A New Role for Lawyers?: The Corporate Counselor After Enron

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Lawyers seem to have played a relatively minor part in the theater of deception and self-dealing that has led to the collapse of Enron Corp. ("Enron") and other corporate titans of the 1990s. The spotlight has been on the grasping managers at the heart of the drama, debased accounting standards and practices, corrupt politicians pressing to abolish or weaken regulations and cripple enforcement, opportunistic investment bankers, conflicted stock analysts, and a credulous business press. But lawyers—both in-house lawyers and outside law firms—were participants in many of the central transactions that ultimately brought about the companies’ ruin.

I. SOME PROBLEMS WITH WHAT LAWYERS DID

A. Non-Disclosure by (Technical) Disclosure

Securities laws require accurate and transparent financial statements, so that investors can know the financial condition of the company. Enron arranged to borrow money from banks through transactions disguised as sales of real assets.\(^1\) No real assets ever changed hands, nor were they going to; Enron was going to repay the money with interest and cancel the sales. The purpose was to show the debt on the company’s books as earnings. Another purpose was to make it possible for Enron to borrow money on the security of assets without relinquishing any control, or any benefits from the proceeds, of those assets.\(^2\) Lawyers wrote opinions certifying the disguised loans as “true sales.” Enron moved other debt off of its own

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\(^2\) Id. at 48.
books by creating sham transactions with limited-partner-entities. By law, these must be “independent”—i.e., conform to the (incredibly lax) requirement that a minimum of investors (three percent) must be from “outside” the parent firm. In some cases, even the outside investors were creatures of Andrew Fastow, Enron’s CFO. Lawyers—both inside the company and outside counsel—approved all of these transactions. More generally, lawyers repeatedly facilitated Enron’s strategy of structuring dubious transactions so that nobody could understand them, by using language to describe them in proxy and financial statements that, although literally and technically correct, was in practice completely opaque.

B. Approval of Insider Dealings

It is elementary that some of the main abuses that the Securities Acts of 1933 and 1934 were designed to prevent were those of insiders trading on information not available to the public. One of Enron’s practices now most sharply challenged was that of offering select groups of rich investors special opportunities, through Enron’s off-the-books partnerships, to profit from confidential information not available to ordinary shareholders. What made Enron’s offerings possible were rules requiring investment bankers to set up Chinese walls prohibiting disclosure of confidential information. The purpose of those rules is to prevent bankers from profiting on inside information on deals they are financing. Enron used them for the reverse purpose, to create investment vehicles giving an information advantage to insiders. Also, since the partnerships were managed by Enron’s CFO, and created gross potential conflicts between his roles as general partner and CFO, Enron obtained a waiver of the conflicts from the Enron Board.3

C. Facilitating Self-Dealing

Special Purpose Entities (“SPEs”) paid enormous sums to managers (again, Enron officers—Fastow’s subordinates and designates) for managing them. Fastow personally received over $30 million in management fees from one set of SPEs.4 Under Enron’s own conflict-of-interest policy, such arrangements had to be approved in advance by the board of directors.5 SEC rules require that disclosure is required “where practicable” of the amount of compensation being paid to interested parties.6 Fastow had a

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3 For a description of these transactions, see Diana B. Henriques & Kurt Eichenwald, A Fog Over Enron, and the Legal Landscape, N.Y. Times, Jan. 27, 2002, § 3, at 1.
5 Id. at 194.
"strong desire" to avoid disclosure of his compensation,7 and apparently was accustomed to treating the lawyers as his own personal vassals. The lawyers—in this case, Vinson & Elkins ("V&E")—obliged, by reasoning that since it was uncertain how much Fastow would eventually earn from all the transactions, Enron did not have to disclose even what he had already earned.8 In their SEC filings, the lawyers also asserted, as required by law, that these "related-party" transactions were negotiated at "arm's-length" and on "comparable terms" to deals with non-related parties, but apparently did not look for any factual support for these assertions, although the deals seemed questionable on their face.9

D. The Investigation that Wasn't

Sherron Watkins, a vice president for corporate development at Enron, warned company chairman Kenneth Lay that the company was about to "implode in a wave of accounting scandals" because of dubious accounting by Enron's auditors, Arthur Andersen, for the many limited-partnership investment deals it had used to keep debt off the parent company's books and inflate Enron's earnings.10 Watkins said that many senior executives had complained loudly about these practices, that the company was "crooked," and that the side deals either had to be undone (if not too late to escape detection) or disclosed.11 She advised the chairman to ask an independent outside law firm to investigate, noting that Enron's regular law firm of V&E should be disqualified because it had signed off (given "true sale" opinions) on some of the deals and had a conflict of interest.12 Contrary to her advice, Lay did ask V&E to review the transactions, but to stop short of looking into Andersen's treatment of them. V&E, overlooking its own conflict and the patent contradiction in Lay's instructions to avoid looking at the very source the whistleblower had identified as the cause of the problem, duly reported back that the transactions seemed fine—because Andersen had, after all, approved them. The lawyers interviewed only eight senior executives, who all denied knowledge of any problems, and failed to interview any of the lower-level employees who had been identified as people who might provide helpful information.13 The lawyers then warned that "the bad cosmetics" of the partnerships could result in "a seri-

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7 Powers Report, supra note 4, at 187.
8 Id. at 178-208.
9 Id. at 198.
11 Id.
12 Id.
13 See Roger C. Cramton, Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues, 58 BUS. LAW. 143, 163-67 (2002).
ous risk of adverse publicity and litigation," but concluded with the advice that no further investigation was necessary.\textsuperscript{14}

Was there anything illegal or unethical about what these lawyers did? Scholars who have studied these transactions in detail have argued that there was, that the lawyers' conduct subjects them to potential liability for criminal fraud, civil fraud, and violation of the securities laws. In addition, they could face discipline under state ethical codes for facilitating fraud, or malpractice liability for failing to competently represent their actual clients, the corporate entities.\textsuperscript{15} Of course, the lawyers themselves vigorously deny any wrongdoing or ethical lapses, some even going so far as to say they would do it all over again.\textsuperscript{16} Even if lawyers did step over any of these lines, however, it is difficult and exceedingly rare to hold corporate lawyers and law firms liable for frauds committed by their clients' managers. According to Susan Koniak, state bars and state prosecutors do not go after corporate law firms; neither do federal prosecutors, except in very rare cases. Even agencies like the SEC rarely try to regulate lawyers.\textsuperscript{17} In addition, the Supreme Court and Congress have eviscerated private actions against lawyers for aiding and abetting under the securities laws.\textsuperscript{18}

The organized bar is determined to keep things that way. After every wave of business failures resulting from corporate fraud, pressures mount to revise the rules to make lawyers and accountants better monitors—or at least less amiably cooperative enablers—of managers' misconduct. The lawyers and accountants sometimes lose a point or two, but their professional organizations and lobbies usually succeed in thwarting the reforms.\textsuperscript{19} As I write, the SEC has just retreated in its efforts to write rules to enforce the Sarbanes-Oxley Act's attempts to reform corporate conduct, by making

\textsuperscript{14} Jim Yardley & John Schwartz, Legal Counsel in Many Ways Mirrors Client, N.Y. TIMES, Jan 16, 2002, at C6.


\textsuperscript{19} One of the most dramatic pre-Enron examples of this pattern of resistance to reforms comes from the organized bar's response to attempts to regulate lawyers of the Office of Thrift Supervision ("OTS"), the federal agency set up to handle the collapse of the savings-and-loan industry in the 1980s. The collapse ended up costing taxpayers around $500 billion. OTS brought actions to hold accountable law firms whose work had helped failing S&Ls conceal the riskiness of federally-insured loans and their precarious financial condition from banking regulators. The organized bar defended the law firms to the hilt and denounced the OTS's attempts to hold them accountable. 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, 248-49 (1998).
accountants more independent of the companies they audit, and by requiring that lawyers report evidence of possible manager misconduct up the corporate ladder, to the board of directors if necessary. Prior to Sarbanes-Oxley, the corporate bar had long strenuously resisted adding an “up-the-ladder” reporting requirement to its ethics rules; although, in the wake of the Enron scandal, and seeing the writing on the wall, an ABA Task Force actually did recommend this modest but important reform in 2002. In December, 2002, the SEC proposed rules that would put teeth into up-the-ladder reporting by requiring lawyers whose client’s boards failed to take any action to make a “noisy withdrawal” from representing that client—i.e., to inform the SEC that they were withdrawing for professional reasons. The ABA and many other bar organizations and law firms conducted a saturation bombing attack on the proposed rules and have succeeded, at least for the present, in getting the SEC to suspend the “noisy withdrawal” rule, pending more comments. Even more ominously, they pushed the SEC to rephrase the wording of what lawyers must know or suspect to trigger the new reporting requirements as to threaten to render the requirements meaningless.

It is likely that some of these lawyers engaged in conduct that may expose them to civil liability. Some may even face criminal liability for fraud or obstruction of justice (such as the lawyer who, on the eve of receiving subpoenas from the SEC, sent messages to Arthur Andersen accountants advising them to comply with “document retention policies” which the accountants reasonably interpreted as instructions to destroy documents). Some may have violated state ethics rules; though if past practice is any guide, no state bar counsel will have the will or resources to pursue such a case. The big problem, as I see it, is not so much that law-

25 See Kurt Eichenwald, A Higher Standard for Corporate Advice, N.Y. TIMES, Dec. 23, 2002, at A1 (reporting a recent decision by Judge Melinda Harmon of the federal district court in Houston that held that corporate advisers may be civilly liable to investors as primary participants in a fraud “if they constructed corporate transactions with the knowledge that such deals would mislead investors about a company’s finances”).
yers who actually crossed the line may get away with it. It is that lawyers can assist corporate managers to inflict enormous damage and then argue, often plausibly, that they are only doing the job they are supposed to do. If they are right, might there not be something seriously amiss with the way our profession defines that job?

II. SOME EXCUSES FOR WHAT THE LAWYERS DID

It is clear that the advice both in-house lawyers and outside law firms gave to the managers of Enron and other companies like it was instrumental in enabling those managers to cream off huge profits for themselves while bringing economic ruin to investors, employees, and the taxpaying public. Although the lawyers were not principally responsible for these acts of waste and fraud, their advice was a contributing (and often necessary) cause of those acts. Such fraud could not have been carried out without the lawyers’ active approval, passive acquiescence, or failure to inquire and investigate. Nonetheless, not only the lawyers involved but large numbers of practitioners and bar committees have few or no regrets about the part they played. They vigorously justify their conduct as consistent with the highest conceptions of legal, ethical, and professional propriety, and just as vigorously resist all attempts to change the legal and ethical rules so as to increase their obligations as gatekeepers and monitors of managers’ conduct. This attitude is not universal—there are prominent corporate lawyers who dissent from it, and think the profession is failing to live up to its responsibilities; but it is pervasive.

How are we to understand why the lawyers acted as they did, and why they are justifying their actions now? Observers from outside the profession, and even some from within the profession, are tempted to say that the lawyers were simply weak and corrupt, or, for those who prefer to talk this way, that the lawyers were rational economic actors. They want the client’s business, in an intensely competitive market, and so they will wish to approve anything senior management of the client firm asks, avert their eyes from signs of trouble and their noses from the smell of fish. Asking too many questions and (horrors) refusing to bless a transaction risks losing the client to another firm across town. Demonstrating ingenuity in giving the managers the results they want despite apparent legal obstacles wins praise and repeat business. Sailing close to or even over the line of illegal conduct is not unduly risky, because lawyers who advise on complex transactions for corporate clients almost never face sanctions.

But this is the amoral rational calculator’s perspective, and professionals in high-status jobs at respectable blue-chip institutions do not like to think of themselves as amoral maximizers. Like human beings everywhere who want to enjoy self-respect and the esteem of others, they tell stories about how what they do is all right, even admirable; however, some of the
stories that the lawyers would like to tell were not available in this situation.

A. Law as the Enemy: Libertarian Antinomianism

In recent years many lawyers have taken on the values of and completely identified with their business clients, some of whom see law as an enemy or a pesky nuisance. Such lawyers say things like, “Helping our clients is good because they create wealth, innovation, and jobs; while their adversaries, the people we help them fight, small-minded vindictive bureaucrats and greedy plaintiffs’ lawyers, create nothing and destroy innovation and enterprise. We help our clients work around the constraints on their autonomy and wealth-maximizing activities.”

I call this the viewpoint of the libertarian antinomian, because it rests on an express contempt for, and disapproval of, law and regulation. Tax law, products liability tort law, drug law, health and safety law, environmental law, employment discrimination law, toxic waste cleanup law, foreign corrupt payments law, SEC disclosure regulation, and the like are all shackles on risk-taking initiative. They interfere with maximizing profits, and anything that does that must be bad. As the chairman of the American Institute of Certified Public Accountants recently put it, “Minimization of taxes maximizes profit for the company. That is a benefit to the company, therefore a benefit to the shareholders.”26 Companies that view law as nothing but a negative drag on profits naturally want professionals to minimize its effects. They are good customers for “creative” and “aggressive” lawyering and accounting services—for example, for the “tax products” (complex and ingenious tax-shelter schemes) that tax specialists from law and accounting firms like to devise and sell to attract clients. The IRS would most likely disapprove of most of these schemes if its agents had the resources and ingenuity to unravel them; but they do not—and even if they did, the savings realized even from illegal schemes exceed the penalties for adopting them.27

B. Law as Neutral Constraint: The Lawyer as Risk-Manager

This viewpoint is much like the first, but without the negative normative spin. Adverse legal consequences are not an evil, they are just a fact. In this view, law is simply a source of “risk” to the business firm; it is the lawyers’ task to assess and, to the extent possible, reduce it. These lawyers do not feel a moral imperative, as libertarians do, to defy or undercut the

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law; but neither do they feel one to comply.

[Corporate] [m]anagers have no general obligation to avoid violating regulatory laws, when violations are profitable to the firm . . . . We put to one side laws concerning violence or other acts thought to be malum in se . . . . [M]anagers do not have an ethical duty to obey economic regulatory laws just because the laws exist. They must determine the importance of these laws. The penalties Congress names for disobedience are a measure of how much it wants firms to sacrifice in order to adhere to the rules; the idea of optimal sanctions is based on the supposition that managers not only may but also should violate the rules when it is profitable to do so.28

This restates what Holmes called the “bad man’s” view of legal rules as prices discounted by sanctions—or, to reduce it still further, by the probability of enforcement of sanctions. The outputs of law in the regulatory state are not norms that express views of right conduct or desirable states of the world, but simply tariffs on conduct. The lawyer objectively assesses the risks, then games the rules to work around the constraints and lower the tariffs as much as possible. If some constraints are unavoidable he “not only may but should” advise breaking the rules and paying the penalty if the client can still make a profit.

These two story-lines were not available in the case of Enron, for the obvious reasons that managers were looting the companies for their own benefit while concealing debts and losses from workers and investors. When the lawyers and accountants outwitted the pesky regulators—who, had they known what was happening, might have put a stop to it—they were not helping heroic outliers add value to the economy and society by defying timid convention, but enabling, if not abetting, frauds and thieves. Nor were the professionals objectively, if amorally, assessing risks and weighing benefits against costs of efficient breach. It seems not to have occurred to them that outsiders might find out that the many-sided transactions with special entities were not actually earning any real returns, but merely concealing debts and losses, and that when that happened, Enron’s stock price would tumble, and with it, all the houses of cards secured by that stock. The company they advised is now facing at least seventy-seven lawsuits as a result of its conduct. At best, the lawyers were closing their eyes to the risk of disaster; at worst, they were helping to bring it on.

28 Frank H. Easterbrook & Daniel R. Fischel, Antitrust Suits by Targets of Tender Offers, 80 Mich. L. Rev. 1155, 1168 n.36, 1177 n.57 (1982). For an exceptionally penetrating critique of this view of law, see Cynthia A. Williams, Corporate Compliance with the Law in the Era of Efficiency, 76 N.C. L. Rev. 1265, 1385 (1998) (asserting that the “law-as-price” theory weakens social and political relationships through its subjugation of the moral component of law in favor of an exclusively economic construction).
The lawyers have been relying instead on different stories, somewhat in conflict with one another.

C. "We Din' Know Nothin'": The Lawyer as Myopic or Limited-Function Bureaucrat

These are claims that the lawyers were not at fault because their role was limited: We didn’t know, we weren’t informed, the accountants said the numbers were okay, management made the decisions, our representation was restricted to problems on the face of the documents or to information submitted to us.

Many of these claims of innocent ignorance now look pretty dubious. Some of the outside law firms, such as V&E and Andrews & Kurth, in fact worked closely with Andersen accountants in structuring many of the transactions. Sometimes lawyers made notes that they needed further information or managers’ or the board’s approval to certify a deal, but signed opinions and proxy statements even if they never got it. Sometimes they expressed doubts about the deals. An in-house lawyer, Jordan Mintz, once even hired an outside law firm to look more closely into some of Fastow’s deals. Ronald Astin of V&E repeatedly objected to some of Fastow’s deals, saying they posed conflicts or weren’t in Enron’s best interests; but when Fastow persisted, Astin expressed unease to in-house attorneys or executives but not to the board. Moreover, in V&E’s report on the whistleblower Watkins’ allegations, Astin minimized suspected problems. In the end, the doubting lawyers never pressed the issues.

Some of their claims of limited knowledge are plausible, however, because Enron never trusted any one set of lawyers with extensive information about its operations—it spread legal work out to over 100 law firms. If one firm balked at approving a deal, as V&E occasionally did, Enron managers would go across town to another, more compliant firm such as Andrews & Kurth. Even Enron’s General Counsel, James Derrick, had no means of controlling or supervising all of the legal advice the company was receiving, because the different divisions all had their own lawyers and outside firms. It is this layering of authority, fragmentation of responsibil-

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29 This was the position taken by most of the Enron in-house and outside counsel, like Jordan Mintz, Vice President and General Counsel for Corporate Development at Enron Corp., who testified before a House subcommittee investigating the role of lawyers in the Enron collapse. See The Financial Collapse of Enron—Part 2: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 107th Cong. 36, 42-43, 45, 73, 77, 82, 85 (2002).
30 Id. at 42-43.
31 Id. at 42-43, 45, 48, 50, 58.
33 See Pollock, supra note 33.
ity, and decentralization that has made it possible for the chairman, CEO and board of directors of Enron, as well as the lawyers, to claim that they did not know much about what was going on in their own company. One question for lawyers—as well as for senior managers and board members—is whether they can conscientiously and ethically do their jobs and exercise their functions as fiduciaries in organizations structured to diffuse responsibility and prevent their access to the big picture.

D. The Lawyer as Advocate

The classic defense of the corporate lawyer’s role, both most often advanced and held in reserve if other defenses fail, is of course that we are advocates, whose duty is zealous representation of clients. We are not like auditors, who have duties to the public; our duties are only to our clients. Our job is to help them pursue their interests and put the best construction on their conduct that the law and facts will support without intolerable strain, so as to enable them to pursue any arguably-legal ends by any arguably-legal means. The paradigmatic exercise of the adversary-advocate’s role is the criminal defense lawyer’s; and the role is a noble role, both because it furthers the client’s freedom of action and protects his rights against an overbearing state, and because it facilitates the proper determination of his claims and defenses.

For the advocate the law is a medium of action and discursive moves, an arsenal of procedures, and a field of argumentation and negotiation. Ultimate responsibility for determining the facts and interpreting the law rests with other actors and institutions—the authoritative decision-makers, especially the courts. The lawyer does not look for truth or justice, although of course to play his role he needs to know what courts are likely to say, and how far he can get them to see the facts and bend the rules his client’s way. As one of Enron’s tax advisors put it recently, speaking of the company’s complex tax-avoidance transactions, “The government is not going to like these deals. People can disagree on what works within the written rules. . . If you know the rules you don’t have to break the rules, you just use them. That’s what lawyers and accountants do.”34 The lawyer is a specialist playing a differentiated role in an overall process (the adversary system) that will, if it functions property, approximate (we hope) truth and justice in the aggregate.

The advocate is subtly different from the other lawyer-types I have mentioned. Unlike the antinomian and the neutral risk-assessor, the advocate is not hostile or indifferent to law. Law, to the advocate, is binding if the rules and facts are clear and there is no plausible basis for spinning them. To put this another way, the advocate is loyal to the law seen as the

outer boundaries of the arguably-legal, the point beyond which facts and law can no longer be stretched. He will push up to the boundaries, and even to creative plausible extensions of the boundaries, but not beyond. And unlike the myopic bureaucrat, the advocate wants to know everything relevant to representing the client.

What is less clear and more debated about the corporate lawyer-as-advocate is whether he has any obligation to try to induce his clients to comply with the law. It is clear that the lawyer may not actively help clients engage in what he knows to be a crime or a fraud. It is not at all clear what steps lawyers should take to prevent this from happening, to encourage the client to walk in the paths of legality, or to respond if the client strays off the paths. Most state ethics codes impose stricter requirements on lawyers than the ABA’s Model Rules—they say that lawyers who become aware of fraud, especially if it has been accomplished through lawyers’ efforts, must try to get clients to correct the wrong, and that if the client does not comply, the lawyer may or must withdraw and disaffirm any documents he has helped to prepare; and if serious harm is likely to result, may or must disclose to relevant parties or authorities.35

In the post-Enron debates—as in the wake of past corporate scandals—the view of the lawyer-as-advocate has most often been invoked to resist rule-changes that would give corporate lawyers positive obligations as monitors or gatekeepers of the legality of corporate conduct, especially by requiring them to report, if all else fails, managers’ violations of law to authorities. Law firms and bar associations almost always take the position that such reporting requirements would turn lawyers into “cops,” “snitches,” or “informers,” and thus pervert their function as confidential advisors and advocates.36 If clients do not trust their lawyers, they will not be candid and forthcoming with the information that the lawyers need to do their job.

But what is their job? One view is that the lawyer needs the information simply so that he can present the best case for his client as an effective adversary advocate, so as not to be sandbagged by prosecutors, regulators, or adversaries who know more than he does and have access to facts more exculpatory than the client may suspect. But another—which one hears just as often, or more so, from the corporate bar—is that the lawyer needs

35 See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.6(b) (2003) (stating that “a lawyer may reveal [confidential] information . . . to the extent the lawyer reasonably believes necessary”); CONN. RULES OF PROF’L CONDUCT R. 1.6(b) (2003) (stating that “a lawyer shall reveal such information to the extent the lawyer reasonably believes necessary”).

his client's trust so that he can learn about possibly illegal plans and take steps to stop them. The argument for confidentiality here recognizes that one of the lawyer's functions is to monitor compliance and head off wrongdoing—not just to put the best face on things if the client goes ahead and breaks the law. This function is (weakly) recognized in the Comments to the ABA's Model Rules of Professional Conduct:

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights. . . . Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. . . . Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.\(^\text{38}\)

This Comment and the policy arguments against allowing lawyers to breach client confidences seem, however, to be among the few contexts in which the bar officially recognizes some sort of duty of lawyers to advise compliance with the law. The bar does not prescribe giving such advice as a duty, or suggest any sanction for failing to provide it. It fiercely resists attempts by legislatures or regulators to impose any such obligations:

Efforts by the government to impose responsibility upon lawyers to assure the quality of their clients' compliance with the law or to compel lawyers to give advice resolving all doubts in favor of regulatory restrictions would evoke serious and far-reaching disruption in the role of lawyer as counselor, which would be detrimental to the public, clients and the legal profession.\(^\text{39}\)

And the bar does not help at all to clarify what would seem to be the crucial issue, which is what view of "the law", or "the bounds of the law", the zealous advocate should take when giving a client legal advice about a prospective course of action. Should "the law" in this context be the same as the "law" in adversary proceedings charging the client with misconduct, i.e., construction of the applicable legal regime as any arguably-legal, even if strained, interpretation of facts and law that favors the client? The strong

\(^{37}\) See id. (commenting on the need for confidentiality).

\(^{38}\) MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 1, 3 (1983) (requiring the confidentiality of information).

\(^{39}\) Donald J. Evans et al., Statement of Policy Adopted by the 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, 545 (1975).
advocacy view of the lawyer’s role says, yes: In advising the client, the lawyer may look forward to the defenses of the client’s conduct that an advocate might raise in future adversary proceedings (i.e., a regulatory action, criminal prosecution, or civil lawsuit) down the road. As long as those defenses of the conduct are colorable, the lawyer-advocate may properly advise the client to engage in the conduct. Of course, if the client is likely to lose despite the availability of a colorable defense, the lawyer as neutral risk-assessor must also inform the client of that risk.

III. INADEQUACY OF THE EXCUSES

The Enron and similar scandals illustrate the limits of all these standard stories as adequate accounts of the corporate lawyer’s proper role.

Despite their increasing popularity among practicing and some academic lawyers, the profession surely has to reject out of hand libertarian-antinomian and neutral-risk-assessment theories of its appropriate role and ethics. Both construe the client’s interests and autonomously-chosen goals as supreme goods, and law as a set of obstacles that the lawyer helps to clear out of the way. The antinomian ranges the lawyer alongside his client as an opponent of law, someone who sees law as merely an imposition and a nuisance. The lawyer as risk-assessor also views legal norms, rules, institutions, and procedures in a wholly alienated fashion from the outside, as a source of opportunity and risk to his client.

Some might dispute whether even ordinary citizens of a liberal-democratic republic may, consistent with their enjoyment of its privileges and protections, legitimately adopt such a hostile or alienated attitude toward its laws. People who participate in self-rule through the representatives they elect—constrained by the constitutional limits their ancestors have adopted in conventions or by amendments—and whose lives are mostly benefited from the restraints law puts on private predation and public oppression, should generally internalize the norms and purposes of their legal system and voluntarily respect and obey even the laws they do not particularly like.\(^{40}\)

Others might reply that so long as they outwardly conform to its commands citizens may adopt whatever attitude toward law they please. This response comes from our admirable liberal respect for individual dignity and autonomy, and consequent reluctance to coerce the inner souls of the unwilling. Fair enough; but the pragmatic limits of this position derive

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\(^{40}\) To be sure, the obligations to internalize, respect and obey the law less convincingly bind groups who have been left out of the legal system’s privileges and protections, such as African-Americans in the South in the ages of slavery and Jim Crow; or pariahs, dissenters and the poor, whose main experience of law is as imposition rather than protection. Such groups may legitimately feel a privilege to defy and dishonor laws that they have had no share in making and whose purpose is to subordinate them.
from the sociological fact that unless people in fact internalize the norms and respect the general obligation to obey the law, they will tend to violate it when they can get away with it. That is a recipe for anarchy, because all law depends on voluntary compliance, on my willingness to keep my hands off of your property even when nobody can see me stealing it, and to report my taxable income honestly even though I know only one percent of returns are audited. Societies whose leaders and institutions have conditioned their members into contempt for law and its norms and purposes are plagued by theft, fraud, crime, unenforceable contracts, uncollectible taxes, valueless currencies, and general civil strife. Evidently, this does not mean that society will fall apart unless everyone feels that they must obey every law all the time. In all societies, people obey some laws instinctually, some willingly, and others grudgingly; and they ignore or routinely violate others that they think do not matter all that much. 41 But a general disposition in most people to respect the laws and the purposes behind them really does seem to be a precondition to peaceful, prosperous, cooperative, and orderly social life, which is why good societies put a lot of effort into socializing their citizens into dispositions of general law-abidingness.

However one comes out on this broader argument does not, it seems to me, really much affect the question at issue here: Whether lawyers representing public corporations may confront the legal system as alienated outsiders, determined to work around it and minimize its effects to the extent it gets in the way of the client’s projects. To this the right answer ought to be, unequivocally, no. I will discuss first the corporate clients, then their lawyers.

People who defend corporations’ taking a "bad man’s" approach to law sometimes seem to suggest that business entities should have special privileges—more leeway than individual persons—to game and evade regulations they do not like, because, as engines of growth, job-creation, innovation, and shareholder wealth, they are heroic actors on the social scene, a breed of Nietzschean supermen, beyond good and evil. The taxes, regulations, and liabilities that government pygmies and plaintiffs’ lawyers keep trying to impose on them, on the other hand, are often foolish and inefficient, the product of ignorant populism or envy or special-interest rent-seeking. This attitude plays well in boom periods, but it sounds a lot less convincing when defrauded and impoverished employees and investors are licking the wounds from their losses and looking to more, not less, regulation to protect them in the future. Anyway, it is basically an incoherent position. A strong state and effective legal system are preconditions, not obstacles, to successful capitalism, ones capable of legislating and enforcing an adequate infrastructure of ground-rules creating stable curren-

41 This is the subject of an enormous amount of literature. For a general treatment, see Tom R. Tyler, Why People Obey the Law (1990).
cies, defining and enforcing property rights, contracts, and rules for the
transparent and fair operation of markets, and deterring frauds, thefts, torts,
discrimination, abuses of labor and harms to competition, health, safety,
and the environment.

Of course, the laws in force are not always those businesses would prefer, nor are regulations anywhere near optimally efficient. But though businessmen running large public corporations love to grumble about the SEC, the EPA, and OSHA—and products-liability class-action suits—they are hardly in a position to claim that they are like Jim Crow southern blacks, or vagrants picked up and accused of crimes: powerless outcasts and victims. Big American business firms are not discrete and insular minorities. They have exceptional access to influence in legislatures, administrative agencies, and the courts through government advisory commissions, trade associations, lobbies, and lawyers.

Indeed, it is precisely because of their exceptional power to collectivize
and command resources and employees, and to influence governments, that
American legal tradition and popular opinion have usually concluded that
corporations need to be more, and not less, constrained by law than ordi-
nary citizens. If corporations cheat on or evade their taxes, the treasury
loses billions; if corporations bribe politicians or officials, whole govern-
ments may be corrupted; and if corporations ignore environmental re-
straints, entire ecosystems may be wiped out. When it became clear that
the financial statements of Enron, WorldCom, Tyco, Adelphia, and Global
Crossing could no longer be trusted, investors fled the markets en masse.

It may be that a natural person cannot be compelled to internalize the
values promoted by law, or to feel an obligation to obey the law, without
violating his or her dignity or freedom of conscience. But a company has
no soul to coerce, dignity to offend, or natural freedom to restrain. Nor can
it be schooled by parents, educators, and peers into a general disposition
toward sociability or law-abidingness. It can only have the character that
its managers, contracts, and organizational incentives and the legal system
build into it. It is a creature of law made to serve limited social purposes.
Since we are free to construct the character of these artificial persons, we
should construct them for legal purposes as good citizens, persons who
have internalized the public values expressed in law and the obligation to
obey even laws they do not like, for the sake of the privileges of the law
that generally benefits them as well as the rest of us.

Nothing in this conception prevents the good corporate citizen from
challenging taxes and laws he thinks are unfairly or improperly applied to
him; or trying to change them through political action. But it does fore-
close the amoralist’s argument, that the corporation should be free to ig-
nore, subvert, or nullify the laws because the value it contributes to society
justifies its obeying the higher-law imperatives of profit-seeking and
shareholder-wealth-creation. If the artificial person is constructed as a
good and law-abiding person, it follows that the manager who ignores or
tries to nullify the valid objectives of law and regulation is not acting as a
responsible or faithful agent of his principal, the good corporate citizen.

If the corporation should be constructed and presumed to have the in-
terests of a good, law-respecting, citizen, so should its lawyers (even more
so). Lawyers are not simply agents of clients—they are also licensed fidu-
ciaries of the legal system, "part of a judicial system charged with upholl-
ing the law," to use the ABA’s words.42 They do not have, as the dissent-
ing citizen does, the option of taking up a position outside the legal order,
rejecting the norms and public purposes of the legal system and limiting
themselves to a grudging and alienated outward compliance with such of
its rules as they think they cannot safely or profitably violate when their
interest or inclination is to do so.43 The lawyer is, by vocation, committed
to the law.44

Now, of course, the “norms and purposes and public values” of law are
not something fixed and definite and certain; rather, they are contested and
dynamic and alterable—by, among other people, corporate clients and their
lawyers. But there is a difference between trying to game and manipulate a
system as a resistance movement or alienated outsider would, and to en-
gage in a committed and good faith struggle within the system to influence
it to fulfill what a good faith interpreter would construe as its best values
and purposes.

Applying these general standards to many of the Enron transactions
seems in some ways pretty simple. The purpose of the securities laws is to
make public companies’ financial condition transparent to investors.
Agents of Enron had an interest in making their finances opaque, in order
to boost the stock price of the company and with it their compensation in
options, and to conceal the management fees they were paying themselves.
They asked lawyers to manipulate the rules so that they would appear to be
disclosing without actually disclosing. The lawyers obliged—and by so
doing effectively thwarted the valid purposes of the laws.

How about the claims that the lawyers did not know the extent of the
company’s misrepresentations and frauds, relied on information given
them by accountants or managers, saw only small pieces of the puzzle, and
took on assignments validly narrowed and specialized in scope? These
claims would really have to be analyzed in detail, case by case, to see if
they are any good; and I do not find many of them very convincing—for

42 MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 1 (1983).

43 Again, I would partially except lawyers for the excluded, marginalized, and disinherited, who
ought to have exceptional latitude to help their clients resist the imposition of unjust laws.

44 For an interesting debate on this issue, see William H. Simon, Should Lawyers Obey the Law?,
38 WM. & MARY L. REV. 217 (1996) (noting that whether lawyers should obey the law turns on what is
meant by the law); David B. Wilkins, In Defense of Law and Morality: Why Lawyers Should Have a
example, the arguments of V&E that they acted reasonably in: (1) Accepting the assignment to investigate Sherron Watkins’s complaints, notwithstanding their involvement in some of the complained-of deals; (2) accepting the limits excluding the accounting from their inquiry although that was where Watkins located the problem; (3) failing to interview any but a handful of top managers, accepting without question the denials of those managers that anything was wrong, failing to follow up further leads, and, above all, given the limited scope of their own inquiry; and (4) concluding that no further investigation was necessary. But I would make some general points about these claims.

One is that, although lawyers may take on an assignment that limits the scope of their representation or asks them to accept some facts as given, they may not agree to such limits as will preclude them from competent and ethical representation. They should not, for example, agree to write an opinion certifying the legality of a deal to third parties if they have some reason to be suspicious of the facts or numbers reported to them, without doing some digging to ensure that the facts are accurate. Nor should they give assurances that certain facts are true if they have no independent means of verifying them. If the client’s agents are given unrestricted discretion to limit the scope of the lawyer’s work, it becomes all too easy for them to use lawyers to paint a gloss of respectability (sprinkle holy water, as it were) on dubious transactions. Lawyers like to say that they have to assume and hope that their clients are not lying to them. But they should not passively cooperate in a corporate strategy to attach a respectable law firm’s name to a scam, even if they are not dead certain that it is a scam.

More generally, the ways in which many corporations structure their legal services operate to prevent their receiving appropriately independent law-respecting advice. The practice of spreading fragments of business around to different outside firms, and different lawyers’ offices within the company, makes it easy for managers to shop around for compliant lawyers, thus inducing races to the bottom, in which law firms or in-house counsel determined to give independent and conservative advice either lose out to their cross-town rivals or gradually acquiesce in the corrosion of their standards. It also eliminates responsibility, since no set of lawyers ever knows enough about the business decisions to know the likely purpose

45 See Cramton, supra note 13, at 162-67, for a particularly astute dissection of V&E’s investigation. See also Wilkins, supra note 44.

or effect of their advice, and how it fits into the company’s plans as a whole. If you believe the testimony of Enron’s general counsel and principal outside law firm partners, for example, their ignorance of what their client’s senior managers were up to is astonishing. Enron also relied extensively on cut-outs: Its outside lawyers “interfaced” with and reported to in-house lawyers; as did in-house legal staff with other in-house lawyers. The lawyers could not sit down with managers and directly press them for information about the purposes and underlying facts of the transactions they were being asked to bless. And for the most part they did not try to do so.

Big companies used to have a single outside law firm on which they would rely for most of their legal advice. The firm’s senior partners were personally close to the company CEO and senior managers. At its best (which may overly romanticize the practice) the system allowed lawyers to learn the business they were advising and, since they were not easily replaced, to give independent and critical advice. When, in the 1970s, companies began to move most of their legal business in-house—using outside firms only for specialized business and making those firms compete for their business—some established high-powered general counsel’s offices (inside law firms, in effect), also with close ties to the CEO, to provide independent advice. But in recent years, as Robert Rosen’s recent research shows, the replacement systems in many companies have fallen apart. Lawyers are scattered over and outside the organization, usually working as legal consultants to project teams, providing legal risk analysis. There is no entity inside or outside the organization with the overall knowledge and prestige to give independent advice. In fact, independent advice is not valued—only, occasionally, is the appearance of independent advice.

The pervasiveness of lawyers’ “we din’ know nothin’” defenses to critiques of what went wrong at Enron has to make one skeptical about another set of lawyers’ claims. As mentioned earlier, lawyers resist all proposals for changes in the rules requiring them to disclose client wrongdoing if clients persist in it by saying that their advocate-adviser’s role depends on a free flow of information from their clients, which in turn de-

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47 See generally, Ronald J. Gilson, The Devolution of the Legal Profession: A Demand Side Perspective, 49 Md. L. Rev. 869 (1990) (arguing that professional standards serve to cast lawyers in the role of enforcers, reducing information asymmetry and changing the nature of the relationship between client and counsel); Robert Eli Rosen, The Inside Counsel Movement, Professional Judgment and Organizational Representation, 64 IND. L.J. 479 (1989) (exploring inside counsel’s “new found success” and addressing the question of whether the legal profession should limit the corporate power lawyers may have).

48 See Robert Eli Rosen, “We’re All Consultants Now”: How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services, 44 ARIZ. L. REV. 637 (2002) (examining the ways in which the corporate bar has changed how companies use lawyers and mapping out a possible future for corporate legal services); See also Robert Eli Rosen, Risk Management and Corporate Governance: The Case of Enron, 35 CONN. L. REV. 1157 (2003).
pends on the lawyers' being able to give an absolute assurance of confidentiality. The Enron lawyers, however, seemed mostly content with a system structured so that they were given very limited information and assignments of very limited scope, because the managers were determined to disclose as little as possible about their questionable transactions. If the lawyers had questions about some of the deals they were discouraged from probing for answers, and by and large they did not try. Joseph Dilg, the lead V&E partner acting for Enron, told an investigating Congressional committee that:

With regard to the related party transactions, it is important to consider the role of legal counsel. If a transaction is not illegal and has been approved by the appropriate levels of corporation's management, lawyers, whether inside corporate counsel or with an outside firm, may appropriately provide the requisite legal advice and opinions about legal issues relating to the transactions.

In doing so, the lawyers are not approving of the business decisions that were made by their clients. Likewise, lawyers are not passing on the accounting treatment of the transactions.49

The problem with this formulation is that whether a transaction is legal, or even "not illegal", depends on underlying facts. If a deal between Enron and one of its many special-purpose entities is to be reported as a "true sale", it must, in economic substance, actually have the characteristics of a sale. In analyzing such deals, courts put substance over form, disregarding the labels the parties have put on the transaction, and disregarding the accounting treatment they have given it.50 The documents that Enron lawyers were given, however, on their face seemed to indicate that the deals were loans, so thinly disguised as sales that, as the Bankruptcy Examiner has put it, "the only common characteristics in most of the Selected Transactions that support a sale characterization are the express terms of the documents that, among other things, state that the relevant transfers are sales, and that in some cases Enron accounted for most of these transactions as sales."51

These would seem to be situations in which legal and ethical rules—giving lawyers a duty to ascertain relevant facts, and a duty to refuse approval, where their approval is necessary, if those facts are not forthcoming—would be much more effective in inducing client candor than rules

50 Batson Report, supra note 1, at 41-42.
51 Id. at 50-51 (emphasis added).
prohibiting disclosure of information that the client does not want to disclose and the lawyer finds it more convenient not to know.

The most important lessons of Enron, et al., for lawyers are the additional clouds of doubt they cast on the most common defense of the corporate lawyer's role, and the one most often invoked by the profession in the current debates over reform. That is the corporate lawyer as adversary-advocate. The usual way in which this role is framed is that the lawyer's loyalty runs to the client and only to the client. The lawyer must help the client realize its goals and desires, recognizing as hard limits only such legal constraints, the "bounds of the law," as the most ingenious interpretations he can construct of fact and law that are most favorable to his client's position. Even if the lawyer is advising the client not in an adversary proceeding but in an office, and with respect to future rather than past conduct, the lawyer is entitled to make use of any colorable justification for the client's conduct that he could use to defend it in future adversary proceedings, however unlikely such proceedings may be.52 Of course, the lawyer must advise the client of the risks of adventurous interpretations of law and fact, that decision-makers (if they ever find out) may not accept them and will find the client in violation of the law. But if the client is willing to take the risks, the lawyer may ethically assist the client beyond the merely conventional limits, all the way up to the arguable limits, exploiting all conceivable loopholes and ambiguities of the existing law.

This idea that the role of the corporate lawyer is really just like the role of the criminal defense lawyer has been criticized so often and so effectively that it always surprises me to see the idea still walking around, hale and hearty, as if nobody had ever laid a glove on it. I will quickly run through some of the strong objections to the analogy and then add another objection: The bar's standard construction of the corporate lawyer's role is deficient in part because it does not take the analogy seriously enough.

The most obvious objection is that legal advice given outside of adversary proceedings is not subject to any of the constraints of such proceedings. The reasons that the lawyer is given so much latitude to fight for his client in court is that the proceedings are open and public, effective mechanisms such as compelled discovery and testimony exist to bring to light suppressed inconvenient facts and make them known to adversaries and adjudicators, adversaries are present to challenge the advocate's arguments of law and his witnesses' and documents' view of facts, and there is an impartial umpire or judge to rule on their sufficiency and validity. Absent any of these bothersome conditions, lawyers can stretch the rules and facts very extravagantly in their clients' favor without risking contradiction by

52 For a nice account, with many examples, of this projection-back into office advice of arguable claims in hypothetical future adversary proceedings, see Bruce A. Green, Thoughts About Corporate Lawyers After Reading The Cigarette Papers: Has the "Wise Counselor" Given Way to the "Hired Gun"?, 51 DEPAUL L. REV. 407, 422-24 (2001).
adversaries, or the annoyed reactions of judges or regulators to far-fetched positions.

In the trial setting, aggressive advocacy (at least in theory) supposedly operates to bring out the truth, by testing one-sided proof and argument against counter-proof and counter-argument. Ideally, it facilitates decisions of the legal validity of the parties’ claims on the merits. Outside of such settings, one-sided advocacy is more likely to help parties overstep the line to violate the law, and to do so in such ways as are likely to evade detection and sanction, and thus frustrate the purposes of law and regulation.

Look at Enron for obvious examples. The legal system prescribes many rules calling for transparency of corporate activities: Disclosure of financial condition to securities markets; disclosure to the IRS of the economic purpose and substance of tax-shelter schemes; and disclosure for potential bankruptcy purposes of whether assets have been actually transferred from one entity to another, so that they may properly be considered as part of the transferor’s or transferee’s estate. Corporations in short are, for many legal purposes, supposed to disclose material facts about their financial situations. The lawyers treated this injunction as: Corporations may actually conceal material facts so long as we help them do it in such a way that we can later argue that, technically, they did disclose in the sense of meeting the literal requirements of disclosure laws. The purpose of their advice was to facilitate effective non-disclosure under a cover of arguably lawful action. The lawyers looked forward to a hypothetical role as counsel in adversary proceedings and the arguments they would make in that role. But the main object and real point of the help they gave to clients was to prevent anyone from ever finding out what the client was actually doing, and a fig leaf of cover in case anyone ever did find out and challenge it.

The advocacy ideology regularly and persistently confuses the managers, who ask for lawyers’ advice, with the lawyers’ actual client, the corporate entity. Admittedly, much corporate-law doctrine makes this easy for them because it is excessively permissive in allowing lawyers to treat the incumbent managers who consult them as the entity. At least until the adoption last year of the Sarbanes-Oxley’s Act’s “up the ladder” reporting requirement, the bar’s ethical rules also facilitated this conflation of the corporate client with management, by waffling over whether corporate counsel who becomes aware that a corporate agent has engaged in conduct that is a “violation of law” and is “likely to result in substantial injury to the organization” must report the misconduct up to or, if necessary, even

beyond the board of directors. But the general principle is clear: A corporate agent acting unlawfully no longer represents the corporation, and the corporation’s lawyer therefore owes him no loyalty, and no duty of zealous representation. On the contrary, if his illegal acts are harming the actual client, the lawyer should not help him out at all. And that, obviously, is a huge difference between representing a company and representing the criminally accused.

The point I want to add to these standards, but valuable, points is a simple one. Corporate lawyers could actually learn something useful from the role of the criminal defense lawyer. And that is that the adversary-advocate’s role—like that of all lawyers—is in large part a public role, designed to fulfill public purposes: The ascertainment of truth and the doing of justice; the protection of the autonomy, dignity and rights of witnesses and especially of the accused; and the monitoring and disciplining of police and prosecutorial conduct. The defense lawyer is not merely or even mostly a private agent of his client, whose function is to zealously further the client’s interest (which is usually to evade just punishment for his past conduct, or continue to engage in it in the future). He is assigned a specialized role in a public process in which his zealous advocacy is instrumental to the service of various public objectives. He is encouraged to make the best possible arguments for suppressing unlawfully seized evidence, not for the purpose of furthering his client’s interest in freedom or getting away with crimes, but to protect third parties who are not his clients, i.e., other citizens whose freedom and security will be put at risk unless police misconduct is deterred. He is allowed to present a very one-sided, partial, and selective version of the evidence favoring the defense, in part because resourceful adversaries can poke holes in his story and present a counter-story, but even more to fulfill a public purpose—that of keeping prosecutors up to the mark, making sure they know that they have to put together a defense-proof case, deterring them from indicting where they do not have the evidence. Defense counsel’s zeal is restricted precisely at the points where it might help the client at the risk of damage to the performance of his public functions and the integrity of the procedural framework that those functions are designed to serve. He may not, for example, lie to judges, suppress or manufacture real evidence, pose questions on cross-examination that he has no basis in fact for asking, or suborn or knowingly put on perjured testimony.

If you extend this analysis of the public functions of the defense bar to

55 Id.
56 Id. What the lawyer should do, unfortunately, is a hopeless muddle under present ethical rules, which try as hard as they can to avoid forcing lawyers into unpleasant confrontations with the corporate agents who hire and fire them.
the corporate bar, what might you conclude? That, like the defense lawyer's, the corporate lawyer's role has to be constructed so that it serves and does not disserve its public functions as well as its private ones. I have explained the public benefits of allowing defense lawyers to suppress unlawfully seized evidence, or to refrain from volunteered inconvenient facts pointing to their clients' guilt. But what are the benefits of allowing lawyers to conceal—or hide in a maze of fine print—facts from regulators and investors that would be highly relevant to determining what the companies' real earnings were, or whether its tax shelters had some economic purpose beyond avoidance, or that managers were setting up side deals paying themselves and their cronies huge bonuses? What is the virtue of allowing lawyers to pull the wool over the eyes of the understaffed bureaucrats who monitor their transactions and try to enforce the laws? Even if all of these schemes should turn out to be (at least arguably) technically legal, what values of overall human happiness, individual self-fulfillment, or economic efficiency are served by helping clients promote them? The autonomy of clients generally is a good thing, to be sure; but there is no virtue per se in action, any old action, that is freely chosen, if it is likely to bring destruction in its wake—including, in these examples, harm to the real clients themselves, not their incumbent managements but the long-term corporate entities and their constituent stake-holders.

The real lesson from the defense lawyer's or advocate's role is simply that the lawyer is, in addition to being a private agent of his clients, a public agent of the legal system, whose job is to help clients steer their way through the maze of the law, to bring clients' conduct and behavior into conformity with the law—to get the client as much as possible of what the client wants without damaging the framework of the law. He may not act in furtherance of his client's interest in ways that ultimately frustrate, sabotage, or nullify the public purposes of the laws—or that injure the interests of clients, which are hypothetically constructed, as all public corporations should be, as good citizens who internalize legal norms and wish to act in furtherance of the public values they express.

IV. TOWARDS AN ALTERNATIVE CONCEPTION OF THE CORPORATE COUNSELOR'S ROLE

The view that I am pressing here of the corporate counselor's role is neither new nor unorthodox. It is in fact one of the traditional conceptions.

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57 I do not think that these supposed benefits of an adversarial process and the exclusionary rule are actually as valuable as they are made out to be. They are clumsy devices for achieving goals that could be achieved in more straightforward ways, such as effective judicial supervision, under defense monitoring, of police and prosecutorial behavior. And their obvious downside is that they interfere with the search for truth and reliable fact-finding. But there is at least a plausible case for their public benefits.
of the counselor’s role in our legal culture, with a pedigree quite as venerable and considerably more respectable than the rival notion of the lawyer as zealous advocate or hired gun. It was regularly invoked by leading lawyers throughout the nineteenth century and surfaced as an express ethical standard in the ABA’s first Canons of Ethics, promulgated in 1908:

Canon § 32: No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render, any service or advice involving disloyalty to the law, whose ministers we are . . . or deception or betrayal of the public. . . . [T]he lawyer . . . advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent.58

In the post World War II era, a group of lawyers and legal academics—including Lon Fuller, Willard Hurst, Hart and Sacks, and Beryl Harold Levy—theorized, from hints dropped by such Progressive lawyers as Brandeis and Adolf Berle (who disagreed on everything else but concurred on this), the role of the new corporate legal counselor as a “statesman-advisor.” The counselor represents his client’s interest “with an eye to securing not only the client’s immediate benefit but his long-range social benefit.” In negotiating and drafting contracts, collective bargaining agreements, or reorganization plans, the lawyer is a lawmaker of “private legislation” and “private constitutions”, a “prophylactic avoider of troubles, as well as pilot through anticipated difficulties.”59 The emphasis is on creative compliance with government regulators and labor unions, and on harmonious stable compromises with contract partners and the workforce. It is a vision founded on a very particular model of corporate leadership as the ideal business client, what we now call the “managerialist” model (Berle named the lawyer-executive Owen D. Young of General Electric as the exemplar of vanguard corporate leadership)—business leaders who had made their peace with the New Deal, accepted unions as the price of stabil-

58 AMERICAN BAR ASSOCIATION, CODE OF PROF’L ETHICS Canon 32 (1908). Notice that the lawyer’s advice on the statute is not to be the construction that most favors the client, but the lawyer’s independent view. See Susan D. Carle, Lawyers’ Duty to Do Justice: A New Look at the History of the 1908 Canons, 24 LAW & SOC. INQUIRY 1, 2, 18-26 (1999), on the debate among elite lawyers over the appropriate relative scope of client and public-regarding norms in the drafting of the Canons.

ity, and whose lawyers moved in and out of government and co-drafted regulations in semi-captured regulatory agencies. The vision also assumed the model of stable corporate law-firm relations that prevailed until the 1970s: A single firm composed of partners for life, who did virtually all of the legal work for companies that retained them indefinitely, rarely questioned their bills, and formed ties of trust and confidence with the senior partners. The “wise-counselor” vision of the lawyer’s role found its way into the Joint Report prefacing the ABA’s 1969 Model Code of Professional Responsibility and portions of the Code itself,60 and according to Erwin Smigel’s 1964 study of Wall Street law firms, had been completely internalized by the partners of those firms.61

Since the 1970s, this conception of the wise-counselor-lawyer-statesman has been in decay. It is no longer recognized by most corporate lawyers as a norm. It has almost no institutional support in the rules and disciplinary bodies that regulate the profession. Some academic lawyers still support some version of it; and so too do some judges and regulators. It resurfaces on occasion after business disasters such as the savings-and-loan and Enron scandals. The SEC, IRS, banking regulators, and the courts have sporadically revived it and brought enforcement actions in its spirit. Bar commissions on professionalism sometimes nostalgically evoke it. Yet even where it still has some residual influence there are no effective sanctions behind it.

The decline of the counselor’s ethic has many causes: The collapse of the state-corporate-labor concords; the rise of the new social regulation and with it a newly adversary stance of companies toward regulation and regulators; the sharp rise in inter-corporate and mass-tort litigation; the consequent escalation of legal costs, which caused companies to bring operations in-house and make outside firms compete for specialized business; the reordering of law firms’ priorities towards attracting business and maximizing profits-per-partner; the reorientation of professional ethics from complying with aspirational standards to following rules; the displacement of the vocation of public-regarding lawyering onto a specialized “public-interest” bar, academics and government lawyers; and the rise of the cults of market economicism and shareholder-wealth-maximization as supreme goods and the vogue of contempt for government and regulation. All of these tendencies have resulted in lawyers’ recharacterizing their calling as the wholly privatized business of providing consulting services aimed at legal-risk-reduction and creative law-arbitrage and law-avoidance schemes

60 See, e.g., MODEL CODE OF PROF’L RESPONSIBILITY EC 7-3, EC 7-4 (1969) (clearly distinguishing the lawyer’s roles of advocate and counselor and suggesting that in the counselor’s role the lawyer has far less latitude to exploit uncertainties and ambiguities in the law for his client’s benefit than in adversary proceedings).

rather than the professional service of public values and the rule of law.\footnote{This and the preceding paragraph present, in compressed form, some of the narratives and arguments in another paper. See Robert W. Gordon, The Privatizing of the American Legal Profession, Delivered at the Annual Meeting of the American Society for Legal History (Nov. 9, 2001) (unpublished manuscript, on file with author).}

We cannot hope to revive the counselor’s role as the profession’s dominant role or self-conception or practical way of life. But events like the Enron collapse make one realize that the corporate counselor would still have a useful role to play, if one could revive it as one of the legal profession’s many roles, to be deployed on occasions where clients and society would be best served by independent, public-regarding legal advice.

My idea is this: that there be established a separate professional role for a distinct type of lawyer, the Independent Counselor, with a distinct ethical orientation, institutionalized in a distinct governance regime of ethical codes, liability and malpractice rules, special statutory duties and privileges, and judicial rules of practice. Clients could for most purposes decide whether they wished to be represented by counselors or ordinary attorneys, making clear by contract and representations to the outside world which role they wanted the lawyer to occupy. For some legal purposes however, clients would be required to act through counselors. “Counselor” would be primarily an elective role that lawyers could move in and out of, could assume for particular representations or transactions or purposes, and then resume the role and function of regular lawyer.\footnote{The role might be particularly attractive to older lawyers, retiring from careers as law firm partners or in-house counsel.} But it might also be a role regularly institutionalized in practice settings. Lawyers could organize law firms, branches, or offices within client organizations, consisting only of counselors. The counselor’s role might eventually evolve into a distinct profession, one organized into separate law firms, or counselors’ offices within firms or within client organizations.

This idea is only in an embryonic stage of its development. If it ever caught on as a practical possibility there would of course be many, many details to be worked out. Before that day comes, it hardly seems worthwhile to try to fill out the fine points of what is only at present a hypothetical and possibly completely utopian scheme. So I will limit my job here to trying to spell out what I think would be the essential elements of the counselor’s role.

The most basic is this: That the lawyer engaged as a counselor adopt an independent, objective view of the corporate agents’ conduct and plans and their legal validity. This emphatically does not mean that the counselor must take up an adversary stance to the client, or an attitude of indifference toward its welfare; indeed, as its lawyer, she ought to view the company’s legitimate aims and objectives sympathetically and to give advice that will generally further those aims. Nor does it mean that her ad-
vice must be invariably conservative and obstructive, that she must be the unhelpful kind of lawyer who constantly tells managers that they cannot do what they want to do; counselors can and should be as creative as any other good lawyers in devising means to accomplish clients’ objectives that will overcome and work around legal objections, and in devising innovative arguments that will alter and expand the boundaries of the existing law. But whatever advice the counselor gives, she should: (a) Construe the facts and law of the client’s situation as a sympathetic but objective observer such as a judge, committed to serving the law’s spirit and furthering its public purposes, would construe them; (b) impute to the corporate client the character of the good citizen, who has internalized legal norms and wishes to comply with the law’s legitimate commands and purposes while pursuing its own interests and goals; and (c) be based on an interpretation and practical application of the law to the client’s situation that helps the client, so constructed, to satisfy rather than subvert the purposes of the law.

When the counselor asserts facts or makes a legal claim or argument to authorities or third parties—outside the context of fully adversary proceedings where all interested parties have effective access to relevant facts and legal knowledge necessary to forming the opinion—they should generally be facts and arguments that a fair-minded and fully-informed observer could accept as plausible and correct. For example, if the counselor is giving a legal opinion on the validity of a client’s proposed conduct or transaction, she cannot leave out important facts that might cast doubt on her conclusions, or slant the facts so as to obscure difficulties with the conclusions. If she is not sure that her client’s agents have been giving her the important facts, or reporting them accurately, she has to ask questions until satisfied or refuse to give the opinion. In other words, she should give the kind of report that a lawyer hired to be an independent investigator and analyst of a client’s situation would be expected to give. Unlike the Enron lawyers, she may not accept limits on the scope of her representation that would effectively prevent her from doing the counselor’s job; nor may she permit her opinion or conclusions to be used to give cover or respectability to actions she has not really had a chance to look into.

The notion that the counselor’s role has to be consistent with the law’s public purposes, and should further rather than frustrate those purposes—and that she should give candid, truthful, and undistorted reports to authorities and third parties—does not mean that she must become an informer or enforcement officer. Nor does it mean that the lawyer has to accept regulators’ or adversaries’ construction, or an ultra-conservative and risk-averse constructions, of the law’s purposes: She is perfectly entitled to present an innovative view of the law and facts that favor what her client wants to do, so long as it is a view that she thinks a judge or other competent law-maker would actually be likely to accept. But the conception of the role does pretty clearly imply that if a counselor wants to press on a client’s behalf
an adventurous, strained, or ingenious interpretation of existing law, or a
construction of fact that an objective observer might reasonably think parti-
tal and one-sided and potentially misleading, she must do so in a way that
flags the contentious nature of what she is proposing and thus permits its
adequate testing and evaluation. If no effective adversary process and in-
dependent adjudicator is available to test it—not in the hypothetical distant
future but here and now—the counselor has either to refrain from pushing
the envelope or give intended audiences signals sufficient to inform them
of the legal riskiness of getting involved with the plan. Technical, cos-
metic, or literal disclosure or compliance that in practical effect is non-
disclosure or non-compliance is ruled out under this conception. So is tax-
evasion parading as tax-minimization. So is trying to sneak a legally-
dubious transaction under the noses of regulators or third-parties whom the
lawyers know are too overburdened or unsophisticated or uninformed to
discover the potential problems with it.

Maybe what most of the Enron lawyers did was permissible under cur-
cent legal regimes and ethics codes. I doubt it, for all the reasons Cramton,
Koniak, and the bankruptcy examiner have given. Under the obligations of
the counselor’s role as I am try to construct it, almost all of the doubtful
advice they gave would be impermissible.

In advising clients contemplating litigation, the counselor takes into
account the merits or justice of the claim. She seeks to dissuade plaintiffs
from pursuing plainly meritless claims and encourages defendants toward
fair settlement, and away from invalid defenses, of just claims. In conduct-
ing litigation or similar adversary proceedings, the public-minded lawyer
regards herself as an “officer of the court,” that is, a trustee for the integrity
and fair operation of the basic procedures of the adversary system, the rules
of the game and their underlying purposes. She fights aggressively for her
client, but in ways respectful of the fair and effective operation of the
framework. In discovery, she frames requests to elicit useful information
rather than to harass and inflict costs, and responds to reasonable requests
rather than obstructing or delaying. She claims privilege or work-product
protection only when she thinks that a fair-minded judge would be likely to
support the claim independently. In deciding how ferociously to attack the
credibility of a witness on cross-examination, she takes into account the
likely truthfulness of the witness and the underlying merits of the case.

If the counselor perceives that her services have been or are being used
to further, or even just to facilitate by providing plausible cover for, corpo-
rate strategies that could not be justified to a fully-informed objective ob-
server as conforming to the letter, spirit, and public purposes of the law,
she has to take steps to correct the problem and to try to bring the client’s
agents back into compliance. This means that if she has suspicions she
should investigate them; if not satisfied, she should bring the problem to
the general counsel, CEO, and if necessary, the board of directors to insist
on compliance; and if corrective steps are not taken, she must resign. Finally, if serious damage to outside interests may result from the agents' misconduct, she must signal the problem to people such as regulatory authorities who could prevent it.

I can already hear the cries of protest: "But this is not the lawyer's role!" The obvious answer to that is, yes, I know that it is not the lawyer's role as most corporate lawyers and the bar now see that role; but that is precisely the problem that the savings-and-loan and Enron, etc. scandals have suggested needs to be solved. The legal profession already recognizes differentiated roles with special obligations. The prosecutor is supposed to be a minister of justice, with "special obligations to see that the defendant is accorded procedural justice and that guilt is decided on the basis of sufficient evidence." Government lawyers are supposed to respect the public interest, not just the position of the agency that employs them. Even private lawyers are not always expected to act as hardball adversary advocates and strategic manipulators of the legal system. For many purposes, companies already want their lawyers to act more like counselors to get the benefits of their perceived independence as reputational intermediaries—for example, to reassure regulators or prosecutors that an errant company has cleaned up its act, to reassure potential transaction partners or investors that a deal is legally safe, or to reassure governments or regulators or local communities that a proposed action is environmentally safe or a proposed reorganization is fair to the labor force. Companies mired in scandal, fraud, and mismanagement often hire law firms as independent counsel to conduct sweeping investigations and house-cleanings and recommend reforms. Companies (like divorcing couples) who want to minimize the strains and expenses of litigation hire law firms with reputations for cooperative behavior, candor and fair play in discovery, openness and a disposition to get to mutually beneficial solutions in negotiating settlements. Sometimes corporate law actually requires the use of independent counsel—for example, to assess whether the

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65 See id. R. 1.13 cmt. (stating that "when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved . . . . Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances.").
corporation should support or oppose a shareholder’s derivative suit.67

If the counselor’s role is already available by contract, why do we need a new profession? The reason is that the counselor’s role is too weakly supported by current institutional structures, incentives, statutes, and ethical rules. Ethically, the default master norm of the bar is zealous partisan representation of client interests rather than the counselor’s norm of guidance of the client’s desires to bring them into alignment with an objective and fair-minded construction of the public purposes of the law. Lawyers may face malpractice or disciplinary complaints if their advice is perceived as more public-regarding than client-regarding. Even if retained as counselors, they may face pressures to moderate their independence from clients’ agents unhappy with their advice. Current ethical rules would preclude, or make optional, disclosures to outsiders of corporate agents’ violations of law.68 In short, the counselor may be impeded by ethical rules regarding zeal, confidentiality and conflicts, which are not always waivable by contract.

At the very least, such obligations of partisanship and secrecy should be waivable by contract. Corporations who want to commit themselves ex ante to having their business dealings structured, approved, and monitored by independent counselors, with the obligation to report up and even outside the organization if they cannot get managers to comply, should be able to do so, in order to get the benefits of independent advice and objective controls on misconduct.69

Giving clients the choice to hire counselors by contract would be a useful reform in itself. If the counselor-by-contract alternative were widely available and known about, there could be costs to clients for not choosing lawyers committed to act as counselors in situations where the clients wanted to assure third parties and regulators of good-faith and cooperative conduct. “If you’re such good guys, how come your lawyers are hired-gun advocates?”

67 Model Rule 1.13(b) outlines a lawyer’s options when her organizational client is “engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization.” MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2003). In such event, the lawyer is afforded discretion in deciding whether to seek “a separate legal opinion . . . for presentation to appropriate authority in the organization.” Id. R. 1.13(b)(2). The Comment to Rule 1.13 specifically addresses derivative suits and suggests that outside counsel may be required when conflicts arise between “the lawyer's duty to the organization and the lawyer's relationship with the board.” Id. R. 1.13 cmt.

68 All lawyers are subject to strict confidentiality duties; the Model Rules permit disclosure of confidences when necessary to prevent serious physical harm to third persons. Id. R. 1.6(b). And while Rule 1.13 permits a lawyer in some circumstances to advocate for an outside legal opinion on her client’s conduct, it “does not limit or expand” the lawyer’s duties under Rule 1.6. Id. R. 1.13(b) & cmt.

69 Richard Painter offers a detailed elaboration of the advantages of contracting ex ante for lawyer-monitors with the discretion to blow the whistle, and the change in ethics rules that might be required to permit this. See generally Richard W. Painter, Toward a Market for Lawyer Disclosure Services: In Search of Optimal Whistleblowing Rules, 63 GEO. WASH. L. REV. 221 (1995).
But counseling-by-contract is not enough. It does not ensure that lawyers will continue to give independent public-regarding advice, or candor and cooperation in bargaining and conflict situations, when the pressure is on to keep the client and prevent it from going over to more complaisant competitors. And it does not give clients enough incentives to hire counselors where—for the protection of third parties or the public—they are most needed.

So I think that the full-scale version of my proposal would have to contain at least two more components. First, there should be government mandates that for some representations and transactions, corporations must hire lawyers who have undertaken the role and accompanying obligation of counselors. For example: Lawyers certifying compliance with laws, regulations, orders, consent decrees, or reporting requirements of official agencies; lawyers giving opinions to satisfy disclosure requirements or filing proxy statements under the securities laws; and lawyers giving opinions on conformity with tax laws on tax-minimization devices. In other words, when lawyers are hired to fulfill gatekeeper obligations for the protection of third parties, investors, or the public, or to certify conformity with taxing or regulatory laws, or with official orders or decrees, they are not entitled to act as advocates, and not entitled to exploit ambiguities or loopholes in existing laws—at least not without very clearly signaling that they are doing so. Moreover, lawyers in these capacities must not conceal inconvenient material facts, must not uncritically accept facially implausible assertions of fact from their client’s agents, and must inquire when a reasonable attorney would suspect material lies or violations of law and try to correct them.

Second, there should be effective institutionalization of and support for the counselor’s role, incentives to perform it, and sanctions for breaches. As I picture things counselors, like lawyers, would be largely self-regulating, but with more effective monitoring and sanctions than most lawyers currently face. Counselors in each specialty (tax, securities, banking, litigation, structured-finance, etc.) would have to develop codes of best practices defining the specifics of the counselor’s role for that practice. Then they would have to establish the procedures to inculcate novices into the role, and to monitor performance of it. Some law firms have already set up internal machinery to promulgate and enforce ethical standards; this could be adapted for counselors. Obviously, they would be subject to special regimes of judicial enforcement, civil liability, and malpractice; and, where practicing before agencies such as the SEC or IRS, to administrative discipline. Counselors probably should not be allowed to take equity positions in client companies, or agree to fee arrangements conditioning compensation on results. But they also need incentives to take on the role and perform it faithfully. The most effective incentives would be ones where potential counselors would receive special privileges that would benefit
clients—for example, expedited and presumptively favorable regulatory action, less scrutiny and more rapid approval by courts of discovery plans, settlements of class actions, terms of consent decrees, and safe harbors from malpractice or other liability for conscientious good faith advice.

Is this idea for reviving the counselor's role an idle dream? Perhaps it is. But the status quo—a situation in which lawyers effectively facilitate, or passively acquiesce in and enable corporate frauds, in the name of a noble idea of advocacy that has been ludicrously misapplied to the context of corporate advice-giving—is not tolerable. At least some corporate lawyers may wish to revive the ideal of independent counseling which has, until very recent times, been one of the most inspiring regulative ideals of their profession. And even if they do not, a society that wants its corporations to be good citizens, as well as efficient profit-maximizers, may insist on reviving it, or something like it, against their opposition.