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Chicken Little Lives: The Anticipated and Actual Effect of Sarbanes-Oxley on Corporate Lawyers' Conduct

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I. INTRODUCTION

> *[A] new epoch had commenced, one in which a hundred commentaries and questions—if not flowers—have blossomed and old verities have been challenged.*[1]

This quotation accurately describes the aftermath of congressional enactment of the Sarbanes-Oxley corporate responsibility legislation in 2002.[2] It also captures how many lawyers perceived proposed regulations as a radical departure threatening basic principles of lawyer independence and client confidentiality. Ironically, the statement was actually made in a 1978 article discussing the case of *SEC v. National Student Marketing Corp.*,[3] the most well-known securities case concerning a lawyer's obligation to disclose information that would be damaging to his or her client.

In *National Student Marketing*, the United States Securities and Exchange Commission (SEC) filed a complaint against various defendants, including two prominent law firms and several firm partners.[4] The SEC alleged that the lawyers had aided and abetted client wrongdoing because they "refused to issue the opinion letters and should have insisted that the financial statements be revised and the shareholders be resolicited."[5] If the law firms failed to

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1 Junius Hoffman, *On Learning of a Corporate Client's Crime or Fraud—The Lawyer's Dilemma*, 33 BUS. LAW. 1389, 1390 (1978).

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

3 457 F. Supp. 682 (D.D.C. 1978).

4 *Id.* at 686-87.

5 SEC v. Nat'l Student Mktg. Corp., [1971-1972 Transfer Binder] Fed. Sec. L. Rep. (*continued*)

ignore this advice, "the attorneys should have ceased representing their respective clients" and, under the circumstances, notified the plaintiff SEC concerning "the misleading nature of the financial statements."[6] Notably, the SEC did not condemn the lawyer for actually participating in client wrongdoing, but rather for failing to take action to prevent the client's misconduct.[7]

The *National Student Marketing* case sparked a debate on the role of securities lawyers. As noted by the court in *National Student Marketing*:

> The filing of the complaint in this proceeding generated significant interest and an almost overwhelming amount of comment within the legal profession on the scope of a securities lawyer's obligations . . . to the investing public. The very initiation of this action, therefore, has provided a necessary and worthwhile impetus for the profession's recognition and assessment of its responsibilities in this area.[8]

A reading of the *National Student Marketing* complaint reveals the SEC position that securities lawyers owe a duty to the investing public. In speeches and public pronouncements, SEC Commissioners promoted the view that securities lawyers, as gatekeepers, should function more like auditors than advocates.[9]

The aggressive enforcement strategy of the SEC and public pronouncements of SEC Commissioners triggered a response from the American Bar Association (ABA).[10] In 1975, the ABA issued a policy statement rejecting the SEC's position.[11] The ABA Policy Statement warned

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(CCH) ¶ 93,360, at 91,913 (D.D.C. Feb. 3, 1972).

6 *Id.*

7 Kenneth F. Krach, *The Client-Fraud Dilemma: A Need for Consensus*, 46 MD. L. REV. 436, 460 & n.147 (1987).

8 *Nat'l Student Mktg. Corp.*, 457 F. Supp. at 714 (footnote omitted).

9 For example, in a published speech, SEC Commissioner A. A. Sommer described securities lawyers as the keepers of stop and go signals in securities transactions. *See Commissioner Sommer's Speech on "The Emerging Responsibilities of the Securities Lawyer,"* [1973-1974 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,631 (Jan. 1974). Another SEC Commissioner, Roberta Karmel, challenged this view and the SEC position that securities lawyers owed duties to the public. *See* Roberta S. Karmel, *Duty to the Target: Is an Attorney's Duty to the Corporation a Paradigm for Directors?*, 39 HASTINGS L.J. 677, 678 (1988).

10 For the ABA's response, see *Statement of Policy Adopted by American Bar Association Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to the Compliance by Clients with Laws Administered by the Securities and Exchange Commission*, 31 BUS. LAW 543 (1975).

11 *Id.* at 544-45.

that lawyers' ability to counsel and defend clients could be seriously impaired if lawyers are forced to disclose client confidences to third parties, including the SEC.[12]

Despite the protests of the organized bar, SEC enforcement actions and policy statements caused securities firms to reexamine their handling of securities representation and responsibilities.[13] At a corporate level, firms improved their due diligence procedures and opinion letter policies. Such improvements could help firms minimize their liability exposure. Risk averse firms "anxious to avoid an SEC prosecution began to err by placing too much emphasis on their duty of candor to the government."[14] On an individual level, the looming threat of SEC action may have affected the advice that securities lawyers gave their clients. As a SEC lawyer who moved into private practice, I can attest to the fact that the SEC position influenced my own conception of my role. Admittedly, the risk of liability also influenced my approach to representation.[15]

Within fifteen years, financial institution lawyers faced a similar threat of regulator suit. Following the savings and loan debacle, financial institution regulators, including the Federal Deposit Insurance Corporation (FDIC) and Office of Thrift Supervision (OTS), took an aggressive posture in suing professionals who represented regulated entities. Professionals in both large and small firms faced government claims.[16] New legislation called the Financial Institution Reform, Recovery, and Enforcement Act (FIRREA) of

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12 *Id.* at 544.

13 *See* Krach, *supra* note 7, at 461-62.

14 *Id.* at 462 (footnote omitted).

15 For example, the risk of liability played a role in screening new securities clients.

16 *See* Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639, 640 (1994) (noting that "[f]ederal banking agencies have brought crushing professional liability suits or administrative enforcement actions against more than twenty of our nation's largest law firms"). "All told, the government has instituted over 90 civil or administrative actions against lawyers who represented failed thrifts." *Id.* at 640 n.1 (citing Harris Weinstein, *Attorney Liability in the Savings and Loan Crisis*, 1993 U. ILL. L. REV. 53, 53). Harris Weinstein is the former Chief Counsel of the Office of Thrift Supervision. Joseph E. Addiego III, Comment, *FIRREA Disrupts Traditional Notions of Attorney Duty by Exposing Lawyers, as Financial Institution-Affiliated Parties, to Personal Liability*, 33 SANTA CLARA L. REV. 969, 971 (1993). "Between 1989 and 1992, the government recovered $1.7 billion from claims against professional advisers associated with failed banks and thrifts." Nancy Amoury Combs, Comment, *Understanding Kaye Scholer: The Autonomous Citizen, the Managed Subject and the Role of the Lawyer*, 82 CAL. L. REV. 663, 664 n.2 (1994) (citing Howell E. Jackson, *Reflections on Kaye Scholer: Enlisting Lawyers to Improve the Regulation of Financial Institutions*, 66 S. CAL. L. REV. 1019, 1023 n.12 (1993)).

1989 also enhanced the regulator's enforcement tools.[17] FIRREA empowered government officials to file administrative actions against institution-related parties, including lawyers and accountants.[18] Following the adoption of FIRREA, government officials frequently compared the fiduciary duties of lawyers representing financial institutions to the fiduciary duties of lawyers handling securities transactions.[19]

In March of 1992, the OTS shocked the legal world by using this statutory authority in suing the prestigious firm of Kaye, Scholer, Fierman, Hays & Handler ("Kaye Scholer").[20] In its Notice of Charges, the government sought damages and restitution totaling $275 million arising from actions taken by the law firm when representing Charles Keating and the Lincoln Savings and Loan Association.[21] The OTS also obtained a temporary cease and desist order freezing the firm's assets.[22]

Although the case settled within ten days with Kaye Scholer paying $41 million,[23] the government action sparked a controversy. Critics questioned the government tactic as a "heavy-handed" attack on independent counsel.[24]

In a report on the asset freeze, the Committee on Professional Responsibility of the City Bar of New York concluded that lawyers learned from Kaye Scholer's treatment that if "they represent a client vigorously, they risk financial ruin before an action against them is even brought before a judge."[25] Others defended government action as a legitimate use of regulatory

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17 For a discussion of FIRREA, see Paul T. Clark et al., *Regulation of Savings Associations Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, 45 BUS. LAW. 1013 (1990).

18 *See* Addiego, *supra* note 16, at 970-71.

19 Diane L. Karpman, *"Catch of the Day-Catch 22": Anticipating, Understanding and Defending NonClient Claims, and How the S&L Crisis May Impact Enron*, 126 PRAC. L. INST. 79, 97 (2002).

20 Peter C. Kostant, *When Zeal Boils Over: Disclosure Obligations and the Duty of Candor of Legal Counsel in Regulatory Proceedings after the Kaye Scholer Settlement*, 25 ARIZ. ST. L. J. 487, 487-88 & n.2 (1993).

21 *Id.* at 487-88.

22 *Id.* at 488.

23 *Id.*

24 *See, e.g.*, *Accountability by Sledgehammer*, N.Y. TIMES, Mar. 10, 1992, at A24 (condemning the government's use of "heavy-handed tactics" and criticizing the government's "novel demands that the lawyers abandon their customary loyalty to clients"). *See also* Keith R. Fisher, *Neither Evaders nor Apologists: A Reply to Professor Simon*, 23 LAW & SOC. INQUIRY 341, 356 (1998) (discussing the legitimacy of the bar's concern that the OTS position departed from "generally accepted and well-recognized professional norms").

25 Edward A. Adams, *Panel Condemns Kaye Scholer Asset Freeze*, N.Y. L.J., Apr. 1, 1992, at 1 (quoting a report issued by the Committee on Professional Responsibility of the Association of the Bar of the City of New York). The Committee report recommended

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powers to recoup losses of at least $275 million.[26] Both sides of the debate recognized that financial institution lawyers were functioning in a new regulatory world in which the threat of government enforcement action forced lawyers to reexamine their role in representing clients.[27]

A decade later, lawyers found themselves discussing the same issues following congressional enactment of the Sarbanes-Oxley Act of 2002.[28] The Act, passed in reaction to high profile corporate scandals including Enron and Worldcom, was designed "to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities law, and for other purposes."[29] Section 307 of the statute directed the SEC to issue rules setting forth minimum standards of conduct for lawyers appearing and practicing before the SEC in any way in the representation of issuers.[30] In addition to the "general grant" of authority to issue rules, the statute mandated the adoption of one specific rule requiring that lawyers report "up the corporate ladder" evidence of corporate misconduct.[31] Pursuant to this

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amending FIRREA to require OTS to provide a law firm notice of an asset freeze before it becomes effective. *Id.* at 5.

26 *See, e.g.*, Kostant *supra* note 20, at 489 (asserting that the government held Kaye Scholer to well-established standards of professional conduct).

27 Susan Saab Fortney, *OTS vs. the Bar: Must Attorneys Advise Directors that the Directors Owe a Duty to the Depository Fund?*, 12 ANN. REV. BANKING L. 373, 395 (1993) (concluding that government actions forced lawyers to reassess their role and liability exposure in representing financial institutions).

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

29 N. Henry Simpson et al., *After the Fall: The Sarbanes-Oxley Act of 2002*, 66 TEX. B. J. No.3, Mar. 2003, at 226, 227. As described by Professor Jonathan R. Macey, the statute was "designed to remedy perceived deficiencies in *market processes* by which public corporations interact with the investing public." Jonathan R. Macey, *A Pox on Both Your Houses: Enron, Sarbanes-Oxley and the Debate Concerning the Relative Efficacy of Mandatory Versus Enabling Rules*, 81 WASH. U. L.Q. 329, 350 (2003).

30 Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097, 1098-99 (2003) (noting that the affirmative "obligations will now have the force of federal law, including the potential that violations will be subject to SEC enforcement proceedings").

31 *Developments in the Law—Corporations and Society, Lawyer Conduct and Corporate Misconduct*, 117 HARV. L. REV. 2227, 2228 (2004) [hereinafter *Lawyer Conduct and Corporate Misconduct*]. As provided in the statute, the rule should require that counsel

> report evidence of a 'material violation of the securities law or breach of fiduciary duty' to the chief legal counsel or the CEO of the corporation. If the suspected violation or breach is not addressed, the attorney must then present the evidence to the audit committee, another appropriate

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directive, the SEC on January 29, 2003 proposed Part 205, entitled "Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer" (SEC Standards).[32]

The proposed SEC Standards sparked a heated debate on the necessity and effect of the changes. As was the reaction to the *National Student Marketing* and *Kaye Scholer* cases, many lawyers saw the legislation with the proposed standards as threatening the relationship between lawyers and their corporate clients. A firestorm of criticism and commentary hit the press.[33] Much like the bar's reaction to FIRREA, the new legislation and SEC proposed standards also provoked responses from the organized bar,[34] law firms, and individual lawyers.

Part II of this Article reviews the organized bar's reaction to the Sarbanes-Oxley Act of 2002. Part III focuses on law firms' response to the legislation. Finally, Part IV considers the views of individual corporate and securities lawyers ("corporate lawyers") who have reflected on the short and long term effect of the legislation and related SEC Standards.

II. ORGANIZED BAR REACTION

Before Congress passed Sarbanes-Oxley, 2001-2002 ABA President Robert Hirshon appointed the ABA Task Force on Corporate Responsibility ("Task Force") to examine issues related to corporate responsibility and wrongdoing.[35] The Task Force examined "the framework of laws and

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committee, or the board of directors.

John F.X. Peloso & Stuart M. Sarnoff, *The Sarbanes-Oxley Act of 2002: Whom Does It Affect and How?*, N.Y. L.J., Aug. 14, 2002, at 3.

[32] *Lawyer Conduct and Corporate Misconduct*, *supra* note 31, at 2230-31 (citing 17 C.F.R. pt. 205).

[33] *E.g.*, Leslie Wharton, *Hazards for the Attorney-Client Relationship: Sarbanes-Oxley Act's Reporting Requirements Pose Problems for Privileged Communications*, N.Y. L.J., Nov. 18, 2002, at S1 (concluding that the proposed SEC rule is "more likely to inhibit communications between corporations and their counsel and engender collateral litigation over privilege issues than to further goals articulated by Congress in the Sarbanes-Oxley Act").

[34] For an excellent summary of the organized bar's response to FIRREA and the litigation against professionals who represented failed financial institutions, see William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243, 263-67 (1998).

[35] *Report of the American Bar Association Task Force on Corporate Responsibility*, 59 BUS. LAW. 145, 145-46 (2003) [hereinafter *ABA Task Force Report*]. The Task Force was charged with examining "systemic issues relating to corporate responsibility arising out of the unexpected and traumatic bankruptcy of Enron and other Enron-like situations which have shaken confidence in the effectiveness of the governance and disclosure systems applicable to public companies in the United States." *Id.* at 145-46.

regulations and ethical principles governing the roles of lawyers, executive officers, directors, and other key participants."[36] In fulfilling its charge, the Task Force submitted a Preliminary Report on July 16, 2002, recommending reforms relating principally to corporate governance and lawyers' professional responsibility.[37] With respect to the professional conduct of lawyers, the Preliminary Report "proposed a number of changes to the ABA Model Rules of Professional Conduct, including a recommendation that lawyers be given broader permission to disclose information about corporate misconduct and that [lawyers] be required to disclose confidential information to prevent criminal misconduct."[38]

After the Task Force submitted its Preliminary Report, 2002-2003 ABA President Alfred P. Carlton, Jr. reappointed "the Task Force to draw 'broad public policy conclusions which lead to policy recommendations for the ABA House of Delegates . . . that go beyond the technical aspects of corporate securities law and the ABA's model rules of professional conduct.'"[39] In continuing its work, the Task Force performed an important role in providing the ABA's opinion to the SEC as the SEC developed minimum standards of professional conduct pursuant to section 307 of Sarbanes-Oxley.[40]

The Sarbanes-Oxley legislation and proposed standards requiring "up-the-ladder" reporting impacted the recommendations that the Task Force made in its final report.[41] Although the Task Force's Final Report rejected such inflexibility in proposed changes to Model Rule 1.13, the Final Report encouraged more "up-the-ladder" reporting by including a presumption in the proposed Rule 1.13.[42] As proposed in the Task Force's Final Report, the presumption required "reporting to a higher authority within the organization . . . unless 'the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so.'"[43] In August 2003, the ABA House of Delegates adopted the ABA Task Force's proposed revision of Model Rule 1.13 with a floor amendment related to the standard for triggering reports.[44]

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36 *Id.* at 146.

37 *Id.*

38 *LOMAR News Briefs*, LAW OFF. MGMT. & ADMIN. REP., (The Inst. of Mgmt. & Admin., New York, N.Y.), Jan. 2003, at 8, 9.

39 *ABA Task Force Report*, *supra* note 35, at 146 (quoting ABA President Alfred P. Carlton, Jr. in his testimony given to the Task Force in Chicago on Sept. 20, 2002) (alteration in original).

40 *LOMAR News Briefs*, *supra* note 38, at 9.

41 *See* Lawrence A. Hamermesh, *The ABA Task Force on Corporate Responsibility and the 2003 Changes to the Model Rules of Professional Conduct*, 17 GEO. J. LEGAL ETHICS 35, 42-43 (2003) (tracing the history of the rule changes).

42 *See id.* at 41-43.

43 *Id.* at 42-43 (quoting MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2003)).

44 *Id.* at 45.

During the same meeting, the ABA House of Delegates also adopted the extension of the permissive disclosure provisions recommended by the ABA Ethics 2000 Commission.[45] The broader mandatory disclosure provisions recommended in the Preliminary Task Force Report were withdrawn from the Task Force's Final Report.[46]

The history of the SEC Standards promulgated under the authority of section 307 of Sarbanes-Oxley and the proposed changes to the ABA Model Rules reveals that both the SEC and organized bar influenced each other. Apparently, practitioner outcry and organized bar opposition has chilled the SEC's enthusiastic rush to adopt rule provisions requiring lawyers to make an immediate "noisy withdrawal" when corporate officials of public companies do not appropriately address reported material violations.[47] At the same time, the ABA abandoned some arguments first asserted in opposition to SEC regulation of lawyer conduct.[48] As explained by one commentator, "[T]he practicing bar has staked out fallback positions in the face of the commission's seeming determination to press through with some kind of requirement for attorneys to report wrongdoings of clients."[49]

Lawyers are swimming in unsettled waters because of the uncertainty surrounding the SEC proposed standards and the recently adopted revisions to the Model Rules. Until such time that the SEC proposed rules are actually effective and states adopt the Model Rule revisions, lawyers should comply with the provisions of applicable state ethics rules. At the same time, the SEC will likely take the position that Sarbanes-Oxley and the SEC Standards govern the responsibility of lawyers representing issuers of securities. In some states, this has created the "possibility of a significant collision between the regulation of lawyers by the SEC and the regulation of lawyers by state supreme courts."[50] As suggested by Professor Lawrence Hamermesh, this

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45 *Id.* at 35, 39.

46 *Id.* at 38-39 (noting that the Preliminary Task Force's mandatory disclosure proposal encountered severe criticism).

47 *See ABA Urges SEC Not to Exceed Sarbanes-Oxley Mandate Without Extended Comment Period*, METRO. CORP. COUNS. (Mountainside, N.J.), Jan. 2003 (outlining the ABA's comment letter relating to the SEC's proposed standards implementing Sarbanes-Oxley).

48 *See* Gary Young, *Shifting Tactics on SEC Proposal: Attorneys Stake Out Fallback Positions with Passage Likely*, NAT'L L.J., Apr. 14, 2003, at A15 (noting that other practitioner groups, such as the American Corporate Counsel Association, have also changed their stance). In contrast to an earlier comment letter to the SEC, an April 4, 2003 comment letter did not argue that the SEC "lack[ed] congressional authority to issue a reporting-out rule or that state disciplinary bodies are adequately policing the conduct of securities lawyers." *Id.*

49 *Id.*

50 George A. Riemer, *SEC v. State Bars? Preemption Showdowns Could Be on the Horizon*, 64 DEC. OR. ST. B. BULL. 21 (reviewing positions taken by bar groups in Washington and California).

may leave lawyers in a quandary if they want to disclose information as permitted by the SEC rule, but the state rule prohibits such disclosure.[51] Until uncertainty is resolved, the safest course of action may be for lawyers to limit disclosures to what state ethics rules permit, rather than relying on the permissive disclosure provisions under the SEC Standards.[52]

III. FIRM RESPONSE

Despite the uncertainty surrounding the proposed "reporting out" rule, firm lawyers have not delayed in responding to the provisions of Sarbanes-Oxley and the new SEC Standards that became effective on August 5, 2003.[53] Within a short time after passage, the new legislation and SEC proposed standards sparked a flurry of commentary and conferences.[54] Law school symposia explored theoretical and policy issues such as liability of lawyers as gatekeepers,[55] while continuing legal education programs concentrated on practical compliance issues.[56] For practitioners, educational sessions provided guidance on advising corporate clients of their responsibilities and liabilities. Select programs focused on professional responsibility issues related to law firm compliance with new regulatory requirements.[57]

Beginning in 2003, lawyers and their firms appeared to go through three stages. First, lawyers and firm managers attempted to analyze both the new law, regulatory requirements, and practice ramifications.[58] Second, firms that

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[51] Mark Hansen, *State Fights the SEC: State Bar Warns Lawyers Against Permissive Disclosure Under SEC's New Rules*, 34 A.B.A. J. E-REPORT, Aug. 29, 2003, *available at* WL, 34 ABAJEREP 1 (citing Lawrence Hamermesh, Professor of Law, Widener University School of Law).

[52] *See id.*

[53] *See* Sue Reisinger, *Coping with Tighter Rules for Lawyers*, NAT'L L.J., Aug. 11, 2003, at 8 (referring to an SEC spokesman who said that the SEC "received about one question a week about the reporting rules").

[54] *See, e.g.*, Richard W. Painter, *Forward to Symposium: Evaluation and Response to Risk by Lawyers and Accountants in the U.S. and E.U.*, 29 J. CORP. L. 217 (2004) (noting that the symposium examines the regulation of lawyers and gatekeepers in the United States and Europe).

[55] *See, e.g.*, *id.* at 217.

[56] *See, e.g.*, *Calendar of Coming Events*, N.Y. L.J., June 21, 2004, at 2 (referring to an upcoming continuing legal education program entitled "Sarbanes Oxley: A Complete Review and Update").

[57] For example, the Dallas-based firm of Haynes and Boone, L.L.P. presented a seminar for legal officers on the SEC's new standards of professional conduct mandated by Sarbanes-Oxley. Press Release, Haynes and Boone, LLP, Haynes and Boone Presents "Sarbanes-Oxley: Attorney Standards of Professional Conduct," (Feb. 14, 2003), *at* http://www.haynesboone.com/about/press_detail.asp?pressid=158.

[58] *See* Reisinger, *supra* note 53; Hansen, *supra* note 51.

represent public companies and issuers adopted policies and implemented procedures to enable them to comply with new regulations.[59] Third, firm managers recognized that corporate clients needed assistance in complying with the new legislation and regulations.[60]

Firms used different approaches in assisting corporate clients. Commonly, firms provided client newsletters, client advisories, or personalized letters describing the new law and regulations.[61] In these communications, firms invited client representatives to contact firm lawyers for additional assistance.[62] This reveals how the new laws and regulations provided a business development opportunity for firms. As explained by one commentator, "The passage of Sarbanes-Oxley last summer created a huge and immediate need for governance expertise, and law firms moved quickly to get a piece of the action, cobbling together corporate governance practices from existing corporate, litigation, securities and other practice groups."[63] Lawyers in these special practice groups would assist corporations in complying with the requirements of Sarbanes-Oxley and related regulations.[64] Thus, the new regulatory environment created opportunities for firms to attract new clients and generate additional work from existing clients.[65]

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[59] *See* Michael Bobelian, *Sarbanes-Oxley: Law Firms Negotiate a New Reality*, N.Y. LAW., Mar. 18, 2004, *at* http://www.nylawyer.com/news/04/03/031804d.html. Referring to firms instituting structural reforms, James Jones, a consultant with Hildrebrant International, noted that "'firms are taking risk management much more seriously,' by training lawyers about the new rules, formalizing once loosely drawn processes, and creating internal groups to study and solve problems." *Id.*

[60] The following description of the assistance provided by the Corporate Governance Group at Gardere Wynne Sewell LLP captures the type of guidance firms provide. "In relation to the Sarbanes-Oxley Act of 2002, we advise clients on the expanded disclosure requirements, accelerated timing of disclosure, requirements for independent board and board committee members, prohibitions on personal loans to corporate executives, regulation of insider trading, and certifications by senior corporate officials." Gardere Wynne Sewell LLP, Practice Areas, Corporate Governance, http://www.gardere.com/Practice_Areas_and_Industry_Teams/-Practice_Area?id=84 (last visited Oct.1, 2004).

[61] *See, e.g.*, *SEC Deadline for Updating Corporate Codes of Ethics/Conduct*, CLIENT ALERT (Baker & McKenzie, Chicago, Ill.), July 16, 2003, at 2 (on file with Capital University Law Review) (inviting clients to contact firm lawyers for assistance with review or creation of a Global and Domestic Code of Ethics/Conduct).

[62] *Id.*

[63] Tamara Loomis, *Scandals Lead to a New Kind of Executive*, LEGAL INTELLIGENCER, May 5, 2003, *available at* http://www.palawlibrary.com/cgibin/retrieve.cgi/file_45686?-mode=disp&text=scandals (stating that the purpose of forming a practice group is to deal with interrelated issues that arise under the "governance umbrella").

[64] *See id.*

[65] *See* Peter H. Ehrenberg & Anthony O. Pergola, *Project: Corporate Counsel—Law* (*continued*)

Although larger firms are the ones appearing to use Sarbanes-Oxley as a business development vehicle, firms of all sizes should assess their own needs in considering the implementation of policies and procedures to comply with the SEC Standards. Some malpractice insurers, such as the Attorneys' Liability Assurance Society, Inc., the risk retention group that includes many of the nation's largest law firms, recommended that firms consider adopting a written policy designating a firm committee to work on Sarbanes-Oxley compliance.[66] In-house counsel may also require that their outside counsel adopt written policies.[67]

Integral features of a policy include mandatory training for all firm lawyers and procedures for reporting information that could be material for securities law disclosure.[68] Educational sessions should include supervised and supervisory lawyers, as well those lawyers who do not handle securities work. All firm lawyers could receive at least general training, while securities lawyers should obtain more intensive training.

Firms that do not handle securities matters should consider modifying their engagement letters to clarify that the firm is not being engaged to perform securities work. Firm audit response letters might also clarify that the firm is not securities counsel for the client.

Firms, Corporate Governance Self-Audits: Policing Yourself Before You Get Policed, METRO. CORP. COUNS. (Mountainside, N.J.), 2004 (referring to the developing cottage industry of consultants), *available at* http://www.metrocorpcounsel.com-/article.php?EntryNo=1647. Corporations can also obtain the assistance of consultants who provide Sarbanes-Oxley compliance services. *Id.*

[66] In describing firms' response to the provisions of Sarbanes-Oxley and the related SEC Standards, one commentator notes that "[t]he most important step has come in the form of internal committees empowered to develop policies and respond to questions that may arise among their practicing attorneys." Bobelian, *supra* note 59.

[67] *Sarbanes-Oxley In-Housekeeping; General Counsel Adapt to the Post-Enron Business Climate*, TEX. LAW., Dec. 29, 2003, *available at* LEXIS, News & Business, News, By Individual Publication. According to Mark C. Hill, senior vice president and chief administrative officer for RadioShack Corp., his corporation requires that outside counsel have written policies and "embrace" the corporation's policy. *Id.* Similarly, Katherine K. Combs, deputy general counsel, vice president, and corporate secretary for Exelon Corp., recommends that "law firms and corporations should both draft reporting-up policies and exchange copies of their policies when working together." Melissa Nann, *'Reporting-Up' Procedures Under Sarbanes-Oxley Urged*, LEGAL INTELLIGENCER, Sept. 19, 2003, *available at* http://www.palaw-library.com/cgi-bin/retrieve.cgi/file_46935?mode=disp&text=reporting+up.

[68] Nann, *supra* note 67.

IV. EFFECT ON PRACTICE OF INDIVIDUAL LAWYERS

When first proposed, the SEC Standards prompted warnings that the Standards would fundamentally change the attorney-client relationship.[69] Despite these warnings, experienced practitioners report that the "effects have been moderate."[70] Simon Lorne, an American Bar Association task force member who focuses on reviewing the responses of law firms to section 307 of Sarbanes-Oxley, believes that "'[t]here has been precious little evidence of actual adverse effects' in attorney-client relations."[71] Mr. Lorne predicts that "the theoretical risk [will] turn into a practical risk" once the SEC takes enforcement action against a law firm.[72]

Even though the SEC has not taken enforcement action against practicing lawyers, one firm's withdrawal from representation resulted in national press coverage.[73] In December 2003, *The New York Times* reported that a partner at the firm of Akin, Gump, Strauss, Hauer & Feld cited section 307 of Sarbanes-Oxley in a December 12, 2003 letter to the board of TV Azteca, Mexico's second-largest broadcaster.[74] In the letter, the partner told the board that Akin Gump was withdrawing as TV Azteca's counsel on a pending bond offering because of a dispute related to disclosure obligations concerning a transaction.[75] On the day following the news story, Reuter's reported a nine percent drop in TV Azteca's share price.[76] Interestingly, the leak of the letter to the press effectively converted an up-the-ladder report within the organization to a noisy withdrawal.

This incident suggests that corporate lawyers are attempting to comply with the provisions of section 307 and the SEC Standards. Although state ethics rules may require that lawyers act in the best interest of the organization-client, those rules, which are based on the pre-2003 version of Model Rule 1.13, only mention going "up-the-ladder" among other remedial measures a lawyer "may" take.[77] Now, lawyers in Akin Gump's position no longer have

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[69] Bobelian, *supra* note 59.

[70] *Id.* at 3.

[71] *Id.* (quoting Simon Lorne).

[72] *Id.*

[73] Patrick McGeehan, *Lawyers Take Suspicions on TV Azteca to Its Board*, N.Y. TIMES, Dec. 24, 2003, at C1.

[74] *Id.*

[75] *Id.* "The company, TV Azteca, has had a long-running dispute with lawyers in New York about the need for greater disclosure about transactions that could have yielded a profit of more than $100 million to the company's billionaire chairman and controlling shareholder, Ricardo B. Salinas Pliego." *Id.*

[76] *TV Azteca Debt Deal Under Review, Shares Plunge*, REUTERS, Dec. 24, 2003.

[77] Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, *in* ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 571, 584-85 (Nancy B.

(*continued*)

an option when circumstances trigger the obligations under the new SEC Standards.

The remaining question is whether the SEC Standards actually have changed the conduct of corporate lawyers. To obtain practitioners' opinions on the actual effect of the SEC Standards, I conducted an on-line survey[78] and my own interviews of experienced corporate lawyers. The methodology I used, while not scientific, enabled me to obtain feedback from thirty-six lawyers.

Members of the following specialty bar groups received the e-mail message inviting them to click an Internet web link to complete a ten-question on-line survey: The Dallas Bar Association Securities Section,[79] the Houston Bar Association Securities Litigation and Arbitration Law Section,[80] the Ohio State Bar Association Securities Regulation and Tender Offer Sections, and the New York State Bar Association Business Law Section Committee on Securities Regulation. Twenty-five lawyers completed the on-line survey.[81] In addition to the survey responses, I also obtained more in-depth responses from interviews with corporate lawyers in Illinois, Ohio, New York, and Texas.[82]

The on-line survey yielded twenty-six responses from a range of corporate lawyers in different regions and practice settings.[83] The respondents worked in

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Rapoport & Bala G. Dharan eds. 2004). In referring to the previous version of Model Rule 1.13, Professor Roger Cramton explains that subpart (b) of the rule is ambiguous in reciting a number of factors a lawyer should consider and listing three measures, "including going up the corporate ladder to the board of directors, that the lawyer 'may' take, along with other unspecified measures." *Id.* At its 2003 meeting, the ABA House of Delegates voted to change the revisions of Model Rule 1.13 to create a presumption requiring lawyers to go "up-the-ladder." *See* Hamermesh, *supra* note 41, at 35, 42-43.

78 Susan Saab Fortney, Corporate/Securities Practice Survey (2004) (unpublished survey, on file with author) [hereinafter Corporate/Securities Practice Survey].

79 Email from Susan Saab Fortney, Associate Dean for Student Affairs, Texas Tech University School of Law, to the Dallas Bar Securities Section (July 14, 2004, 11:03 AM) (on file with author).

80 Email from Susan Saab Fortney, Associate Dean for Student Affairs, Texas Tech University School of Law, to the Houston Bar Association Securities Litigation and Arbitration Law Section (July 19, 2004, 12:22 PM) (on file with author).

81 *See* Susan Saab Fortney, Sarbanes Oxley Survey Responses (2004) (unpublished survey responses, on file with author) [hereinafter Sarbanes Oxley Survey Responses].

82 *See* Susan Saab Fortney, Outline of Fortney Interview (2004) (unpublished outline, on file with author) [hereinafter Outline of Fortney Interview].

83 Sarbanes Oxley Survey Responses, *supra* note 81.

firms and offices of varying sizes.[84] Fifty-percent indicated that their firms consisted of more than one hundred lawyers, including all branch offices.[85]

The majority of survey respondents (77%) were transactional lawyers rather than securities litigators.[86] The largest percentage of respondents (46%) were very experienced corporate lawyers who had practiced corporate law for over twenty years.[87] A slight majority (54%) indicated that more than 75% of their practice was devoted to corporate and securities work.[88]

The respondents were evenly split when asked the following question: "Do you believe that complying with the provisions of Sarbanes-Oxley and the new SEC Standards of Professional Conduct for Attorneys have changed the way in which you represent public entities?"[89] The outcome changes when focusing only on the thirteen respondents who practice in firms of over one hundred lawyers.[90] Nine of those thirteen respondents reported that complying with the provisions of Sarbanes-Oxley and the related standards indeed has changed their practices.[91]

The descriptions of how compliance has changed their practices largely fall in to three categories: (1) effects on the clients' attitudes, expectations, and conduct, (2) effects on the nature and amount of work, and (3) effects on lawyers' dealings with constituents.[92]

In the first category of descriptions, comments reveal that client representatives are now more concerned and cautious.[93] This heightened

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84 *Id.*

85 Susan Saab Fortney, Survey Results: Corporate Securities Survey (2004) (unpublished survey results, on file with author) [hereinafter Survey Results: Corporate Securities Survey]. The balance of respondents were mixed between lawyers who practiced in firms of less than 10 lawyers (27%) and those who practiced in firms of 10-75 lawyers (23%). Two respondents served as in-house counsel, one for a publicly held company, and the other for a privately held company. Sarbanes Oxley Survey Responses, *supra* note 81, at Response Nos. 5, 12.

86 Survey Results: Corporate Securities Survey, *supra* note 85.

87 *Id.* Eight lawyers (31%) indicated that they had practiced corporate and securities law for seven to twenty years, and six (23%) noted that they had less than seven years of experience in the practice area. *Id.*

88 *Id.* Twenty seven percent devoted 51% to 75% of their practice to corporate and securities work, and 19% devoted less than 50% of their practice to corporate and securities work. *Id.*

89 *Id.* While thirteen respondents indicated that there has been no change, thirteen other respondents indicated that complying with the law and related rules had changed the way they represent public entities. *Id.*

90 *See* Sarbanes Oxley Survey Responses, *supra* note 81.

91 *Id.*

92 *See id.*

93 *See id.*

awareness and liability exposure for corporate executives appears to have contributed to the constituents becoming more demanding.[94] These results are consistent with reports that I received from interviewed lawyers.[95] While noting that Sarbanes-Oxley has not changed her practice much, one interviewee referred to the "post-Enron mindset" of client representatives who are now more sensitive to issues such as fiduciary duty.[96] The lawyer stated that before Enron, she might have had "to preach all day; but now, in a post-Enron world, it is easier to explain to constituents the issues and their exposure."[97] Other interviewees shared similar sentiments, commenting on the increased sensitivity of corporate officers and heightened attention to compliance matters.[98]

The receptivity of clients to lawyers' advice and counselling suggests that Sarbanes-Oxley may be impacting the dynamics of the lawyer-client relationship. A number of respondents commented on the leverage that Sarbanes-Oxley gives lawyers in dealing with corporate representatives.[99] As stated by one respondent, "Although we discuss the same issues with public entities as we did prior to adoption of the Standards, we cite the Standards as additional support for appropriately addressing the issues."[100] With respect to "up-the-ladder" reporting obligations, one respondent stated, "In the past, there was a lot of give and take on certain issues. Now there is less."[101] This last comment suggests that Sarbanes-Oxley and the Standards have limited the flexibility that lawyers previously had in dealing with corporate representatives. To some, this lack of flexibility provides "leverage" that lawyers can use if constituents act in a manner detrimental to the client-entity.[102] As explained by one respondent, Sarbanes-Oxley "creates some brighter lines for attorneys and gives them more leverage with obstreperous business clients."[103]

To some, the additional exposure under Sarbanes-Oxley has also contributed to lawyers engaging in a kind of defensive lawyering, called "CYA" by one respondent.[104] As stated by the respondent, "It used to be just

94 *See id.* As described by one respondent, "[T]he stakes are much higher, and outside directors are more inquisitive and demanding." *Id.* at Response No. 13.

95 Interviews with Anonymous Sources (2004) (interview notes on file with author) [hereinafter Interviews]. The author promised anonymity to all interviewees.

96 *Id.*

97 *Id.*

98 *Id.*

99 *See* Sarbanes Oxley Survey Responses, *supra* note 81.

100 *Id.* at Response No. 18.

101 *Id.* at Response No. 16.

102 *See, e.g.*, *id.* at Response Nos. 17-20, 24.

103 *Id.* at Response No. 5.

104 *Id.* at Response No. 9.

malpractice you worried about, now it is jail. This is now a no-risk-is-acceptable environment."[105] As a result, lawyers may be documenting more, resulting in more legal work and higher costs for clients.[106] One respondent described this effect in stating that s/he is "more likely to maintain formal notes of advice rendered."[107]

Various survey comments specifically refer to the impact that Sarbanes-Oxley has had in creating additional work for lawyers.[108] Four respondents explained that they are spending more time on regulatory work, including handling reporting and disclosure issues and complying with new SEC Standards.[109] The following comment describes the nature of the additional work:

> Sarbanes-Oxley has greatly increased the time and effort for clients and counsel to comply with prior securities law requirements, not to mention many wholely [sic] new requirements. A lot of that effort is one time start up work, but much of it is ongoing. The education (about the new requirements) and documentation of both new and existing procedures are extensive. In addition, there is the work to interpret a huge number of the new rules created in a short time without adequate comment and thought . . . . The increased items to be documented by boards and committees have led to longer meetings and more lawyer input for the directors.[110]

Interviewees described the increase in legal work at two levels: one for public companies that want to remain public and the second for public

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[105] *Id.*

[106] *See, e.g.*, *id.* at Response No. 26. *See also* Bobelian, *supra* note 59, at 3. Noting that "firms [are] asking more inquisitive questions of clients and documenting oral conversations and internal decisions," Kevin Rosen, the head of Gibson, Dunn & Crutcher's legal malpractice defense group, said that "lawyers are more aware of the changing perception of their role and as a result . . . are taking certain steps to ensure recognition that they are complying." *Id.* (alteration in original).

[107] Sarbanes Oxley Survey Responses, *supra* note 81, at Response No. 28.

[108] *See id.* at Response Nos. 18, 23, 26, 28.

[109] *See id.* Another respondent noted that s/he has "seen increased calls by in house counsel on routine disclosure items (where Sarbox has made no changes directly in the law) as well as changes in governance standards." *Id.* at Response No. 28.

[110] *Id.* at Response No. 26. The respondent also bemoans the uncertainty surrounding adoption of the new SEC Standards. *See id.* The respondent stated that "[t]here are also areas where the SEC and D[O]J have been slow to give any guidance about the meaning of coverage of new requirements." *Id.*

companies that want to go private.[111] First, interviewees referred to the initial upsurge in demand for lawyer services because public clients sought lawyer's assistance in creating policies and committees.[112] A number of interviewees also noted that the increased scrutiny, requirements, and costs for public companies have resulted in an increase in a second type of work—assisting public clients that want to "deregister" and "go private."[113] Similarly, because of the increased costs and requirements for public issues, private clients are now less drawn by the "going public" lure.[114]

Survey respondents were also evenly split on the question of whether the SEC Standards have changed the way they represent "non-public" companies.[115] Thirteen respondents reported that their representation had not changed; however, the other thirteen respondents reported that the legislation and related standards had changed the way they represented "non-public" companies.[116] One respondent commented that the change is "not . . . dramatic"[117] and another stated that the change is "not great."[118]

One change described by three respondents is that some "non-public" companies have started to comply with Sarbanes-Oxley to prepare for a public offering in the future.[119] Other comments suggest that Sarbanes-Oxley changed representation of non-public clients because Sarbanes-Oxley now represents "industry standard,"[120] setting forth principles that apply equally to public and non-public companies.[121] Another respondent explained that, in representing non-public companies, lawyers are "more insistent on process and formality in business dealings."[122] In dealings with non-public companies, two respondents referred to the leverage that Sarbanes-Oxley gives them in dealing with clients. One stated, "We cite the Standards as additional support for

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111 Interviews, *supra* note 95.

112 *Id.* One interviewee noted that the increase in business for lawyers was less than some expected because so many law firms were "giving it away" in an effort to cultivate relationships with clients and build reputations as Sarbanes-Oxley experts. *Id.*

113 *Id.*

114 *See id.*

115 Survey Results: Corporate Securities Survey, *supra* note 85.

116 *Id.*

117 Sarbanes Oxley Survey Responses, *supra* note 81, at Response No. 12.

118 *Id.* at Response No. 25.

119 *See id.* at Response Nos. 5, 19, 28.

120 *Id.* at Response No. 10.

121 *Id.* at Response No. 11. One respondent noted that accountants "are now imposing some public company standards to private company audit[s] and other accounting procedures." *Id.* at Response No. 16.

122 *Id.* at Response No. 11.

appropriately addressing the issues." The other explained that Sarbanes-Oxley "does provide somewhat more weight to objections we might have."[123]

To further explore how Sarbanes-Oxley might impact lawyers' dealings with clients, the on-line survey asked respondents whether they changed the way they interact with corporate representatives.[124] Again, respondents were evenly split on this question with thirteen answering "no" and thirteen answering "yes."[125] When asked to describe the changes, two commented on the importance of reminding clients of Sarbanes-Oxley issues,[126] and three respondents referred to the new requirement of "going upstairs."[127]

Regarding the "up-the-ladder" requirement, I asked interviewees whether they believed that corporate lawyers were going up the corporate ladder before Sarbanes-Oxley.[128] Six experienced corporate lawyers reported that they believed knowledgeable lawyers were already going up the corporate ladder and withdrawing when necessary.[129] Three expressed the view that before Sarbanes-Oxley, lawyers may not have gone to the board, but rather stopped after communicating the problem to manager-constituents such as the chief executive officers.[130]

The vast majority of respondents agreed that Sarbanes-Oxley has affected lawyer's exposure for legal malpractice.[131] Eighty-five percent of the respondents answered affirmatively when asked whether Sarbanes-Oxley and the SEC Standards affect the professional liability exposure of lawyers.[132] While respondents described different avenues for expanding lawyer liability,[133] the general sentiment was that Sarbanes-Oxley at least makes it marginally easier to pursue claims against lawyers.[134] In describing how Sarbanes-Oxley has increased the exposure of lawyers, three respondents indicated that lawyers could be now held liable if they do not meet the new standards and obligations.[135] A correlative view was that Sarbanes-Oxley

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123 *Id.* at Response No. 12.

124 Corporate/Securities Practice Survey, *supra* note 78.

125 Survey Results: Corporate Securities Survey, *supra* note 85.

126 *Id.* at Response Nos. 7, 18.

127 *Id.* at Response Nos. 19, 20, 24.

128 Interviews, *supra* note 95.

129 *Id.*

130 *Id.* As explained by one interviewee, before Sarbanes-Oxley lawyers could justify stopping at management or withdrawing without going to the board. *Id.* Another interviewee made a similar observation on "stopping with management." *Id.*

131 Survey Results: Corporate Securities Survey, *supra* note 85.

132 *Id.*

133 *See* Sarbanes Oxley Survey Responses, *supra* note 81, at Response Nos. 10-12, 15, 19, 24.

134 *See, e.g.*, Response No. 5.

135 *See id.* at Response Nos. 12, 26, 27.

could "actually diminish" exposure if lawyers comply with the new standards.[136] One respondent expressed the opposite opinion in asserting that "the standard of practice has been raised immensely."[137] To limit liability, one respondent emphasized the importance of lawyers documenting compliance with standards, including steps taken to "go up the chain."[138]

V. CONCLUSION

Information obtained in my survey and interviews, coupled with media accounts, indicates that lawyer uproar over Sarbanes-Oxley and the proposed SEC Standard on "up-the-ladder" reporting could be compared to Chicken Little in the childhood story. Chicken Little declared that the sky was falling when an acorn fell on its head.[139] Much like Chicken Little who crusaded to warn the community,[140] various lawyers and commentators railed against SEC proposed standards, especially the proposed noisy withdrawal. The lawyer uproar appeared to have the immediate effect of contributing to the SEC postponing adoption of the noisy withdrawal provisions, while adopting the "up-the-ladder" requirement.

One year after the effective date of the "up-the-ladder" requirement, various practitioners report that the effect of Sarbanes-Oxley and the SEC Standards has not been dramatic.[141] While many corporate lawyers indicate that they were already going "up-the-ladder,"[142] the requirement to do so provides lawyers with leverage in dealing with recalcitrant or unyielding constituents who refuse to act in the best interest of the organization.[143] When dealing with corporate managers, lawyers report that Sarbanes-Oxley has made the clients more receptive to lawyer counseling on proper conduct.[144]

Lawyers, like client representatives, are more concerned about liability. This heightened sensitivity has forced lawyers and their firms to devote more time to ethics training and compliance.[145] Basic ethics training related to "up-the-ladder" reporting, coupled with the widespread debate on Sarbanes-Oxley and the SEC Standards, has raised the consciousness of non-corporate

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136 *Id.* at Response No. 12.

137 *Id.* at Response No. 9.

138 *Id.* at Response No. 15. One commentator predicted this reaction by noting that lawyers would protect themselves by "documenting every step [they take] in handling [a] problem." Tamara Loomis, *Lawyer Rules Proposed by SEC: But New Disclosure Requirements Met with Heavy Opposition*, N.Y. L.J., Nov. 7, 2002, at 1.

139 SALLY HOBSON, CHICKEN LITTLE (Aladdin Paperbacks 1999) (1800s).

140 *Id.*

141 *See, e.g.*, Sarbanes Oxley Survey Responses, *supra* note 81, at Response No. 12.

142 *See id.* at Response Nos. 4, 13, 26, 28.

143 *See id.* at Response Nos. 5, 12, 18.

144 *Id.*

145 *See id.* at Response Nos. 23, 26.

lawyers.[146] While corporate lawyers generally understood the principles of entity representation, lawyers in other practice areas may not fully recognize the ethical obligations of organization representation. Now, with post-Sarbanes-Oxley eyes, employment lawyers representing unions, tax lawyers representing non-profit organizations, litigators handling commercial disputes, and other lawyers representing organizations should better appreciate their duties to protect the entities rather than their constituents. Long term, this reorientation or reexamination of responsibilities may prove to be the greatest impact of Sarbanes-Oxley on lawyer conduct, even though the Act may not technically apply to the circumstances of representation.

For corporate lawyers, Sarbanes-Oxley and the SEC Standards underscore lawyers' duties to the entity. Moreover, possible enforcement actions against lawyers and increased public scrutiny remind lawyers of their liability exposure.[147] As a result, corporate lawyers may take less comfort in relying on court holdings that limit private actions based on violations of securities lawyers.[148] One lawyer described this change by referring to Sarbanes-Oxley's "ulcerative effect" in causing lawyers to worry about civil liability, as well as government enforcement actions.[149]

This effect parallels the consequences of SEC actions against lawyers in the 1970s, as well as banking regulators claims against lawyers in the 1980s. Like securities lawyers in the 1970s and financial institution lawyers in the 1980s, corporate lawyers now are reassessing their roles in representing entities and are taking steps to limit their liability.

By analogy to brides at weddings, Sarbanes-Oxley presents something old, something new, something borrowed, and something blue. For lawyers, the something old is the "up-the-ladder" reporting. At the same time, the "new" feature of Sarbanes-Oxley is that the "up-the-ladder" requirement is mandatory. Borrowed from the 1970s and 1980s are government regulators' attempts to use enforcement actions to force lawyers to act in ways that the regulators believe to be consistent with professional responsibilities of gatekeepers. Finally, the lawyers themselves are "blue" when they conclude that the new requirements increase their professional liability exposure.[150] Such concern over civil liability captures lawyers' attention more than disciplinary rules or ethics opinions. If concern over liability exposure

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146 Interviews, *supra* note 95. *See also* Sarbanes Oxley Survey Responses, *supra* note 81.

147 *See* Sarbanes Oxley Survey Responses, *supra* note 81, at Response Nos. 18, 28.

148 *E.g.*, Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 191 (1994) (eliminating private causes of action for aiding and abetting federal securities law violations by secondary actors); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 200-01 (1976) (requiring scienter for civil liability claims under the Securities Exchange Act of 1934).

149 Interviews, *supra* note 95.

150 *See* Sarbanes Oxley Survey Responses, *supra* note 81, at Response Nos. 18, 28.

contributes to corporate and non-corporate lawyers focusing more on ethical representation of organizations, Sarbanes-Oxley effectively raises the ethical bar for all lawyers.