.2 (a), 205.3 (b)(5) and 205.4 (b), the range of activity includes an attorney who engages in any of the following activities:[26]

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Transacts business with the SEC, including communications in any form.

Represents a company in a SEC administrative proceeding or in connection with any SEC investigation, inquiry, information request, or subpoena.

Provides advice with respect to the federal securities laws regarding any document that the attorney has notice will be filed with or submitted to or incorporated into any document that will be filed with or submitted to the SEC.

Advises the company as to whether information or a statement is required to be filed with or submitted to the SEC or incorporated into a document that is filed with or submitted to the SEC.

Conducts an investigation on behalf of the company pursuant to Part 205.

Supervises and directs an attorney who is appearing and practicing before the SEC in the representation of an issuer.

Further, the SEC establishes that these activities must be undertaken within the context of providing legal services to a company, with whom the attorney has an attorney-client relationship, even though the communications would not be protected by the attorney-client privilege. Hence, if the attorney were only acting in a partial legal capacity, as long as the attorney was providing legal services, s/he would be governed by the law.[27]

- **In the representation of issuers:** The rules provide that attorneys who fall within the ambit of the law are those who represent issuers.[28] The SEC standards further define this type of representation to include "providing legal services as an attorney for an issuer, regardless of whether the attorney is employed or retained by the issuer."[29] The rules state that an attorney represents the issuer as an organization, however, not the issuer's individual officers or employees.[30] Hence, the rule only covers an attorney who is providing legal advice to an issuer where there is an attorney-client relationship. Attorneys for third parties who review part of an issuer's disclosure document or render a legal opinion to an issuer who is not their client are not covered by the rules.
  However, attorneys can become subject to the rules even though they do not counsel the issuer in two instances. First, an attorney employed by an investment adviser who prepares material for an investment company knowing it will be filed with the SEC will fall within the ambit of the rules, on the basis that such conduct falls squarely within the definition of "appearing and practicing" before the Commission. Second, an attorney for a controlled subsidiary can be deemed appearing and practicing before the Commission in the presentation of the parent, as the term "issuer" is defined to include a person controlled by the

issuer.
It is also important to note that once an attorney becomes subject to the rules with respect to an issuer, the material violation that must be reported need not relate to the matter that placed the attorney within the ambit of the law.

The SEC's definition of "appearing and practicing" seems to widen the potential scope of attorneys to which the law applies. For example, a non-securities specialist who prepares or reviews a discrete section of a disclosure document could be deemed to have appeared or practiced before the SEC. An attorney who prepares an agreement that the attorney knows will be filed as an exhibit to a SEC filing may similarly be subject to the rules under certain circumstances. Hence, it is not surprising that many corporations have instructed all attorneys admitted to practice within the U.S. within the general counsel's office to assume they fall within reach of the SEC standards.[31]

For additional discussion on how to interpret "appearing and practicing before the commission," and the extent to which attorneys fall within the ambit of the Sarbanes-Oxley Act, see:

- Laurence Stuart, In-House Counsel as Corporate Cop–Up the Ladder or Down the Chute, (Baker & McKenzie 2003), available at: http://www.acca.com/protected/legres/ethics/corpcop.pdf

- Abba David Poliakoff, A Trap for the Unprivileged: New SEC Attorney Conduct Rules, 37-Feb MDBJ 8, 10 (2004).

- Broc Romanek and Kenneth B. Winer, The New Sarbanes-Oxley Attorney Responsibility Standards, ACCA Docket 21, no.5 (May 2003): 40-55, available at: http://www.acca.com/protected/pubs/docket/mj03/standard1.php

- John Olson, Jonathon Dickey, et al., Recent Developments in Federal Securities Regulations of Corporate Finance as of July 22nd 2004, 2004 ACC Annual Meeting (Oct. 2004), available at: www.acca.com/am/04/

- John Villa, A First Look at the Final Sarbanes-Oxley Regulations Governing Corporate Counsel, ACCA Docket 21, no. 4 (April 2003):90-99 , available at: http://www.acca.com/protected/pubs/docket/am03/ethics2.php

- Washington Metropolitan Area Corporate Counsel Association: Understanding the New SEC Attorney Responsibility Rules (February 6, 2003), at: http://www.acca.com/chapters/program/wmacca/307rules.pdf

To access the legislative and administrative materials online, see:

- Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, Section 307 (2002), available at: http://www.acca.com/legres/enron/sarbanesoxley.pdf

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- Securities and Exchange Commission Final Rule: Implementation of Standards of Professional Conduct for Attorneys, 17 C.F.R. pt. 205 (2002), available at: http://www.sec.gov/rules/final/33-8185.htm

- Securities and Exchange Commission Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys, Release No. 33-8186 (Jan. 29, 2003), available at: http://www.sec.gov/rules/proposed/33-8186.htm

- See www.seclaw.com/secrules.htm for an online version of many securities law statutes, regulations and forms.

B. Outside Counsel Versus In-house Attorneys: Are the Duties the Same?

Since Part 205 of the SEC Rules establishes standards of professional conduct for all attorneys who appear and practice before the SEC in the representation of public issuers, the regulation includes outside attorneys. Thus, under the SEC's new attorney standards, outside counsel incur the same obligations as in-house counsel. There is certainly no one-size-fits-all answer or bright line test to answer the question of when the duty arises. In-house and outside counsel instead must rely on their best judgment and the rules laid out by the SEC on the matter.[32]

Outside firms can play a pivotal role in providing their clients guidance on the SEC Rules. For sample memos to corporate clients, see:

- Letter to Outside Counsel, Thomas Gottschalk, Executive Vice President Law & Public Policy & General Counsel, General Motors, at: http://www.acca.com/protected/policy/conduct/gm_ocletter.pdf

- Memo to Clients and Other Interested Parties, O'Melveny & Myers LLP (February 24, 2003), at: http://www.acca.com/chapters/socal/program/sox/attorney_conduct_rules.pdf

- Washington Metropolitan Area Corporate Counsel Association, Understanding the New SEC Attorney Responsibility Rules (February 6, 2003), at: http://www.acca.com/chapters/program/wmacca/307rules.pdf

For information on how to use outside firms to help your legal department navigate through the new attorney standards, see:

- Richard Ober and Michael Parish, Maybe You Need a Lawyer: Does the Sarbanes-Oxley Act Make the SEC Your Client? ACC Docket 21, no. 4 (April 2003): 70-85, available at: http://www.acca.com/protected/pubs/docket/am03/client1.php

For more information on ethics and professional issues related to Sarbanes-Oxley

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as tied to the role of in-house and outside counsel, see:

- Role of the General Counsel, ACC InfoPAK (March 2005), available at www.acca.com/protected/infopaks/role_gc/infopak.pdf
- Kathryn M. Fenton, Counseling the Corporation Post-Sarbanes-Oxley: Ethics and Professionalism Issues for In-house and Outside Counsel, 2004, available at: www.acca.com/protected/legres/corpresp/counselingcorporation.pdf

Corporations have drafted policies and procedures for outside counsel in satisfying its obligations under Part 205 of the SEC Rules. These revised corporate policies are intended to supplement, not restate the SEC requirements, as the drafters expect that outside counsel will familiarize themselves with the SEC Rules. The following are model corporate policies and procedures for outside counsel:

- Model Letter to Outside Counsel Regarding Compliance with SEC Rule 205, Wilmer, Cutler & Pickering, at: http://www.acca.com/protected/policy/conduct/wilmer_ocpolicy.pdf
- Policy Regarding Compliance with SEC Attorney Conduct Rules, at page 12, at: http://www.acca.com/protected/policy/conduct/rules_sample1.pdf

III. When Does the Duty Arise?

A. Overview

A significant attorney duty imposed by the SEC standards pursuant to Section 307 of the Act is presented in an extensive scheme requiring an attorney who becomes aware of "evidence of a material violation" (as an appearing and practicing attorney before the SEC in the representation of a company), to report that evidence "up the ladder." Specifically, the SEC Rules require an attorney to:

1. report evidence of a material violation of securities law or breach of fiduciary duty (or other similar act) to the Chief Legal Officer (CLO) or Chief Executive Officer (CEO)[33]

and

2. if the CEO or CLO fails to respond appropriately to such evidence to the: Audit Committee of Board of Directors (or another committee of non-employee directors) or the Board of Directors if there is no audit committee.[34]

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However, counsel needs to understand the circumstances that trigger this requirement under the SEC rules. Then, counsel must become familiar with the prescribed methods for reporting up the ladder.

B. When is the Duty to Report "Up the Ladder" Triggered?

Again, "attorney" in this context refers to one appearing and practicing before the SEC in the representation of a company. Once a lawyer is deemed to fall within the reach of the regulations, his or her duty is set forth in Section 205.3(b)(1)[35]:

"[i]f an attorney… becomes aware of evidence of a material violation by the issuer or by any officer, director, employee or agent of the issuer, the attorney shall report such evidence to the issuer's chief legal officer… or to both the issuer's chief legal officer and its chief executive officer… forthwith…"[36]

Thus, the duty to report under the SEC rules is triggered when a lawyer becomes "aware of evidence of material violation by a company or its officer, director, employee, or agent." The rule itself does not specify any required quantum, proportion, or persuasive effect of the evidence. Yet, the rule further explains that such evidence includes "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."[37] Further, the rules and adopting release define these terms as follows:

- **Circumstances** are relevant circumstances, including the reporting attorney's experience, expertise, and knowledge.[38] These also includes the time constraints under which the attorney is acting, the attorney's previous experience and familiarity with the client, and the availability of other lawyers with whom the attorney may consult. [39]

- **Material violation** is a violation of an applicable U.S. state or federal securities law, a material breach of fiduciary duty arising under a state or federal law, or similar material violation of any state statutory or common law, or federal law.[40] Although the Commission did not define "material" in the rules, the release notes that the term material should be interpreted by the courts in light of its usual meaning under the applicable federal securities law.[41]

- **Reasonably likely knowledge requirement** demands that a material violation must be more than merely possible, but need not be "more likely than not."[42]

- **Breach of fiduciary duty** is committed by any breach of fiduciary duty (or similar duty), recognized by federal or state law, to a company including but not limited to: misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions.[43] It remains unclear if all duties of diligence,

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care and loyalty are subject to the rule.

Both the ABA Model Rule and SEC Rule 205.3(b)(1) contain this mandatory up-the-ladder reporting requirement. The Model Rules requires that if a lawyer for an organization knows that an organization's agent is engaged in actions which will harm the company or violate the law in a manner that will cause substantial injury to the client, that lawyer must report it to any higher authority in the organization. The SEC Rule is also mandatory, but refers to these same violations that must be reported as "material violations" instead of those that will cause substantial harm. The SEC Rules attempt to provide greater content and clarity to the reporting requirements than the ABA Model Rules.

C. Issues Presented

(1) Compare Standard to Rule 1.13 of the ABA Model Rules of Professional Conduct

Although the SEC rules only apply to attorneys practicing before the Commission, those states that have adopted Model Rule 1.13 impose substantially the same requirements upon all attorneys. The main difference between the SEC Rule and the state ethics rules is the mechanism of enforcement. Where the Model Rules are enforced through state processes, the SEC rules are enforced by the Commission itself.[44]

The SEC has stated that where the state-adopted ABA Model Rule differs from the standards established in the SEC final rules, the SEC standards will prevail.[45] An important distinction in interpreting which lawyers are within the scope of Sarbanes-Oxley is that the SEC standards require an in-house lawyer to take action, including reporting up the ladder, when the lawyer becomes aware of any evidence of a material violation. Model Rule 1.13, by contrast, requires the attorney to take action only when the attorney learns of certain facts related to his or her representation.[46] Thus, a lawyer under Model Rule 1.13 must act only if he or she has reached a high level of certainty (knows) that a violation has occurred. The SEC's commentary explains that it had rejected the knowing requirement for the "reasonably likely" standard.[47] It also describes the "reasonably likely" standard as "more than a mere possibility but it need not be 'more likely than not.' "[48] Such a loose standard will certainly prove difficult, as attorneys struggle to apply it to factual scenarios in the future. Further, Model Rule 1.13 merely suggests that in-house lawyers may report up the ladder upon receiving evidence of their client's wrongdoing, while Sarbanes-Oxley mandates such action.

Meanwhile, practitioners believe that state bar associations are likely to raise the bar on attorney conduct by modifying Rule 1.13 and other corresponding Sarbanes-Oxley rules.[49] However, since the revised Model Rules of Professional Con-

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duct failed to seize the opportunity to reconcile these differences, it is doubtful the states will take the initiative. Additional issues regarding Rule 1.13 and confidentiality are analyzed in subsequent sections.

For more discussion as well as practical advice concerning these reporting up the ladder issues, the following sources may be helpful:

- Memo Regarding What Legal Departments Can Do to Prepare for Compliance with New SEC Rules, ACCA Memo, available at: http://www.acca.com/protected/article/corpresp/8krule.pdf
- Thomas Lee Hazen, Administrative Law Controls on Attorney Practice: A Look at the Securities and Exchange Commission's Lawyer Conduct Rules, 55 admlr 323 (2003).
- Giovanni P. Prezioso, Public Statement by SEC Official: Letter Regarding Washington State Bar Association's Proposed Opinion on the Effect of the SEC's Attorney Conduct Rules, Gen. Couns. Mem. (July 23, 2003), available at:
- www.sec.gov/news/speech/spch072303gpp.htm
- John K. Villa, A First Look at the Final Sarbanes-Oxley Regulations Governing Corporate Counsel, ACCA Docket 21 no. 4(April 2003): 90-99, available at: http://www.acca.com/protected/pubs/docket/am03/ethics2.php
- Jenny E Cieplak, Michael K. Hibey, The Sarbanes-Oxley Regulations and Model Rule 1.13: Redundant or Complementary, The Georgetown Journal of Legal Ethics, (Summer 2004).
- Reporting Up the Ladder: Unclear Case Law Creates Tough Decisions, Corporate Legal Times, vol. 15, no. 163 (June 2005).

For discussion of preemption issues, see:

- Chi Soo Kim and Elizabeth Laffittee, The Potential Effects of SEC Regulation of Attorney Conduct Under the Sarbanes-Oxley Act, 16 Geojle 707 (2003).

(2) Material Breach of Fiduciary Duty

The SEC definition of "material violation" will certainly cause confusion, as it extends the triggering factor for its reporting requirement to a breach of fiduciary duty including a "similar duty." Some experts observe that attorneys are not necessarily well suited to judge the behavior of corporate management, especially in deciding on such issues as whether a manager has breached a duty of care. A duty of care, in corporate terms, involves a balance of risk and return, a task tradition-

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ally relegated to corporate management, not lawyers. In fact, the role of a lawyer in judging management's duty is inconsistent with the ABA Model Rules (namely 1.13—"up the corporate ladder" rule), which provides that "[w]hen constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing substantial risk, are not as such in the lawyer's province."[50] Placing the responsibility of judging whether management has breached its duty of care upon lawyers, some assert, invites much confusion and trouble.

For a discussion on possible issues surrounding the SEC Rules, particularly on attorney standard of knowledge for reporting and identifying breach of duties, the following articles may be insightful:

- Guidelines Regarding SEC Standards of Professional Conduct for Attorneys, Palmer & Dodge LLP, at: http://www.acca.com/protected/policy/conduct/palmerdodge.pdf
- Securities and Exchange Commission Final Rule: Implementation of Standards of Professional Conduct for Attorneys, 17 C.F.R. pt. 205 (2002), available at: http://www.sec.gov/rules/final/33-8185.htm

For additional resources interpreting key phrases in Part 205 of the SEC standards, see:

- Laurence Stuart, In-house Counsel as Corporate Cop–Up the Ladder or Down the Chute, (Baker & McKenzie 2003), available at: http://www.acca.com/protected/legres/ethics/corpcop.pdf
- John K. Villa, A First Look at the Final Sarbanes-Oxley Regulations Governing Corporate Counsel, ACCA Docket 21, no. 4 (April 2003): 90-99, available at: http://www.acca.com/protected/pubs/docket/am03/ethics2.php

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IV. Reporting Obligations in the Event of Material Violation: Implementing the "Up the Ladder" Requirement

A. Reporting Attorney's Duties

The "up the ladder" duty requires an attorney to report evidence of a material violation to either a supervisory attorney, or the company's chief legal counsel, or chief executive officer. The CEO or CLO, not the reporting attorney, must conduct an inquiry. When the attorney chooses to report such evidence directly to the company's CEO or CLO, she must assess whether the officer responded appropriately. If the attorney does not believe the response from the corporate officer was appropriate, she must report the violation up to the issuer's audit or other independent committee or to the full board of directors. The standards allow an attorney to report directly to the committees or board, if he or she feels that it would be futile to report to the CEO or CLO.

A reporting attorney who receives an appropriate and timely response to his/her report will have satisfied the obligations under the rules. Note that the rules do not impose a separate duty on the reporting attorney to investigate the evidence of a material violation. However, an attorney who has reported the matter all the way "up the ladder" and has not received an appropriate and timely response must explain his reasons for this belief to either the CLO, CEO, Board of Directors, audit or independent committee to whom he reported the evidence of a material violation.

B. Supervisory Attorney's Duties

The "up the ladder" reporting duty requires an attorney to turn in evidence of a material violation to either a supervisory attorney, or the company's chief legal counsel (CLO), or chief executive officer (CEO). If the reporting attorney chooses to report to a supervisory attorney, the supervisory attorney must then assess whether a material violation has occurred, is ongoing, or is about to occur. If the supervisory attorney does not reasonably believe that there is a material violation (or potential violation), then he or she must notify the subordinate attorney of this conclusion. The subordinate attorney may then decide whether to report the evidence to the CLC or CEO, the company's board or audit committee, or other independent committee of the corporation. However, the subordinate attorney is not required to do so. If the supervisory attorney believes that there is credible evidence of a material violation, he or she must report such evidence up the ladder

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to the company's chief legal or executive officer.

The duty of the attorney reporting the matter to the CLO or CEO is not complete at this point. Rather, he or she must evaluate the response from the issuer's chief legal or executive officer. If the reporting attorney feels the officer has not appropriately responded to the concern, he or she must report directly to the company's audit committee, the board of the directors, or another committee of independent directors.

It may be argued that Rule 205 requires no more of lawyers than what most would already do – that is, move issues up the ladder within an organization and seek an appropriate response. However, it is also true that the trigger for the reporting obligation in the rule is inherently ambiguous. The standard is that lawyers must be "aware" of evidence of a material violation. But, how does one define that point in time when they become "aware" of something? And how much evidence of a material violation is required? For example, if an employee or officer forwards in-house counsel an e-mail containing a rumor of bad acts, is the attorney then "aware" of a material violation? What happens when a disgruntled employee of suspect credibility brings a potential problem to the attention of in-house counsel?[51]

The importance of adhering to the new standards was illustrated by the SEC's case against John E. Isselman, Jr., the former General Counsel of Electro Scientific Industries Inc. (ESI). In September 2004, the SEC charged Isselman with a violation of Rule 13(b)2-2 of the Exchange Act for failing to provide important information to ESI's audit committee, board of directors and auditors regarding a significant fraudulent accounting transaction that enabled ESI to report a profit rather than a loss. The SEC did not allege that Isselman participated in the scheme to boost profits, nor that he knew about the fraud. However, the SEC determined that Isselman's failure to report the transaction up the ladder after he learned of the fraud constituted a violation of securities law. In his settlement with the SEC, Isselman did not admit or deny the agency's allegations but he did agree to pay a $50,000 civil penalty and agreed to a cease-and-desist order.

In January 2005, the SEC charged Google and its General Counsel, David C. Drummond, with failure to register over $80 million in employee stock options.[52] The federal securities laws require companies issuing over $5 million in options during a 12 month period to provide detailed financials to recipients or register—thereby publicly disclosing financial and other information. The commission further found that Drummond was aware that the registration and related disclosure obligations had been triggered, but believed Google could avoid providing the information to its employees by relying on an exemption from the law. The exemption was, in fact, inapplicable.

In order to comply with the Section 307 rules, many companies have developed written policies or standards describing their "up-the-ladder" reporting expectations. These expectations should be communicated to (and apply to) all attorneys

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within a company and reportable allegations covered by departmental policies may be broader in scope and application than the SEC rules may require. Most company policies do not want in-house counsel to deliberate as to whether they should report something wrong to the CLO or other senior counsel. Rather, they want allegations of wrongdoing reported up within the legal department immediately. Although individual companies' procedures may vary, most will include the creation of internal guidance resources and extensive training. Many legal departments have a designated advisory counsel or committee to assist attorneys who are confused or need advice.

C. The Duties of the Chief Legal Officer ("CLO") & the Chief Executive Officer ("CEO")

If the reporting or supervisory attorney decides to report to the CEO or CLO of the company, that officer must then conduct reasonable inquiry into the possible violations outlined in the report. If either officer determines no material violation has occurred, is ongoing or is about to occur, it must notify the reporting attorney of such findings and state the basis for such an opinion.

If the CLO finds that there is a material violation, the CLO must take reasonable steps to cause the company to stop the violations, to prevent it, or to remedy the consequences of the violation. A CLO may want to launch an inquiry or turn the matter over to a legal compliance committee. However, the compliance committee must have been established before the event occurred. [53]

On July 15, 2004, Mark Belnick, the former General Counsel for Tyco International Ltd. was acquitted of charges of grand larceny, securities fraud, and falsifying business records for accepting more than $30 million in the form of unauthorized loans and bonuses. The central defense argument throughout the case was that the prosecution's case was based on a fundamental misunderstanding of the GC's role in ferreting out corporate fraud. The prosecution alleged that Belnick must have known about Tyco's misdeeds and that the failure to uncover and disclose irregularities in his $30 million compensation package was part of a cover-up. However, according to the defense, Belnick was entitled to rely on the word of the CEO and CFO for guidance on issues of board approval and compensation. Although a jury ultimately acquitted Belnick, his trial came at a significant personal and professional cost. The Belnick case illustrates the importance of the GC's need to have internal controls that ensure that good information reaches the top of the ladder in light of changing professional rules and changing perceptions of those rules. As GCs assume a greater responsibility for being aware of what is going on in their organizations, there is an increased possibility that more information, and less meaningful information, will be reported up to ladder to them.[54]

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D. Determining Whether the Response is "Appropriate"

The SEC identifies three possible responses an attorney may receive that are considered appropriate. Hence, the phrase, "appropriate response" means a response that provides a basis for an attorney to reasonably believe that:

- there is no occurring material violation,
- the company has adopted appropriate remedial measures (including taking appropriate steps or sanctions to stop any material violations that are ongoing, to prevent any material violation that has yet to occur, and to remedy or otherwise appropriately address any material violation that has already occurred and to minimize the likelihood of its recurrence), or
- the company, with the consent of the board (or other independent committee or a QLCC), has retained or directed an attorney to review the reported evidence of a material violation and has either implemented the attorney's remedial recommendations or been advised by the attorney that he or she can assert a colorable defense in any proceeding relating to the reported violation.[55]

Note that the third approach requires only that the reporting attorney and CLO form a reasonable belief that the company retained or directed an attorney to take action. This will likely reduce the burden of the company to furnish substantial information to the reporting attorney, particularly if the reported violation is beyond the scope of the attorney's expertise. In contrast, the first two options require the reporting attorney to form a reasonable belief as to whether a material violation exists and whether the response was appropriate. Further, under the third approach, the reporting attorney and CLO or CEO will be less exposed to being second-guessed by the SEC.[56]

For guidance and information on up the ladder reporting and checklists, see:

- Attorney-Client Privilege in the Corporate Setting, Fact Sheet, Quinn Emanuel Urquhart Oliver & Hedges, LLP, available at: http://www.acca.com/chapters/socal/program/corpattyclient.pdf
- Broc Romanek and Kenneth Winer, The New Sarbanes-Oxley Responsibility Standards, Feature Article, ACCA Docket 21 no. 5 (May 2003): 40-55, available at: http://www.acca.com/protected/pubs/docket/mj03/standard1.php
- Sample General Counsel Letter to Legal Department regarding Sarbanes-Oxley "Up the Ladder" Reporting, available at: http://www.acca.com/protected/forms/corpresp/jci_qlcc.pdf

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Summary: The Final Rule: Responsibilities of Supervisory and Subordinate Attorneys[57]

- The rules define a “supervisory attorney” (e.g., a CLO in a public company or a partner in an outside law firm) as an attorney who directs or supervises one or more subordinate attorneys.

- A “subordinate attorney” does not include one who is under the direct supervision or direction of the CLO.

- To the extent a subordinate attorney appears and practices before the SEC, that attorney’s supervisory attorneys are deemed also to appear and practice before the SEC.

- A supervisory attorney must make reasonable efforts to ensure that subordinate attorneys comply with the reporting rules.

- Subordinate attorneys are deemed to have satisfied their reporting obligations once a report is made to a supervisory attorney.

- A subordinate attorney who has reported evidence of a material violation to a supervisory attorney and who reasonably believes that the supervisory attorney has failed to comply with the reporting requirements is permitted, but not obligated, to report the evidence “up the ladder.”

- “Appropriate response” means a response that provides a basis for an attorney to reasonably believe that either: (1) there is no occurring material violation, (2) the company has adopted appropriate remedial measures; or (3) the company’s board (or other independent committee or a QLCC), has consented to retaining or directing an attorney to review the reported evidence of a material violation and has either implemented the attorney’s remedial recommendations or been advised by the attorney that the company or individual can assert a colorable defense in any proceeding relating to the reported violation.

- The final rules have eliminated the documentation requirements contained in the proposed rules with respect to:

  (1) the subordinate’s report and

  (2) the basis for the conclusion if the supervisory attorney believes that the information reported by the subordinate attorney need not be reported “up the ladder.”

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V. The Qualified Legal Compliance Committee (QLCC) Option

The QLCC is a vision initially created by the SEC for regulating attorney conduct in its final rules, codified in 17 CFR Part 205 pursuant to Section 307 of the Sarbanes-Oxley Act. The primary purpose of a QLCC, or optional "independent" board committee, is to provide legal problem oversight for the board on behalf of the corporation. Since the SEC in Part 205 does not require corporations to create a QLCC, it is wise to examine certain aspects of the entity, such as: (i) its function, (ii) its basic structure, (iii) its responsibility and authority, and (iv)its advantages and disadvantages.

A. Function

Section 205.3 (c) of the SEC Final Rules offers the creation of a QLCC as an alternative method of reporting up the ladder. For instance, rather than reporting to a supervisory attorney, company CEO or CLO or Board of Directors, an attorney who discovers evidence of a violation can report directly to a Qualified Legal Compliance Committee (QLCC). The SEC requires that a QLCC be established prior to the event upon which an allegation is based. Specifically, Section 205.3 (c) provides:

> (1) If an attorney… becomes aware of evidence of a material violation… the attorney may, as an alternative to the reporting requirements of paragraph (b) of this section, report such evidence to a qualified legal compliance committee, if the issuer has previously formed such a committee. An attorney who [so] reports… has satisfied his or her obligation to report… and is not required to asses the issuer's response…
>
> (2) A chief legal officer… may refer a report of evidence of a material violation to a previously established qualified legal compliance committee in lieu of causing an inquiry… The chief legal officer (or the equivalent thereof) shall inform the reporting attorney that the report has been referred…

Thus, as an alternative to the prescribed methods of reporting up the ladder, an attorney may seek to disclose evidence of a violation directly to the QLCC—if the corporation has established one—and relieve himself or herself of further reporting responsibilities required by the SEC rules. In doing so, the QLCC allows an attorney to bypass several steps of reporting up the ladder by reporting to a single entity. Similarly, a chief legal officer may refer a report of evidence of a material violation to the company's QLCC, rather than causing an inquiry, and inform the reporting attorney of this course.[58] This reporting approach allows lawyers who discover a potential violation to shift the responsibility of follow-up to the

board. The QLCC then assumes responsibility for the investigation, remedial action, or any necessary reporting out required by law. Further, the establishment of a QLCC is encouraged by the Commission in the final SEC rules, because such a structure institutionalizes the practice of assessing evidence of a material violation and promotes a more preventative approach.

B. Basic Structure of a QLCC

Section 205.2(k)(1) defines the structure of a "qualified legal compliance committee of a company." Specifically, it requires a QLCC to have both of the following:

- At least one member of the issuer's audit committee (or, if the issuer has no audit committee, one member from an equivalent committee of independent directors); and
- Two or more members of the corporation's full board of directors who are not employed either directly or indirectly by the company and are not "interested persons" (in the case of a registered investment company) as defined in Section 2(a)(19) of the Investment Company Act of 1940.

C. Responsibilities and Powers

Sections 205.2(k)(2), (3) & (4) provide that a qualified legal compliance committee of a corporation is vested with certain obligations and authority. Specifically, the regulations require that the QLCC:

- Has adopted written procedures for the confidential receipt, retention, and consideration of any report…[59]
- Has been duly established… with the authority and responsibility:

    (i) To inform the issuer's chief legal officer and chief executive officer… of any report of evidence of a material violation (except in the circumstances described in Section 205.3(b)(4));

    (ii) To determine whether an investigation is necessary… and, if it determines an investigation is necessary or appropriate, to:

    (A) Notify the audit committee or full board of directors,

    (B) Initiate an investigation… and

    (C) Retain such additional expert personnel as the committee deems necessary; and

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(iii) At the conclusion of any such investigation, to:

(A) Recommend, by majority vote, that the issuer implement an appropriate response… and

(B) Inform the chief legal officer and the chief executive officer…and the board… of the results of any such investigation…;[60] and

- Has the authority and responsibility, acting by majority vote, to take all other appropriate action, including the authority to notify the Commission in the event that the issuer fails in any material respect to implement an appropriate response… [61]

It is important to clarify a few aspects of the QLCC's requisite powers and obligations. First, while QLCC has the authority and responsibility to recommend that an issuer take appropriate remedial action in response to the QLCC's noted violation, it has no authority to direct the issuer to take such action. The reason that the SEC fashioned the rules this way is because vesting QLCC with power to compel the board to act would conflict with established corporate governance models.[62] Any decisions and actions of the QLCC must be made by majority vote, although unanimity is not required. Further, if the corporation materially fails to implement an appropriate response that the QLCC has recommended, the QLCC has authority and responsibility, by way of majority vote, to notify the Commission of such failure.[63]

For guidelines on the mechanics of reporting to a QLCC and sample company procedures, see:

- Securities and Exchange Commission Final Rule: Implementation of Standards of Professional Conduct for Attorneys, 17 C.F.R. pt. 205, 205.2 (k) (2002), available at: http://www.sec.gov/rules/final/33-8185.htm
- General Motors Corporation Qualified Legal Compliance Committee Procedures, at: http://www.acca.com/protected/forms/corpresp/gm_qlcc.pdf
- Joseph T. McLaughlin, Guy N. Molinari, Karen Crupi-Fitzgerald, and Holly Kulka, Qualified Legal, Compliance Committee: Policies and Procedures, Heller Ehrman (April 2003), at: http://www.acca.com/protected/program/qlcc_presentation.pdf

D. Liability of QLCC Members

While neither Section 307 of the Act nor the Final Rules contain any provision regarding the liability of directors who serve on the QLCC, the Commission expressly states in the Final Release that it "does not intend service on a QLCC to increase the liability of any member of a board of directors under state law, and in-

deed, expressly finds that it would be inconsistent with public interest for a court to so conclude."[64]

E. Issues Presented

(1) QLCC and the Reporting Out Requirement

Some practitioners have commented that the language in section 205.2(k)(4) is ambiguous. While this section states that the QLCC is vested with "authority and responsibility… to take… appropriate action, including the authority to notify the Commission…" it remains unclear whether the QLCC also has the affirmative responsibility to notify the Commission. The fact that the word "authority" refers to the act of notifying the Commission suggests that it may be a permissive— rather than mandatory—code of conduct.

What is also unclear is whether the QLCC would be subject to disciplinary action in the event that it should fail to act properly. Since Congress directed the SEC to establish standards of conduct for lawyers, it is unclear if the SEC may sanction directors under such a directive. Thus, in the spirit of the law, it remains uncertain if the definition of a QLCC provided in section 205.2. (k)(4) should be interpreted to require reporting out, or whether reporting out is merely an option. [65] For more information on this topic, see:

- Susan Hackett, QLCCs: The In-House Perspective, Wall Street Lawyer (May 2004) at: http://www.realcorporatelawyer.com/wsl/wsl0504.html
- Simon M. Lorne, An Issue-Annotated Version of the Sox: A Work in Progress, Munger, Tolles & Olson LLP (December 2003), at: http://www.acca.com/protected/article/corpresp/sarbox_attyethics.pdf

(2) Advantages and Disadvantages of Creating a QLCC

One way to preserve the corporation's ability to use the attorney-client privilege and work product doctrine to protect any information discovered through the course of an investigation is to use a QLCC. A QLCC may retain outside counsel at the outset of an investigation to examine the potential of a material violation. In following this course of action, a QLCC can help prevent increased liability due to disclosure of potentially damaging information.[66]

Curiously, although many corporations quickly adopted the many corporate governance suggestions and mandates, very few have chosen to create a QLCC. One reason is context. While the SEC suggested the creation of the QLCC in its final rules, it drafted the suggestion when mandatory reporting out requirements were still in the rules. Since the reporting out requirements were removed from the final

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rule, Part 205, there is little need for a QLCC.[67]

Another reason for the scarcity of these entities is that the creation of a QLCC primarily benefits lawyers, while leaving their director counterparts subject to liability. Corporate boards may be reluctant to establish yet another committee of the Board charged with governance responsibilities, while the entire in-house legal department evades the investigation, assessment and internal reporting responsibilities. Such resistance is a natural response from directors, particularly in light of recent corporate debacles in which director liability has substantially increased. Thus, many in-house lawyers are re-thinking the QLCC suggestion.

Another issue that has hindered the use of the QLCC is the cost in recruiting qualified Directors.[68] Because QLCC members face increased workloads and liability, individuals will often be either reluctant to serve or cost the company too much by demanding the company buy stronger (i.e., costlier) D&O coverage and pay them higher fees than the other directors.

Further, a QLCC can bread animosity amongst the board itself. A board committee that operates apart from—and is more knowledgeable than—management is not compatible with normal corporate functioning. Management, especially the CEO, is therefore apt to resist formation of the QLCC and to refuse to cooperate with it.

After first glance, the structure of the QLCC is suspect.[69] The reason in-house lawyers would promote the establishment of a QLCC is to shift responsibility and liability to an independent committee. However, in order for this to work, the QLCC must hire an independent counsel, unfamiliar with the client's operations. Clearly, a Corporate Legal Officer would not favor this route, as the board committee would be retaining a law firm which is unfamiliar with the corporation to pursue a probing and sensitive investigation, free of any oversight by the corporation's in-house lawyers.

In addition, given the outside firm's lack of experience with the corporation, the costs may be considerably high, and may significantly impact in-house counsel budget. The fact that this may have a negative affect on intra-corporate communications—namely between in-house counsels and corporate directors and executives—makes the QLCC approach appear counter-intuitive from the standpoint of best practices in corporate responsibility. The alternative would be to select in-house lawyers to work with an independent counsel retained by the QLCC. Given this scenario, however, in-house lawyers are subject to liability and increased responsibility, and the QLCC's purpose is largely diminished.

Further, most in-house counsel have a sense of professional obligation and competency in the area of corporate governance. Given that most members of a QLCC are experts in the fields of business and finance, it would seem impractical that they have the time, expertise or interest in making informed decisions regarding

allegations and reports. Although the CLO plays a crucial role in advising the directors in the day-to-day business decisions, the QLCC effectively locks the CLO out of the advising loop. Thus, shifting responsibility to the QLCC raises critical issues as to basic competency of the corporate officers.[70]

However, there are several good reasons in favor of the creation of a QLCC. Referral of a possible material violation to the QLCC should remove any suspicion that the matter would not be dealt with appropriately by management. When a CLO refers a report of misconduct to the QLCC, the CLO is not then required to make any further response to the reporting attorney, other than informing the attorney of the referral. An attorney reporting to a QLCC has no duty to evaluate its response, as otherwise required under the rule. In addition, creating a QLCC may become standard "best practice" in corporate governance. And, although not mandatory, its absence may raise questions about other governance issues.

The continued development of SEC rules and regulations based on the Sarbanes-Oxley Act means that in-house counsel must remain current on legal developments. Counsel should conduct frequent research, or attend legal education classes to ensure awareness of regulations is as current as possible.[71]

For additional dialogue on issues regarding the QLCC option, confidentiality issues, and advantages and disadvantages, the following sources may be useful:

- Susan Hackett, Issues for Law Departments Considering Whether to Recommend that Their Board Create a QLCC, ACCA Memo (August 27, 2003) at: http://www.acca.com/protected/article/corpresp/qlcc_issues.pdf

- Simon M. Lorne, An Issue-Annotated Version of the Sox: A Work in Progress, Munger, Tolles & Olson LLP (December 2003), at: http://www.acca.com/protected/article/corpresp/sarbox_attyethics.pdf

- Joseph T. McLaughlin, Guy N. Molinari, Karen M. Crupi-Fitzgerald, and Holly Kulka, Qualified Legal Compliance Committee: Policies and Procedures, Heller Ehrman White & McAuliffe LLP, at 13-16 (April 2003), available at: http://www.acca.com/protected/program/qlcc_presentation.pdf

- Memo Regarding What Legal Departments Can Do to Prepare for Compliance with New SEC Rules, ACCA Memo, at 1-2, available at: http://www.acca.com/protected/article/corpresp/8krule.pdf

- The New Sarbanes-Oxley Attorney Responsibility Standards, ACCA Docket 21 no. 5 (May 2003), available at: http://www.acca.com/protected/pubs/docket/mj03/standard2.php

- Paul S. Maco, Kevin Lewis and David Godschalk, The Qualified Legal Compliance Committee: A Practical Choice?, Securities Regulatory Update (June 9,

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2003).

- Audrey Strauss, Qualified Legal Compliance Committees: Pros and Cons, New York Law Journal (May 1, 2003).

- Susan Hackett, QLCCs: The In-House Perspective, Wallstreetlawyer.com: Securities in the Electronic Age (May 2004).

VI. Drafting a Company Policy

Many corporate legal departments have responded to the new rules by drafting policy statements and guidelines to aid attorneys with proper professional conduct. Some companies with pre-existing professional guidelines will simply reiterate the comprehensive policies already in place, while others will develop new guidelines. Whatever the case, it is important to bear in mind a few key issues in forming a sample policy for your company.

First, identify the various purposes for drafting a policy. These may include:

- Attorney Interest: Rules of professional responsibility regulating attorney conduct.

- Client Service/Liability Interests of Law Department: Mandate proper management policies that ensure reports are made and remedies are sought in response to allegations.

Drafting a policy with these distinct goals in mind will best enable your legal department to balance the obligations imposed by the Commission's rules and company policies with their duty to act in the best interest of their clients. This approach can dispel the notion that attorneys are now in the "gotcha!" reporting business, and recognize instead that counsel are members of a corporate team, responsible for legal counseling and preventive compliance.[72]

- **Sample Policies:** Developing a policy is necessary, but not sufficient. It is essential to educate employees about what the policy means, when to ask questions, whom to turn to for aid, and the importance of ethical conduct to the company. To view the comprehensive plans of companies such as BellSouth Corporation, Duke Energy Corporation, General Electric Company, General Motors Corporation, Hasbro, Inc., PepsiCo, Inc., Starbucks, Xerox Corporation, check out the following:

  Emerging and Leading Practices in Sarbanes 307 Up-The-Ladder Reporting and Attorney Professional Conduct Programs: What Companies

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and Law Firms are Doing, Leading Practice Profiles Series, ACC (September 4, 2003), at: http://www.acca.com/protected/article/corpresp/lead_sarbox.pdf

Guidelines Regarding SEC Standards of Professional Conduct for Attorneys, Palmer and Dodge LLP, at: http://www.acca.com/protected/policy/conduct/palmerdodge.pdf

Law Department Polices/Memoranda, Hasbro, Inc. Mission Statement, at: http://www.acca.com/protected/policy/conduct/hasbro.giv

Leading Practices in Codes of Business Conduct and Ethics: What Companies are Doing, Best Practices Profiles Series, ACCA (August 2003), at: http://www.acca.com/protected/article/ethics/lead_ethics.pdf

Office of General Counsel Policy Compliance with SEC Attorney Conduct Standards, Policy Statement, Xerox Corporation (August 1, 2003), at: http://www.acca.com/protected/policy/conduct/xerox.pdf

Memo to In-House Attorneys re: SEC Standards, General Motors, at: http://www.acca.com/protected/policy/conduct/gm_inhouse.pdf

- **Tips**

Five Practical Steps for In-house Counsel Concerned about Changes in Lawyer Regulation Pursuant to Sarbanes-Oxley Section 307, available at: http://www.acca.com/legres/corpresponsibility/307/steps.pdf

Broc Romanek and Kenneth B.Winer, Practical Tips for Dealing with the New Attorney Responsibility Standards, ACC Docket 21 no. 5 (May 2003): 40-55, available at: http://www.acca.com/protected/pubs/docket/mj03/standard_tips.php

VII. Whistleblowers

A. Protection for Whistleblowers

Sarbanes-Oxley creates a new claim for employees, including attorneys, fired or treated adversely because of a complaint or report of conduct by a company that violates Sarbanes-Oxley.[73] If an attorney who was formerly employed or retained by an issuer who has reported evidence of a material violation reasonably believes that he or she has been discharged on the basis of his or her report, such attorney may notify the board of directors of such discharge. In-house attorneys may fur-

ther avail themselves of the benefit of Section 806 of Sarbanes-Oxley Act, which offers whistleblower protection. However, given the traditional limitations on wrongful discharge, and respecting a client's fundamental right to choose counsel, it remains to be seen if this provision will be of significant value to in-house counsel who shed light upon corporate misfeasance.

Section 806 of Sarbanes-Oxley, entitled "Whistleblower Protection for Employees of Publicly Traded Companies," strictly prohibits companies from engaging in retaliation against an employee for (1) providing information or making a complaint regarding conduct the employee "reasonably believes" constitutes a securities violation or securities fraud, or (2) filing or participating in proceedings related to fraud against shareholders. Employers (and in some cases individuals) found to have retaliated against a whistleblower may be subject to administrative, civil, and criminal sanctions. The whistle-blowing protections of the Act apply not only to publicly-traded companies, but also to their officers, employees, contractors, subcontractors, and agents. The Act specifically protects employees, including counsel, when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping fraud. All that the Act requires is that the employee reasonably believes that a violation of federal securities law, the rules of the SEC, or "any provision of Federal law relating to fraud against shareholders" has occurred or is occurring. The Act protects employees who complain to any person at the company with the authority to "investigate, discover, or terminate misconduct," which likely includes all corporate counsel and human resources professionals. This statutory language would appear to allow for individual liability of officers and employees. If the employer takes illegal action in retaliation for lawful and protected conduct, the Act allows the employee to file a complaint with the Department of Labor ("DOL").

Sarbanes-Oxley protects two broad classes of conduct. First, an employee is protected from retaliation when providing information, causing information to be provided, or otherwise assisting in the investigation of conduct that "the employee reasonably believes" constitutes wire fraud, bank fraud, securities fraud, or violation of "any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." Second, the Act protects an employee from retaliation for filing, causing to be filed, testifying in, participating in, or otherwise assisting in a proceeding filed or about to be filed (that the employer knows about) relating to the types of fraud listed above.

The "whistleblower" employee must file a complaint with DOL within 90 days of the alleged retaliation. The whistleblower's initial burden of proof is to show that the protected activity (i.e., complaint relating to fraud against the shareholders) was "a contributing factor" in the adverse employment decision. By contrast, the employer must prove "by clear and convincing evidence" that it would have taken

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the same adverse employment action even in the absence of the whistleblower's protected activity. If DOL decides to hold a hearing, it must do so expeditiously and must issue a final order within 120 days of the hearing. The employee can bring the matter to federal district court only if DOL does not resolve the matter within 180 days (and there is no showing that such delay is due to the bad faith of the claimant) as a normal case in law or equity, with no amount in controversy requirement. The Act provides for reinstatement of the whistleblower, back pay with interest, and compensatory damages to make the whistleblower whole, including reasonable attorneys' fees and costs, as remedies if the whistleblower prevails. The Act does not provide for either punitive damages or a jury trial. Judicial review is only available through an appeal to the Court of Appeals, but such appeal does not automatically stay the Department of Labor's order.

The Sarbanes-Oxley Act also makes it a felony offense for any person to "knowingly" and "with the intent to retaliate" take "any action harmful" to a person for providing truthful information to a law enforcement officer relating to the commission or possible commission of "any Federal offense."[74] The statute makes it clear that "harmful" conduct includes interference with employment but it does not define what additional harm may violate the law. This provision is noteworthy because it protects a broader class of whistleblowers than do the civil provisions of Sarbanes-Oxley. The statute protects truthful reporting of information relating to any federal offense, not just information relating to securities or other corporate fraud. Violation of this provision is punishable by fines of up to $250,000 for individuals and $500,000 for companies, ten years' imprisonment, or both.

On February 15th, 2005 Administrative Law Judge Stephen Purcell ordered Cardinal Bankshares Inc. to reinstate its former chief financial officer, David Welch, and pay him nearly $65,000 in back pay and damages.[75] The significance is that Welch became the first person to win protection as a whistleblower under the Sarbanes-Oxley Act, passed by Congress in 2002 in the wake of corporate scandals at Enron, WorldCom and other firms.

Since the law took effect in mid-2002, about 750 people have filed complaints with the Department of Labor, alleging that their employers retaliated against them for calling attention to financial mismanagement. The Labor Department oversees such cases in a three-step process that an employee must exhaust before going to federal court. The number of cases has risen with about 150 in the law's first year and nearly twice that in its third.[76] Welch is one of just three workers to win protection so far. Fewer than 100 cases have ended in settlements.[77] While the case will be appealed in federal court, it suggests that the Whistle-blower provisions of Sarbanes will be enforced by the courts.

For legislative materials, see:

- Securities and Exchange Commission Final Rule: Implementation of Standards of Professional Conduct for Attorneys, 17 C.F.R. pt. 205 (2002), available at: http://www.sec.gov/rules/final/33-8185.htm

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- Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, Section 307 (2002), available at: http://www.acca.com/legres/enron/sarbanesoxley.pdf

B. Whistle-blowing/Noisy Withdrawal

A pertinent question is will an attorney face any culpability if, after having reported the matter all the way 'up the ladder'—from his supervising attorney to the CLO, CEO and directors—the attorney learns that no action was taken?

In response to practitioner comments, state ethics regulators and foreign lawyers, the SEC deferred and/or eliminated some of the most controversial provisions that many believe were beyond the spirit of Sarbanes-Oxley. Initially, the SEC required that any attorney dissatisfied with the client's response must make "a noisy withdrawal."[78] Under the SEC's alternative rule, however, the corporation, rather than the reporting attorney, is required to notify the SEC regarding the circumstances of withdrawal. The following chart compares the requirements under the initial proposal with those contained in the proposed alternative rule.[79] Also note that the proposed alternative requires the corporation to file a form 8-K.

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	Originally Proposed Rules	Alternative Rule
Circumstance	Reporting attorney who has not received an appropriate response in a reasonable time	Reporting attorney who has not received an appropriate response in a reasonable time
Standard	Reporting attorney believes the material violation is either ongoing or is about to occur and is likely to result in substantial injury to the company or investors	There is substantial evidence that a material violation is ongoing or about to occur
Attorney Requirement "withdrawal" Reporting Firm Attorney:	Under these circumstances, attorney must withdraw from representation.	Under such narrow circumstances, reporting attorney MUST: • Withdraw from representation; • Immediately cease to engage in any matter regarding the alleged violation; and • Firm Attorney: Notify the company in writing that the company has not provided an appropriate response in a reasonable time
Reporting In-house Counsel "withdrawal"	In House Counsel: may, but is not required to withdraw from representation.	In-house Counsel: Notify the board stating that he or she will not be allowed to continue to work for the client on related issues for professional reasons, but does not need to resign.
SEC Notification "noisy"	Reporting attorney MUST notify the SEC within one business day that the withdrawal was based on business considerations AND disaffirm any false or materially misleading submissions to the SEC that s/he has helped prepare.	Reporting attorney NOT required to notify the SEC of the withdrawal, but is permitted to do so if the company did not report the attorney's notice.
Company Requirement		Company must, upon receiving such written notice from reporting attorney, report such notice and related circumstances on Form 8-k, 20-F or 40-F, within two business days of receipt.

In a speech to the ABA Business Law Section on April 3, 2004, SEC General Counsel Giovanni Prezioso said that although the Commission has not yet decided whether to proceed with a mandatory "noisy withdrawal" rule, it is closely monitoring attorney compliance with the new "up the ladder" rule as well as the bar's efforts to address the concerns raised by Congress in enacting Section 307.[80] It would appear that so long as Model Rules 1.13 and 1.6 are effective, they SEC will not attempt to enact regulations mandating a "noisy withdrawal."

For list format of noisy withdrawal alternatives, see:

- Attorney-Client Privilege in the Corporate Setting Fact Sheet, at 25, Quinn

Emanuel Urquhart Oliver & Hedges, LLP, at: http://www.acca.com/chapters/socal/program/corpattyclient.pdf

For recommendations on noisy withdrawal alternatives, see:

- Barry Nagler and M. Elizabeth Wall, ACC's Second Comment Recommendations on Noisy Withdrawal, File No. S7-45-03 (April 7, 2003), available at: www.acca.com/advocacy/307comments2.pdf.

For information on the SEC rules on the new attorney standards and its alternative proposal of creating a Form 8-K public reporting requirement by the board, see:

- Stanley Keller, SEC Implements Standards of Professional Conduct for Attorneys, ACC and Palmer & Dodge LLP, available at: http://www.acca.com/legres/corpresponsibility/307/summary.pdf

Critics comment that any permissive withdrawal should allow a reporting attorney to withdraw from representing its client on the matter at issue, but continue representation otherwise. For a discussion, see:

- Robert S. Risoleo, Sullivan & Cromwell Memoranda, Advanced Doing Deals 2003: Dealmaking in the New Transactional Marketplace, Practicing Law Institute (June 19-20, 2003), 1377 PLI/Corp 529, Order No. B0-01UN.

C. Preventative Measures

There are several steps that GCs can take to protect themselves and their companies from the threat of criminal and civil sanctions under the Sarbanes-Oxley whistleblower provisions:81

- **Impress upon your company the importance of establishing an effective internal compliance program.** Such a program should include clear policies regarding corporate ethics and conduct, internal reporting procedures, and training of employees and executives regarding these rules and their responsibilities and potential liability.

- **Adopt or revise codes of conduct.** The code should reflect both the culture of the company and the standards of conduct expected from the company. The code should also encourage employees to report potential financial, ethical, legal, or other misconduct.

- **Examine job descriptions.** Manager and supervisory job descriptions should reflect their duties and responsibilities with regard to corporate compliance. This communicates to managers and supervisors that the company takes compliance seriously and that it prohibits retaliation for reporting suspected misconduct.

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- **Establish response and investigation procedures.** Written procedures should be in place for documenting and responding to employee complaints regarding alleged corporate fraud.

- **Train and educate employees regarding corporate compliance.** Communicate to non-supervisory employees about the company's expectations regarding accurate reporting of company financial information and reporting potential misconduct. The company should also make it clear that employees who report alleged misconduct in good faith will not be subjected to discrimination, harassment, or retaliation.

- **Properly document discipline and termination.** Because the close timing of an employee's termination relative to a complaint made by that employee regarding corporate compliance may create the appearance of retaliation, it is critical to carefully document employee performance problems as they come up and at termination. Managers and supervisors should carefully document employee performance deficiencies, and these records should be maintained.

VIII. Attorney-Client Privilege Issues

A. Confidentiality & Model Rule 1.6

The issue of confidentiality in the representation of the corporation as a client is complex, especially since the corporation can only act through its agents—namely corporate executives and board members. The recent changes in the SEC Rules regarding attorney confidences further complicate matters. The purpose of the revised ABA Rule is to help "prevent a client from using a lawyer's services to commit a crime or fraud that results in substantial financial injury to innocent third parties."82

The ABA modified Rule 1.6 of the Model Rules on Professional Responsibility to allow attorneys to report evidence of a client corporation's ongoing or future financial fraud if and only if the fraud is reasonably likely to have a significant financial impact on third parties and if the lawyer's services have been used by the client in the commission of such a fraud.[83] However, state regulations differ on how attorneys should respond in this situation. As states may impose more rigorous attorney standards, the SEC does not preempt this field entirely; however, it certainly prevails where there is a conflict. In particular, such a conflict will exist in states that do not allow attorneys to break client confidences to prevent financial harm or fraud.

The SEC Rules permit an attorney to reveal confidences to the Commission, with-

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out the issuer's consent, under the following circumstances:

- to prevent the company from committing a material violation that is likely to cause substantial injury to the financial interests of that company or its investors,
- to prevent the issuer from committing perjury during a Commission or administrative investigation, or
- to rectify the consequences of a material violation by the issuer that has caused, or may cause, substantial injury to the financial interests of the company or its investors.

Thus, a lawyer may disclose to the Commission certain civil violations not rising to level of a crime, if such violations have been reported "up the ladder" and a response has been inadequate. Although this may conflict with a state rule that may require such reporting, the SEC has stated that the SEC rules would prevail in such instances.[84] In effect, this position would entail federalizing the SEC rules on ethics. Further, under the SEC Rule 205.6(c), a lawyer may not be liable for complying with the SEC Rules in good faith, even if such an action would be inconsistent with the standard of conduct dictated by state rules. Meanwhile, several states question whether Congress intended to extend power to the SEC to allow a breach of attorney-client privilege in states, such as Washington and California, which do not authorize such a breach of confidences.

B. Reporting Up the Ladder: SEC Regulations and Model Rule 1.13

The SEC Rules contain another important provision relating to confidentiality: Rule 205.3(d)(2) allows an attorney to reveal confidential information related to the attorney's representation if they reasonably believe such revelations are necessary to:

(1) prevent a material violation that will injure the company or stockholders

(2) prevent perjury,

(3) to rectify the consequences of a material violation.

In the same manner, Model Rule 1.13 allows attorneys to reveal information to prevent a violation that is reasonably certain to result in substantial injury to the organization and most likely shareholders. Model Rule 1.13 requires corporate attorneys to report law violations by officers and employees up-the-ladder within the organization and, if necessary, to report corporate violations outside the organization. The Model Rule provides that if a lawyer representing a corporation knows

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that a corporate officer / corporate employee is engaged in a violation of law that is likely to result in "substantial injury to the organization", the lawyer must proceed in a manner that is in the best interest of the organization.[85]

Unless the lawyer reasonably believes that it is not necessary to do so, they must also refer the matter to a higher authority in the organization that can act on behalf of the organization. I the up-the-ladder provisions of Model Rule 1.13(b) fail, the Model Rules, allow the lawyer to reveal information relating to the representation, whether or not Model Rule 1.6 might prevent such disclosure.[86] This provision specifically allows lawyers to reveal confidential client information outside the organization.

Both of these provisions, the SEC rule and the ABA Model Rule, override Model Rule 1.6 and its state counterparts, which in some will prevent the revelation of information.

The SEC Rule augments and provides greater clarity than the ABA Model Rule. It specifies when attorneys have the option to report out, without making such reporting mandatory. The rule corresponds to ethics rules adopted by "the vast majority of states," even though it is slightly broader than the Model Rule 1.13.[87]

SEC Rule 205.3(d)(2) is a permissive rule, not a mandatory one. Attorneys may reveal to the Commission information that will help "prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest of property of the issuer or investors."[88] This corresponds closely with Model Rule 1.13, which states that a lawyer may reveal information "if the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization."[89]

C. Impact on Attorney-Client Relations

The role of the attorney is not only to defend clients after a crime has been committed, but to prevent their commission through effective communication with the client regarding the specific aspects of applicable laws. The sheer complexity of Sarbanes-Oxley and related state securities laws will help ensure that clients will continue to seek out legal advice, regardless of the new reporting requirements. In the post-Enron world lawyers will need to be constantly on the lookout for client misconduct, or the perception that there is misconduct, if they hope to effectively protect the company and ultimately, themselves.

The SEC Rule and the Model Rule may likely serve to strengthen the relationship between attorneys and their true clients: corporations. Model Rule 1.13 provides that a corporation is the client to whom duties of confidentiality are owed, not the organization's directors, officers, or employees.[90] An attorney is justified, and reasonably obligated, to inform the client (the company) that it's agent are acting

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in a detrimental manner.

In the end, it is likely that clients (the individuals who represent the company) do not rely on confidentiality rules as much as lawyers believe. Limiting the privilege will probably not change revelations of clients' confidences or affect their relationship with in-house counsel.

Model Rule 1.13 implies that in-house counsel and corporate attorneys must reevaluate their roles in corporations. Before Enron, Worldcom, etc. corporate law viewed in-house lawyer as advocates whose duty was zealous representation of clients, including corporate directors and officers.[91] The passage of Model Rule 1.13 imposes upon counsel new responsibilities. Model Rule 1.13 reminds corporate lawyers of individual responsibility to maintain their professional role and to not cross over from their position of company advocate to partner to a client. These new limitations on the applicability of the in house lawyer's role as an advocate may help lead to better corporate compliance.

For discussion on preemption issues, see:

- Stanley Keller, SEC Implements Standards of Professional Conduct for Attorneys, ACC and Palmer & Dodge LLP, available at: http://www.acca.com/legres/corpresponsibility/307/summary.pdf
- Chi Soo Kim and Elizabeth Laffittee, The Potential Effects of SEC Regulation of Attorney Conduct Under the Sarbanes-Oxley Act, 16 Geojle 707 (2003) (discussing preemption issues).
- Mathew S. Rosengart, Protecting the Corporation and Yourself After Enron and Sarbanses-Oxley: A Primer for Lawyers Practicing Before the SEC and DOJ, 2003 The Federal Lawyer 34.
- Washington State Bar Interim Ethics Opin. (July 26, 2003), (challenging SEC's position on preemption) available at: www.wsba.org/lawyers/groups/ethics2003/formalopinion.doc

IX. Privately Held Companies and Non-Profits

Although the impetus for drafting model rules and policies is to regulate lawyers at public companies, many private companies are looking at adopting similar guidelines. This is attributed in large part, to the emerging perspective among state legislatures, state bars, and stakeholders that lawyers representing all companies,

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public and private, should be concerned about corporate responsibility.

It is worth noting that public and private companies alike have to adhere to whistleblower provision under Sarbanes-Oxley, under which employees must be permitted to anonymously notify regulators of any potential wrongdoing within a company. As Chief Justice Veasey of Delaware's, Supreme Court stated:

> "I do think the changes in corporate governance that we're seeing through the voluntary best practices codes, for example… have created a new set of expectations for directors. And that is changing how courts look at these issues."[92]

In addition, privately held companies must take many of the steps required to demonstrate compliance with Sarbanes-Oxley if they decided to go public or agreed to merge with a public company. Both issues illustrate the current impact SOX can have on any private company operating in today's marketplace.

A study by Foley & Lardner LLP found that private companies and nonprofit organizations are embracing many of the reforms imposed on public companies by the Sarbanes-Oxley Act. The study found that "87 percent of private firms and nonprofits said the reforms mandated by Sarbanes-Oxley are having an impact on their operations, up from 77 percent in 2004."[93] Examples of the impact include:

- 75 percent of those surveyed now require board approval of non-audit services provided by the organization's auditor
- Almost 68 percent also said they require their CEO and CFO to certify financial results
- 72 percent said they had put protections in place for whistle-blowers[94]

Additionally, the study found that nonprofits are more amenable than private companies to restricting executive compensation, with 59 percent of nonprofit respondents saying they planned to implement such restrictions, compared to only 38 percent of for-profit companies.[95]

Sarbanes-Oxley, and the related regulations by the SEC and PCAOB, has significantly the legal practice in many areas of corporate governance and financial compliance for public companies. As states and the federal government continue to evaluate the effects of Sarbanes-Oxley, private and non-profit companies should expect that several of these requirements will be extended to them. In one example, California passed the nations first governance law for nonprofits, which, in part requires charities that do business in the state and have revenues exceeding $2 million to form audit and compensation committees.[96] In 2005, at least 8 states (including New York, New Jersey, and Arkansas) have also considered extending provisions of Sarbanes-Oxley into the non-profit sector.

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By taking action now to comply voluntarily with as many of these requirements is reasonable, larger private companies (or those companies which desire to go public or being acquired) can ease their transition into the public sector or the future of corporate regulation. At the same time, these companies can reduce their litigation exposure.

To view best practices of corporate governance policies of privately held companies and non-profit organizations, as well as discussion on why private company lawyers should be concerned about Sarbanes-Oxley, see:

- Leading Practices in Codes of Business Conduct and Ethics: What Companies are Doing, Best Practices Profiles Series, ACC (August 2003), at: http://www.acca.com/protected/article/ethics/lead_ethics.pdf
- Hot Topics in Representing Nonprofits, ACCA's 2003 Annual Meeting, Course Materials (November 2003), available at: http://www.acca.com/education03/am/cm/509.pdf
- Susan Hackett, It's Private Companies' Turn to Dance the Sarbox Shuffle, ACCA Paper (August 2003), available at: www.acca.com/public/article/corpresp/sarbox_shuffle.pdf.
- Harvey Goldschmid, Comm. Speech, Securities and Exchange Commission, Orison S. Marden Lecture, Association of the Bar of the City of New York (November 17, 2003) (discussing non-profits and non-publicly traded companies), available at: http://www.sec.gov/news/speech/spch111703hjg.htm
- Paul Broude, Richard Prebill, Foley & Lardner, LLP, The Impact of Sarbanes-Oxley on Private & Nonprofit Companies, Presentation at the 2005 National Directors Institute (March 10th, 2005), available at: /www.foley.com/files/tbl_s60WorkingGroups/FileUpload627/69/privatestudydraft3-04-05.pdf
- Jeffrey S. Cronn, Sarbanes-Oxley trickles down to nonprofits, The Business Journal – Portland, (April 1, 2005)
- Thomas Hoffman, Direct and indirect impact of Sarbanes-Oxley hits private companies: Companies considering IPOs or mergers must now address accountability issues, Computerworld (July 25th, 2003); available at: computerworld.com/governmenttopics/government/legalissues/story/0,10801,83457,00.html
- Linda Kelso, Voluntarily, private companies get into oversight act, Jacksonville Business Journal (May 6, 2005), available at: jacksonville.bizjournals.com/jacksonville/stories/2005/05/09/focus3.html

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X. Document Retention Procedures

A. Introduction to Document Retention

Managing records is an important challenge within a corporation, regardless of its size. This is especially true in light of the Sarbanes-Oxley Act and the related Securities and Exchange Commission's rules on Management's Report in Exchange Act Periodic Reports.[97] The impetus for records management, in addition to compliance with the Sarbanes-Oxley mandates, is to restore investor confidence. Thus, the new rules add additional requirements and consequence components, emphasizing the importance of records.

B. How Does the Sarbanes-Oxley Act Affect Companies' Document Retention Obligations?

The Act, as well as the regulations which were implemented following its passage, imposed new requirements and duties on affected companies. These include:

(1) Criminalization of the Destruction, Alteration and Falsification of Records in Federal Investigations, Bankruptcy Cases and Official Proceedings - Sections 802 and 1102 of the Act amended the federal obstruction of justice statute, Title 18 of the United States Code (Crimes and Criminal Procedure), to significantly increase penalties for the destruction, alteration and falsification of records in certain circumstances.

(2) Section 802 provides for a fine and/or imprisonment up to 20 years for anyone who knowingly "alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry" in any record or document with intent to impede, obstruct or influence the investigation or administration of any matter within the jurisdiction of a federal department or agency or any bankruptcy case. 18 U.S.C. § 1519.

(3) Section 1102 establishes the same penalty as Section 802 for anyone who corruptly "alters, destroys, mutilates, or conceals" a record or document with intent to impair its integrity or availability for use in an official proceeding. 18 U.S.C. § 1512(c). Significantly, the official proceeding need not be pending or about to be instituted at the time of the offense. Id. § 1512(f)(1).

(4) New Federal Sentencing Guidelines Related to Obstruction of Justice. Section 805 of the Act commands the Sentencing Commission to review and amend the Sentencing Guidelines to ensure that the base offense level and sentencing enhancements are sufficient to deter and

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punish obstruction of justice. The Commission has proposed amendments that would increase the base offense level for obstruction-of-justice offenses by two and create a two-level enhancement for the destruction, alteration or fabrication of records in certain circumstances. 68 Fed. Reg. 2615 (proposed January 17, 2003). If adopted, these changes would increase the penalties for anyone convicted of these offenses.

(5) Broader Record Retention Requirements for Auditors of Public Companies. Section 101(a) of the Act establishes a Public Company Accounting Oversight Board to oversee the audit of public companies, and Section 103(a)(2)(A)(i) commands the Board to adopt auditing standards that require accounting firms to "prepare, and maintain for a period of not less than seven years, audit work papers, and other information related to any audit report, in sufficient detail to support the conclusions reached in such report." In addition, Section 802 of the Act amends Title 18 of the United States Code to require auditors of publicly held companies to maintain "all audit or review workpapers" and directs the SEC to enact related regulations. 18 U.S.C. § 1520(a)(1) and (2). The SEC regulations, which apply to all audits or reviews completed on or after October 31, 2003, establish a seven-year retention period for "records relevant to the audit or review, including workpapers and other documents that form the basis of the audit or review, and memoranda, correspondence, communications, other documents, and records (including electronic records), which (1) are created, sent or received in connection with the audit or review, and (2) contain conclusions, opinions, analyses, or financial data related to the audit or review." 17 C.F.R. § 210.2-06(a). In addition to the audit or review of financial statements of publicly traded companies, the retention requirement applies also to the audit or review of financial statements of registered investment companies. Id. Knowing or willful violation of Section 802 (a)(1) of the Act or the related SEC regulations is punishable by fine and up to 10 years of imprisonment. 18 U.S.C. § 1520(b).

For more guidance on records retention practices in light of Sarbanes-Oxley, see:

- Leading Practices in Information Management and Records Retention Programs: What Companies are Doing, Best Practices Profiles Series, ACC (August 2003), available at: http://www.acca.com/protected/article/records/lead_infomgnt.pdf
- Records Retention Enforced Corporate Records Programs, ACC InfoPAK (December 2003), available at: http://www.acca.com/infopaks/recretent.html
- Document Retention After Sarbanes-Oxley, http://www.perkinscoie.com/content/ren/updates/corp/093003.htm

XI. Sanctions and Other Standards of Professional Conduct

The following points address applicable sanctions that apply to attorneys who fail to comply with Sarbanes-Oxley:[98]

- Violators of the rules are subject to civil penalties and remedies, including administrative disciplinary proceedings that could result in a censure or a suspension or bar from practicing before the SEC.
- Attorneys who comply in good faith with the rules are not subject to discipline under inconsistent state rules.
- Foreign attorneys (who do not qualify as "non-appearing foreign attorneys") are exempt from the rules to the extent their own laws would prohibit compliance.
- The rules do not provide for criminal liability and expressly state that no private right of action is established.
- The rules set forth a minimum standard of professional conduct for attorneys appearing before the SEC; these standards are meant to supplement, but not replace, applicable state standards.
- Where a state standard actually conflicts with the standard in the rules, the rules govern.

The Sarbanes-Oxley Act has also added numerous criminal sanctions to the SEC's enforcement arsenal. These include:

- The Corporate Responsibility Act (Title III)
- The Corporate and Criminal Fraud Accountability Act (Title VIII)
- The White-Collar Crime Penalty Enhancements Act of 2002 (Title IX)
- The Corporate Fraud Accountability Act of 2002 (Title XI).

(1) The Corporate Responsibility Act (Title III)

In §302, "Corporate Responsibility for Financial Reports", the CEO and the CFO are required to prepare a statement to accompany the audit report to certify the

"appropriateness of the financial statements and disclosures contained in the periodic report, and that those financial statements and disclosures fairly present, in all material respects, the operations and financial condition of the issuer."

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A violation must be knowing and intentional to give rise to liability. As an example of how this standard may provide accused officers with a defense, one need only look at the HealthSouth lawsuit. Richard M. Scrushy, former chairman and CEO of HealthSouth Corporation, has argued that his financial executives were the ones responsible for his company's $2.5 billion accounting fraud. Scrushy has claimed that he only signed off on fraudulent accounting figures because he "unknowingly" trusted the five CFOs who had served under him. His argument may serve to provide him with a non-guilty verdict.

The criminal fraud provisions of this section make a distinction between a CEO who "knowingly" signs off on inaccurate financial statements and one who does so "willfully and knowingly." "Knowing violations" are punishable by up to 10 years in jail and $1 million in fines, while those individuals who sign inaccurate statements "willfully and knowingly" face 20 years and a $5 million fine.

The Sarbanes-Oxley Act also allows for the redirection of civil penalties paid by violations. Previously, all civil penalties were paid into the U.S. Treasury. Under the §308, "Fair Funds for Investors" provision, the SEC has the authority to direct civil penalties to defrauded investors. Examples of the use of this provision:

- WorldCom, Inc., agreed to satisfy its civil penalty obligation by paying $500 million in cash and $250 million in stock to defrauded investors.
- Merrill Lynch will pay investors $80 million,
- JP Morgan Chase ($135 million), and
- Citigroup ($120 million).

(2) The Corporate and Criminal Fraud Accountability Act (Title VIII)

"Anyone who knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States can be fined, imprisoned for up to 20 years, or both"[99]

§807 states that anyone who knowingly executes, or attempts to execute, a scheme or artifice to defraud any person in connection with a securities issue or attempts to obtain, by means of false or fraudulent pretenses, representations, promises, money, or property, in connection with the purchase or sale of any security, can be fined, or imprisoned up to 25 years, or both.

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(3) The White-Collar Crime Penalty Enhancements Act of 2002 (Title IX)

Individual corporate officers or employees who certify a financial statement (required under §302) knowing that the periodic report accompanying the statement does not comply with this section can be fined up to $1 million, imprisoned up to 10 years, or both. If found to have done so "willfully," the penalty shall be increased to a fine up to $5 million and imprisonment up to 20 years, or both.[100]

(4) The Corporate Fraud Accountability Act of 2002 (Title XI)

§1102 of Title XI can also be used to prosecute corporate officials. Individuals who corruptly alter, destroy, mutilate, or conceal a document with the "intent to impair the object's use in an official proceeding", can be fined, imprisoned up to 20 years, or both. This rule also applies to those who obstruct, influence, or impede any official proceeding, Under §1106 fines rose from up to $1 million / 10 years to $5 million and up to 20 years in prison. The SEC also was provided with the authority to prohibit any person who has violated section 10(b) or the rules or regulations from serving as an officer or director of a registered company. [101]

For additional information regarding attorney sanctions, the following materials may be insightful:

- Attorney-Client Privilege in the Corporate Setting, Fact Sheet, at 27, Quinn Emanuel Urquhart Oliver & Hedges, LLP, available at: http://www.acca.com/chapters/socal/program/corpattyclient.pdf.
- Stanley Keller, SEC Implements Standards of Professional Conduct for Attorneys, ACC and Palmer & Dodge LLP, available at: http://www.acca.com/legres/corpresponsibility/307/summary.pdf

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XII. Additional Resources

ACC Resources

Gregory R. Watchman, Sarbanes-Oxley Whistleblowers: Avoiding the Nightmare Scenario, ACC Docket 24, no. 4 (April 2006): 38-55 available at http://www.acca.com/protected/pubs/docket/apr06/watchman.pdf

Green Eye Shades For Lawyers: A Toolkit, ACC Docket 23, no.3 (March 2005): 62-67 http://www.acca.com/protected/pubs/docket/mar05/toolkit.pdf

Danette Wineberg and Philip H. Rudolph, Corporate Responsibility: What Every Lawyer Should Know, ACC Docket 22, no. 5 (May 2004): 68-83 available at http://www.acca.com/protected/pubs/docket/may04/social.pdf

Peter Connor, If The Other Hat Fits- Wear it: A Guide To Effective Business Partnering, ACC Docket, 22, no. 9 (October 2004): 88-102 available at http://www.acca.com/protected/pubs/docket/oct04/partner.pdf

John K. Villa, Investigative Attorneys and the Reporting Obligations Under the SEC's Professional Conduct Rules, ACC Docket 22, no. 4 (April 2004): 133-137 available at http://www.acca.com/protected/pubs/docket/apr04/ethics.pdf

John K. Villa, Ethics & Privilege: Hidden Storms for Those in Safe Harbors: The SEC's Professional Conduct Rules and the Federal Preemption Doctrine, ACC Docket 22, no.2 (February 2004): 81-85 available at http://www.acca.com/protected/pubs/docket/feb04/ethics.pdf

Broc Romanek and Kenneth Winer, The New Sarbanes-Oxley Responsibility Standards, ACCA Docket 21, no. 5 (May 2003): 40-55, available at: http://www.acca.com/protected/pubs/docket/mj03/standard1.php

Richard F. Ober Jr. and Michael Parish, Maybe You Need a Lawyer: Does the Sarbanes-Oxley Act Make the SEC Your Client? ACC Docket 21, no. 4 (April 2003): 70-85, available at: http://www.acca.com/protected/pubs/docket/am03/client2.php

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XIII. Sample Policies

A. Sample: Procedures For Complaints Regarding Accounting, Internal Accounting Controls Or Auditing Matters[102]

Introduction

The Audit Committee of Company, Inc. (the "Company") seeks to facilitate disclosure regarding accounting and auditing matters, encourage proper individual conduct and alert the Audit Committee to potential problems relating to accounting or auditing matters before they have serious consequences. Accordingly, the Audit Committee has established the following procedures for the receipt, retention and treatment of complaints received by the Company regarding accounting, internal accounting controls or auditing matters, and for the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters.

Procedures for Complaints

A. Scope of Matters Covered by These Procedures

These procedures relate to complaints or concerns regarding accounting, internal accounting controls or auditing matters of the Company ("Complaints"), including, without limitation, the following:

- fraud or deliberate error in the preparation, evaluation, review or audit of any financial statement of the Company;
- fraud or deliberate error in the recording or maintaining of financial records of the Company;
- deficiencies in or noncompliance with the Company's internal accounting controls;
- misrepresentations or false statements to or by an officer of the Company or an accountant regarding a matter contained in the financial records, financial reports or audit reports of the Company; or
- deviation from reporting of the Company's financial condition as required by applicable laws and regulations.

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B. Submission and Receipt of Complaints

1. In General

A person with a Complaint should promptly report the Complaint in writing to the Company's General Counsel. Complaints may, however, be submitted telephonically or in person. Electronic submissions may be emailed to [________@companyname.com]. The General Counsel will maintain the confidentiality and anonymity of persons making Complaints to the fullest extent reasonably practicable within the legitimate needs of law and any ensuing evaluation or investigation.

2. Anonymous Complaints Hotline

Employees who have Complaints may, rather than submitting such Complaints directly to the General Counsel, submit them confidentially and anonymously by contacting [Anonymous Complaints Hotline Provider]. [Provider] is an independent third party that the Company has hired to receive anonymous Complaints from Company employees and coordinate the delivery of such Complaints to the Audit Committee or appropriate Company personnel. [Provider] may be reached by telephone at ___________. The address for writing to [Provider] is: _________ _______. Employees may also contact [Provider] by e-mail at __________.

C. Content of Complaints

To assist the Company in the response to or investigation of a Complaint, the Complaint should be factual rather than speculative, and contain as much specific information as possible to allow for proper assessment of the nature, extent and urgency of the matter that is the subject of the Complaint. It is less likely that the Company will be able to conduct an investigation based on a Complaint that contains unspecified wrongdoing or broad allegations without verifiable evidentiary support. Without limiting the foregoing, the Complaint should, to the extent possible, contain the following information:

- the alleged event, matter or issue that is the subject of the Complaint;
- the name of each person involved;
- if the Complaint involves a specific event or events, the approximate date and location of each event; and
- any additional information, documentation or other evidence available to support the Complaint.

D. Retention of Complaints

Written copies of all Complaints shall be kept in a Complaint file. [Copies of Complaints and the Complaint file shall be maintained in accordance with the Company's document retention policy.]

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E. Treatment of Complaints

A copy of all Complaints shall promptly be forwarded to the Audit Committee. The General Counsel shall evaluate each Complaint and may, in consultation with the Audit Committee, conduct an investigation based upon a Complaint. The Audit Committee may, in its discretion, appoint a person other than the General Counsel to initiate and direct an investigation, including an outside attorney or consultant. The Audit Committee may, at any time, request a briefing regarding any investigation of a Complaint and any findings regarding a Complaint. The Audit Committee shall have full authority to determine the corrective action, if any, to be taken in response to a Complaint and to direct additional investigation of any Complaint.

F. Confidentiality/Anonymity

The Company shall maintain the confidentiality or anonymity of the person making the Complaint to the fullest extent reasonably practicable within the legitimate needs of law and of any ensuing evaluation or investigation. Legal or business requirements may not allow for complete anonymity. Also, in some cases it may not be possible to proceed with or properly conduct an investigation unless the complainant identifies himself or herself. In general it is less likely that an investigation will be initiated in response to an anonymous Complaint due to the difficulty of interviewing anonymous complainants and evaluating the credibility of their Complaints. In addition, persons making Complaints should be cautioned that their identity might become known for reasons outside of the control of the Company. The identity of other persons subject to or participating in any inquiry or investigation relating to a Complaint shall be maintained in confidence subject to the same limitations.

G. Protections from Retaliation

Employees are entitled to protection from retaliation for having, in good faith, made a Complaint, disclosed information relating to a Complaint or otherwise participated in an investigation relating to a Complaint. The Company shall not discharge, demote, suspend, threaten, harass or in any manner discriminate against an employee in the terms and conditions of employment based upon any lawful actions of such employee with respect to good faith reporting of Complaints, participation in a related investigation or otherwise as specified in Section 806 of the Sarbanes-Oxley Act of 2002. An employee's right to protection from retaliation does not extend immunity for any complicity in the matters that are the subject of the Complaint or an ensuing investigation.

These procedures are in no way intended to limit the rights of employees to report alleged violations relating to accounting or auditing matters to proper governmental and regulatory authorities.

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B. Sample: Whistle Blowing Policy and Procedures[103]

It is the policy of ________Corporation and that of its Board of Directors that no employee shall be discharged or discriminated against with respect to compensation, terms, conditions or privileges of employment because the employee (or any person acting pursuant to the request of the employee) informs either management, the Board of Directors, the Securities and Exchange Commission, or the U. S. Attorney General regarding a possible violation of any law or regulation by the Company or any director, officer or employee, or for expressing any concerns about any questionable accounting, internal accounting controls or auditing matters.

In connection with the above, the Audit Committee of the Board of Directors has established the following procedures:

Under the Code of Ethical Conduct, employees are encouraged to discuss any concerns they have regarding compliance with laws and regulations or other violations of the Code of Ethical Conduct, directly with their manager or, in the alternative, with the General Counsel, who acts as the Company's ethics officer. However, employees may also submit at any time any concerns regarding questionable accounting, internal accounting controls or auditing matters, or any other possible violations of law, by submitting them anonymously in writing to "Executive Offices - Internal Communications", _______________. Communications addressed in this manner will be opened by the Company's Assistant Secretary, who will discard the envelope without reading the contents and then forward the contents to the Corporate Secretary. The Corporate Secretary will review the contents and report on them directly to the Audit Committee of the Board of Directors.

In the alternative, employees or third parties who wish to express any concerns directly to the Board of Directors may do so by sending them in writing addressed to "Non-management Directors", care of the Corporate Secretary at the Company's headquarters at_____________.

The Corporate Secretary will document and retain all complaints or concerns expressed by employees or third parties regarding possible violations of law or questionable accounting, internal accounting controls or auditing matters and shall report such complaints or concerns directly to the Audit Committee of the Board of Directors.

C. Sample "Up-the-ladder" Company Policy[104]

Date: June 4th, 2005

Subject: Sarbanes-Oxley "Up the Ladder" Reporting

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From: The Office of the General Counsel

To: All Members of the Company Legal Team

As you all are aware, Section 307 of the Sarbanes-Oxley Act required the U.S. Securities and Exchange Commission ("SEC") to adopt "standards of professional conduct for attorneys."

The SEC has issued final rules, codified at 17 CFR Part 205, which become effective August 5, 2003. The full text of the rules is available at www.sec.gov/rules/.

This memo is for the purpose of making you aware of these rules and informing you of Company's (including any subsidiary) policies in this regard.

1. The SEC rule requires attorneys who become aware of "evidence of a material violation" by the company or "any officer, director, employee or agent" of the company to report that matter as required by the rule. See 17 CRF § 205.3(b)(1).

2. There are two alternative methods of reporting set forth in the rules.

A. An attorney should report evidence of a material violation to a "supervisory attorney." For Johnson Controls, this would mean that outside counsel and our in-house Group Counsels, Staff Attorneys or other attorneys should report violations to the appropriate business unit General Counsel. A list of the business unit General Counsels with contact information, is attached. If the business unit General Counsel cannot provide an "appropriate response" within a reasonable time, either the business unit General Counsel or the reporting attorney should report the matter to the Office of General Counsel of the Corporation.

B. An attorney may also report evidence of a material violation directly to the Qualified Legal Compliance Committee (QLCC) of the Board of Directors. A list of the current members of this committee is also attached. Although the QLCC is an alternative allowed under the rules, it is our expectation (and strong preference), that most matters be reported up through the Law Department as outlined in the first alternative.

3. The SEC rule applies to all in-house lawyers employed by Johnson Controls, Inc. or any of its subsidiaries and to U.S. admitted outside counsel. There are certain exceptions which may exempt non-US admitted outside counsel. However, the principles reflected in the new SEC rule are consistent with Johnson Controls' policy and we expect our outside lawyers in all jurisdictions to report matters of serious concern they encounter in the course of their representation to appropriate members of JCI management and to the local representative of the JCI Law Department.

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4. We will require annual certifications from all of our in-house attorneys that they are familiar with the SEC rules (as amended and modified from time to time) and agree to abide by them. Please sign the attached certification and return it to Sue Christianson by September 30, 2005.

Person, Senior Vice President,

Person, Deputy General Secretary and General Counsel Counsel and Assistant Secretary

D. Up-The-Ladder-Chart Under Sarbanes-Oxley[105]

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Up the Ladder Reporting Under Sarbanes-Oxley

Lawyer, appearing and practicing before the Commission has evidence of material violation

If reporting to CLO/CEO is futile

Reports evidence to CLO or CLO & CEO

(If there is a QLCC)

Reports to QLCC

Determines if investigation warranted

Retains expert to investigate

Expert reports finding to QLCC

QLCC authorizes response/action

Informs Board, CLO and Lawyer

SEC proposal: Informs SEC if action not implemented

Appropriate Response

NO

Audit Committee

NO

Independent Committee

NO

Board of Directors

YES

Report evidence to Audit Committee

YES

Report evidence to Independent Committee

Does Lawyer believe material violation either has not occurred, or has been prevented or rectified?

YES

Sox duties satisfied

NO

Are consequences of violation likely to result in substantial financial injury?

Lawyer may report to the Commission

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Endnotes

[1] This information was orginally compiled by Laura Martino, Esq., and updated by Jeanine Mazzorana Esq., at the direction of the Association of Corporate Counsel.

[2] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (hereinafter cited by section), available at: http://www.acca.com/legres/enron/sarbanesoxley.pdf.

[3] See In re Enron Corp. Securities, Derivative & ERISA Litigation, (S.D.Tex. 2003) available at 2003 WL 230688 (dismissing charges against Temple). See In re Enron Corp. Securities, 235 F.Supp.2d 549, 684-85 (S.D.Tex. 2002). See AOL and Time Warner Executives Accused of Pocketing Nearly $1 Billion in Insider Trading; Media Giant Inflated Stock Prices With 'Tricks, Contrivances and Bogus Transactions' While Top Executives Hastily Cashed in Their Shares for Personal Profits, Ascribe News, April 13, 2003 available at 2003 WL 5500512. See Jason Hoppin, GC Faces Fraud Charges in the McKesson Case, Prosecutors Allege Active Participation by Top Lawyer, Legal Times, June 16, 2003, Vol. 26, No. 24.

[4] See ACCA Memorandum from Michaela Allbee, Jeffrey M. Smith, and John K. Villa, Recent Proposals for Changes in Corporate Governance, Public Auditing, and the Role of Corporate Counsel: An Update as of July 26, 2002, available at http://www.acca.com/public/reference/enron/acca_update.pdf (noting how the Act passed the House by 423-3 and the Senate by 99-0).

[5] Sarbanes-Oxley Act of 2002, § 307 available at: http://www.acca.com/legres/enron/sarbanesoxley.pdf

[6] Securities and Exchange Commission Final Rule: Implementation of Standards of Professional Conduct for Attorneys, 17 C.F.R. pt. 205 (2002), (hereinafter cited by section) available at: http://www.sec.gov/rules/final/33-8185.htm.

[7] "Washington Metropolitan Area Corporate Counsel Association: Understanding the NEW SEC Attorney Responsibility Rules," Wilmer, Cutler & Pickering (February 6, 2003), available at: http://www.acca.com/chapters/program/wmacca/307rules.pdf.

[8] Giovanni P. Prezioso, Public Statement by SEC Official: Letter Regarding Washington State Bar Association's Proposed Opinion on the Effect of the SEC's Attorney Conduct Rules, Gen. Couns. Mem. (July 23, 2003), available at: www.sec.gov/news/speech/spch072303gpp.htm.

[9] See 17 C.F.R. pt. 207, § 205.1, Purpose and Scope, available at: http://www.sec.gov/rules/final/33-8185.htm.

[10] See Fidelity Fed Sav. & Loan Ass'n. v. de la Cuesta, 458 U.S. 141, 155 (1982) (holding that where an agency regulation permits conduct while state law is prohibits such action, state law is preempted because its prohibition removes the "flexibility" provided by the agency's regulation).

[11] See ABA Model Rules of Professional Conduct (hereinafter ABA Model Rules), Rule 1.6: Confidentiality of Information, (ABA) (August 2003), available at: http://www.abanet.org/cpr/mrpc/new_rule1_6.pdf.

[12] See ABA Model Rule Rules, Rule 1.13: Organization as Client, (ABA) (August 2003) available at: http://www.abanet.org/cpr/mrpc/new_rule1_13.pdf.

[13] Id.

[14] See 17 C.F.R. pt. 207.

[15] Jon Hurdle, Stronger in-house counsel a growing need for business, Philadelphia Business Journal, (Feb. 18, 2005).

[16] SEC §205.1 provides in part: "These standards supplement applicable standards of any jurisdiction where an attorney is admitted or practices and are not intended to limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of this part. Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern"; See also Implementation of Standards of Professional Conduct for Attorneys, Release Nos. 33-8185, 34-47276 (Jan. 29th, 2003) available at ww.sec.gov/rules/final/33-8185.htm

[17] 17 C.F.R. pt. 207, §§205.2(c), 205.2(g), 205.2(h).

[18] Stephen M. Cutler (Director of the Division of Enforcement of the SEC), "The Themes of Sar-

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banes-Oxley as Reflected in the Commission's Enforcement Program." Speech delivered before the UCLA School of Law, (September 20, 2004), available at: www.sec.gov/news/speech/spch092004smc.htm.

[19] 17 C.F.R. pt. 207.

[20] 17 C.F.R. pt. 207, §§205.1 and 205.2 (c).

[21] Securities Act of 1933, 15 U.S.C.A. §77a, at §12 (1933).

[22] Securities Act of 1933, 15 U.S.C.A. §77a, at §15(d) (1933).

[23] 17 C.F.R. pt. 207, § 205.2(h).

[24] Id.

[25] Broc Romanek and Kenneth B. Winer, The New Sarbanes-Oxley Attorney Responsibility Standards," ACCA Docket 21 no. 5 (May 2003): 40-55, available at: http://www.acca.com/protected/pubs/docket/mj03/standard1.php.

[26] Id.

[27] Id.

[28] 17 C.F.R. pt. 207, §205.2(g).

[29] Id.

[30] Id.

[31] Xerox Corporation Policy Statement, Office of General Counsel Policy Compliance with SEC Attorney Conduct Standards (August 1, 2003), available at: http://www.acca.com/protected/policy/conduct/xerox.pdf.

[32] Mike Stenglein, Independent Audit Committees and Risks to General Counsel, Corporate Counsel (Feb. 17, 2005), available at: http://www.law.com/jsp/cc/pubarticleCC.jsp?id=1108389926758

[33] 17 C.F.R. pt. 207, §205.3(b).

[34] 17 C.F.R. pt. 207, §205.3(b)(3).

[35] 17 C.F.R. pt. 205.3(b)(1).

[36] 17 C.F.R. pt. 207, §205.3 (b)(1).

[37] 17 C.F.R. pt. 207, §205.2(e).

[38] Id.

[39] 68 Fed. Reg. at 6302.

[40] 17 C.F.R. pt. 207, §205.2(i).

[41] 68 Fed. Reg. at 6302.

[42] Id.

[43] 17 C.F.R. pt. 207, §205.2(d).

[44] Jenny E Cieplak, Michael K. Hibey, The Sarbanes-Oxley Regulations and Model Rule 1.13: Redundant or Complementary, The Georgetown Journal of Legal Ethics, (Summer 2004).

[45] Giovanni P. Prezioso, Public Statement by SEC Official: Letter Regarding Washington State Bar Association's Proposed Opinion on the Effect of the SEC's Attorney Conduct Rules, Gen. Couns. Mem. (July 23, 2003), available at: www.sec.gov/news/speech/spch072303gpp.htm.

[46] John K. Villa, A First Look at the Final Sarbanes-Oxley Regulations Governing Corporate Counsel, Ethics & Privilege, ACCA Docket 21, no. 4(April 2003):90-99, available at: http://www.acca.com/protected/pubs/docket/am03/ethics2.php.

[47] 17 C.F.R. pt. 207, §205.2(e) (defining standard of "evidence of a material violation means 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).

[48] See id. (explaining in commentary that it has rejected the standard requiring lawyers to "know" that the conduct is a violation of law or legal duty to the corporation, in favor of a reasonably likely standard, which the SEC describes as "more than a mere possibility but it need not be 'more likely than not.")

[49] See ACCA Memo, What Legal Departments Can Do to Prepare for Compliance with New SEC Rules, available at: http://www.acca.com/protected/article/corpresp/8krule.pdf

[50] ABA Model Rules, Rule 1.13: Organization as Client, cmt 3.

[51] Steven N. Machtinger and Dana A. Welch, In-house Ethical Conflicts: Recognizing and Responding to Them, ACC DOCKET 22, no. 2 (February 2004).

[52] SEC Press Release, "SEC Charges Google and Its General Counsel David C. Drummond with Failure to Register over

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$80 in Employee Stock Options Prior to IPO" (January 13, 2005).

[53] Reporting Up the Ladder: Unclear Case Law Creates Tough Decisions, Corporate Legal Times, vol. 15, no. 163 (June 2005).

[54] Jay K. Musoff and Adam S. Zimmerman, The Changing Role of the General Counsel, New York Law Journal (August 6, 2004).

[55] 17 C.F.R. §205.2(b) (e.g., the company has substantially implemented any remedial recommendations made by the selected reviewing attorney after a reasonable investigation and evaluation of the reported evidence). The reporting attorney has advised the corporation that s/he may assert a colorable defense on behalf of the company in any investigation or judicial or administrative proceeding relating to the reported evidence of a material violation. Id.

[56] Broc Romanek and Kenneth B. Winer, The New Sarbanes-Oxley Attorney Responsibility Standards, Acca Docket (May 2003), available at: http://www.acca.com/protected/pubs/docket/mj03/standard2.php

[57] Fact Sheet, Quinn Emanuel Urquhart Oliver & Hedges, LLP, Attorney-Client Privilege in the Corporate Setting 25, available at: http://www.acca.com/chapters/socal/program/corpattyclient.pdf

[58] See Section 205.3(c)(1) and (c)(2).

[59] 17 C.F.R. pt. 207 §205.2(k)(2).

[60] 17 C.F.R. pt. 207 §205.2(k)(3).

[61] 17 C.F.R. pt. 207 § 205.2(k)(4)

[62] 17 C.F.R. pt. 207 § 205.2(k).

[63] See 17 C.F.R. pt. 207, §205.2(k)(4); See also, Joseph T. McLaughlin, Guy N. Molinari, Karen M. Crupi-Fitzgerald, and Holly Kulka, Qualified Legal Compliance Committee: Policies and Procedures, Heller Ehrman White & McAuliffe LLP, 3-16, (April 2003), available at: http://www.acca.com/protected/program/qlcc_presentation.pdf (interpreting QLCC powers and responsibilities).

[64] 17 C.F.R. §205.2(k).

[65] See Simon M. Lorne, An Issue-Annotated Version of the Sox, A Work in Progress, Munger, Tolles & Olson LLP, (December 2003), available at: http://www.acca.com/protected/article/corpresp/sarbox_attyethics.pdf.

[66] See Joseph T. McLaughlin, Guy N. Molinari, Karen M. Crupi-Fitzgerald, and Holly Kulka, Qualified Legal Compliance Committee: Policies and Procedures, Heller Ehrman White & McAuliffe LLP 14 (April 2003), available at: http://www.acca.com/protected/program/qlcc_presentation.pdf (interpreting QLCC powers and responsibilities).

[67] Susan Hackett Memo to ACCA Members, Issues for Law Departments Considering Whether to Recommend that Their Board Create a CLCC (August 27, 2003), available at: http://www.acca.com/protected/article/corpresp/qlcc_issues.pdf.

[68] Jill Fisch, The Qualified Legal Compliance Committee: Using The Attorney Conduct Rules To Restructure The Board Of Directors, Duke Law Journal, Vol. 53, No. 2, (2005)

[69] See id. (criticizing the structure of QLCC).

[70] Id.

[71] More information and discussion about the Sarbanes-Oxley Act, please visit ACC Corporate Responsibility page at www.acca.com/legres/corpresponsibility/index.php and the SEC Final Rules at http://www.sec.gov/rules/final/34-49412.htm [

[72] See Emerging and Leading Practices in Sarbanes 307 Up-The-Ladder Reporting and Attorney Professional Conduct Programs: What Companies and Law Firms are Doing, Leading Practice Profiles Series, ACCA (September 4, 2003), available at: http://www.acca.com/protected/article/corpresp/lead_sarbox.pdf

[73] 18 U.S.C. 1514A.

[74] 18 U.S.C. § 1513(e).

[75] Welch v. Cardinal Bankshares, Corp., Case No. 2003-SOX-15 (U.S. DOL ALJ Jan. 28, 2004)

[76] Kathleen Day, Whistle-Stop Campaigns: Some Firms Are Trying to Limit Protection of Workers Who Express Wrongdoing, The Washington Post, F1 (April 23, 2006).

[77] Adam Geller, Judge Orders Reinstatement for First Sarbanes-Oxley Whistleblower, AP News (Feb. 23rd, 2005), available at: http://www.law.com/jsp/article.jsp?id=1108992919634

[78] In-house counsel would not have been required to "withdraw from representing the issuer and notify the SEC within one business day of such withdrawal and indicate that the

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Sarbanes-Oxley

Financial and Accounting Disclosure Information

Accounting Oversight

Information Center
Main Accounting Oversight Information Center

Sarbanes-Oxley
Sarbanes-Oxley Act of 2002

Title XI
Corporate Fraud And Accountability

• Section 1101
Short Title

• Section 1102
Tampering With A Record Or Otherwise Impeding An Official Proceeding

• Section 1103
Temporary Freeze Authority For The Securities And Exchange Commission

• Section 1104
Amendment To The Federal Sentencing Guidelines

• Section 1105
Authority Of The Commission To Prohibit Persons From Serving As Officers Or Directors

• Section 1106
Increased Ciminal Penalties Under Securities Exchange Act Of 1934

• Section 1107
Relaliation Against Informants

Section 1107

Relaliation Against Informants

(a) IN GENERAL.—Section 1513 of title 18, United States Code, is amended by adding at the end the following:

> "(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.".

Posted on **November 13, 2002** by KarlN

Page 1

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ACC Extras

Supplemental resources available on www.acc.com

Business Ethics- Compliance and Ethics Officers- Profession or Passing
ACC Docket. April 2007
http://www.acc.com/legalresources/resource.cfm?show=14533

Framework for Conducting Effective Compliance and Ethics Risk Assessments
InfoPAK. August 2008
http://www.acc.com/legalresources/resource.cfm?show=19642

Ethics and Compliance Will Always Matter: Building Compliance Programs
Article. August 2008
http://www.acc.com/legalresources/resource.cfm?show=258687

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