University of St. Thomas Journal of Law and Public Policy

Volume 15
Issue 2 *Alternate Realities: Conspiracy Theory and the Constitutional and Democratic Order*

Article 32

April 2022

When are We Going to Learn: The Role of Lawyers in Corporate Fraud

Alexander Klein

Follow this and additional works at: https://ir.stthomas.edu/ustjlpp

Part of the Legal Profession Commons, Organizations Law Commons, Other Law Commons, Secured Transactions Commons, Securities Law Commons, and the Tax Law Commons

Recommended Citation
Alexander Klein, *When are We Going to Learn: The Role of Lawyers in Corporate Fraud*, 15 U. ST. THOMAS J.L. & PUB. POL'Y 785 (2022).
Available at: https://ir.stthomas.edu/ustjlpp/vol15/iss2/32

This Comment is brought to you for free and open access by UST Research Online and the University of St. Thomas Journal of Law and Public Policy. For more information, please contact the Editor-in-Chief at jlpp@stthomas.edu.

COMMENT

WHEN ARE WE GOING TO LEARN: THE ROLE OF LAWYERS IN CORPORATE FRAUD

ALEXANDER KLEIN

I. INTRODUCTION

In an age where business and industry are booming, the complexities that go along with it are growing. With a rapid increase in technology, finance, and infrastructure comes a rapid increase in government and legal regulation. As these regulatory frameworks become more and more convoluted, the opportunity to exploit the gaps and make a quick profit also become greater. This is not only true for business leaders and investors, but also for trusted professionals such as auditors and lawyers.

This article will explore some of the worst corporate scandals of the last few decades, the role that the lawyers played, and what the legal profession has—and has *not*—done to address it. Part I will provide a brief factual overview of scandals such as Enron, Petters Group Worldwide, and Wells Fargo. Part II will explore the criminal, civil, and disciplinary actions, or lack thereof, that were taken against the lawyers. Part III will focus on the legal profession's response to these scandals including: Section 307 of the Sarbanes-Oxley Act, the SEC's rulemaking functions, the legal profession's rules of professional conduct, and the Supreme Court's interpretation of aiding-and-abetting liability under federal law. Finally, Part IV will explore competing perspectives regarding lawyer accountability, and my view on what the legal profession must do to once again become a trusted and moral leader.

II. THE SCANDALS

American society is no stranger to corporate fraud. However, we have not always been privy to it. Prior to the late 1990s and early 2000s, most of the U.S. population was unaware of the misconduct that was rampant in the business and finance world. It was not until 2001 that people started to pay attention. Even then, people rarely discussed the involvement of legal practitioners. Before scandals like Enron, lawyers did not even have a duty to report suspected misconduct to the CEOs or Directors of their own

corporation. Everything started to change once Enron, the Wall Street darling, began to fall.

A. Enron

Enron was established in 1985 in Houston, Texas. It was the result of a merger between Houston Natural Gas and InterNorth, a Nebraska pipeline company.[1] At the outset, Enron owned the nation's largest gas pipeline.[2] It derived nearly all its value from hard assets.[3] However, as the gas industry became more and more deregulated, Enron shifted its operations to energy trading.[4] Companies that consume large quantities of natural gas and oil turn to energy trading to ensure a predictable price.[5] In under ten years, Enron completely transformed its business from a hard-asset company, to a commodity trading entity.[6] Notably, as the deregulation of the gas industry continued, the price of gas and oil decreased.[7] Prices became volatile and unpredictable. In turn, companies that were reliant on large quantities of oil and gas turned to Enron's energy trading expertise to ensure stability.[8]

Enron began its evolution by spinning off its physical assets.[9] In 1985, at its inception, Enron owned and operated 37,000 miles of oil and gas pipelines.[10] By 2000—just fifteen years later—Enron only operated 25,000 miles of pipeline.[11] However, Enron's alleged profits and shareholder value had significantly increased. In its Annual Report in 2000, Enron disclosed that its sell-off of major assets had resulted in "the same earnings power with less invested capital."[12] The success of this business model did not go unnoticed. Enron's executives and directors sought to further increase their

---

[1] C. William Thomas, *The Rise and Fall of Enron*, J. ACCT. (Mar. 31, 2002), https://www.journalofaccountancy.com/issues/2002/apr/theriseandfallofenron.html.

[2] Douglas G. Baird & Robert K. Rasmussen, *Four (or Five) Easy Lessons from Enron*, 55 VAND. L. REV. 1787, 1793 (2002).

[3] A "hard asset" is a physical asset that can be touched and felt.

[4] Baird & Rasmussen, *supra* note 2.

[5] *Id.* (explaining that companies can utilize commodity futures to 'lock in' the price of gas at a certain time in the future).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Douglas G. Baird & Robert K. Rasmussen, *Four (or Five) Easy Lessons from Enron*, 55 VAND. L. REV. 1787, 1794 (2002).

[11] *Id.*

[12] ENRON ANNUAL REPORT (2000), https://fliphtml5.com/thnh/cnnm/basic.

profits by not only expanding internationally, but by penetrating other commodity markets wholly unrelated to energy.[13]

By 2000 and 2001, this brilliant tapestry of innovation created by Enron and its executives began to unravel. Its demise was founded upon three major components: (1) marking-to-market accounting, (2) Special Purpose Vehicles ("SPV's"), and (3) flawed oversight of auditing and legal services.[14]

In 1992, then-CFO Jeffrey Skilling, introduced a new accounting method which allowed Enron to value its commodity trading investments at market value, and realize revenues and losses, at the end of any given quarter.[15] Enron was given free rein to estimate the fair market value for its investments—and record it as revenue on its income statement—when no market actually existed.[16] While this method was highly unconventional for a pipeline company, and frankly misleading, it was given a stamp of approval by the SEC on January 2, 1992.[17]

To maintain its credit ratings, and value of its commodity trading investments, Enron had to maintain certain financial ratios including return on assets (ROA) and leverage ratios.[18] To accomplish this objective, it began to offload large quantities of fixed assets and debt to SPVs.[19] An SPV is a shell company that is created for the sole purpose of removing assets and debt from the main corporation's balance sheet.[20] Because Enron had less assets and debt on its balance sheet, due to its extensive use of SPVs, its ROA and leverage ratios improved.[21] As these ratios improved, so did the credit ratings and the valuation of the company's stock.[22] But, just because this debt is no longer on the balance sheet, does not mean that Enron is off the hook.[23] These SPVs began to take on substantial levels of debt which Enron remained responsible for. However, Enron was not required to disclose these debts on

---

[13] Baird, *supra* note 10, at 1795.

[14] Thomas, *supra* note 1.

[15] *Id.*

[16] *Id.*

[17] STAFF OF S. COMM. ON GOV'T AFFAIRS, 107TH CONG., REP. ON FIN. OVERSIGHT OF ENRON (Comm. Print 2002).

[18] Thomas, *supra* note 1.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] C. William Thomas, *The Rise and Fall of Enron*, J. ACCT. (Mar. 31, 2002), https://www.journalofaccountancy.com/issues/2002/apr/theriseandfallofenron.html.

its balance sheet.[24] Therefore, shareholders were misled into believing in the financial vitality of Enron's business model.[25]

While this is only the tip of the iceberg in the ocean of fraud and deceit, how could this have possibly been approved by not only Enron's lawyers and accountants, but by the SEC itself? This is a question that has been the subject of extensive investigations and academic work.[26] But, in the wake of this scandal and the fallout from these investigations, far more corporate scandals have come to light. It seems that we have a long way to go to restore the public's faith in our age-old profession.

B. Petters Company, Inc.

Petters Company Inc. ("PCI") was founded in 1988 by Thomas J. Petters under the name of Amicus Trading Group.[27] Tom Petters was a charming, generous, and successful salesman. In addition to his business success, Petters was a generous philanthropist who donated to causes like the Boys and Girls Club of America, MN Teen Challenge, and various women's shelters across the state of Minnesota.[28] However, this generosity came at the expense of the victims of his $3.6 billion-dollar Ponzi scheme.[29]

PCI was the investment subsidiary of Petters Group Worldwide. PCI had an alleged business objective of purchasing and reselling consumer electronics to big box retailers for a profit.[30] However, not a single consumer electronic was ever purchased or sold by PCI.[31] From day one, Petters used investor capital to maintain a façade of high returns by perpetuating—at the time—the largest Ponzi scheme in U.S. history.[32] He utilized investor funds

---

[24] *Id.*

[25] *Id.*

[26] *See e.g.,* N.Y.C. BAR, REPORT OF THE TASK FORCE ON THE LAWYER'S ROLE IN CORPORATE GOVERNANCE (2006), https://www.nycbar.org/pdf/report/CORPORATE_GOVERNANCE06.pdf.

[27] *Petters Timeline*, STAR TRIB. (Mar. 24, 2011, 1:19 PM), https://www.startribune .com/petters-timeline/71661967/.

[28] Esme Murphy, *Should Charities Have to Return Money Donated by Petters?; Gov. to Decide*, CBSN MINN. (Apr. 2, 2012, 6:46 PM), https://minnesota.cbslocal .com/2012/04/02/should-charities-have-to-return-money-donated-by-petters-gov-to-decide/.

[29] *Id.*

[30] *Tom Petters Case Summary*, U.S. DEP'T JUST., https://www.justice.gov/usao-mn/tom-petters-case-summary (last updated May 1, 2015).

[31] *Id.*

[32] Drew Sandholm, *American Greed: The Rise and Fall of a Multibillion-Dollar Ponzi Scheme*, CNBC (Feb. 22, 2012, 12:23 PM), https://www.cnbc.com/2012/03/07/The-Rise-and-Fall-of-a-Multibillion-Dollar-Ponzi-Scheme.html.

to pay off other defrauded investors, purchase companies with the intention of hiding his fraudulent practices[33], and maintain a lavish lifestyle.[34]

At PCI's peak, Petters owned and operated some of the largest corporations in the country including Sun Country Airlines, Fingerhut, and Polaroid.[35] While these holdings were all legitimate businesses, their operations were funded by bilking investors out of billions of dollars.[36] PCI was so successful that it was preparing to merge Polaroid and Kodak had federal prosecutors not been approached by Petters' close confidant, Deanna Coleman, in 2008.

Petters perpetuated this fraud by providing investors with fabricated financial statements, documents, and promissory notes.[37] These documents purported to show a successful and booming resale business. Often, Petters personally guaranteed payment to investors through promissory notes.[38] However, Petters never paid a dime. To deceive investors into believing in the success of the business, Petters would divert funds from one investor to another.[39] When he could not pay off investors in a timely manner, he made up excuses. He claimed that these big box retailers owed PCI billions of dollars and that he would satisfy his own debts once they had paid up.[40] This, clearly, was a lie. Throughout the duration of his Ponzi scheme, Petters defrauded his investors in the amount of $3.6 billion dollars.[41]

This seemingly perfect business quickly crumbled after Deanna Coleman, Vice President of Operations for PCI, and co-conspirator, approached the federal government.[42] On September 8, 2008, she alleged that, with her assistance, Petters had knowingly and intentionally defrauded investors for the entirety of PCI's existence.[43] Federal prosecutors at the

---

[33] Petters ultimately purchased Fingerhut, Polaroid, and Sun Country Airlines as a front to maintain the appearance of actual business operations. *Id.*

[34] U.S. DEP'T JUST., *supra* note 28 (stating that Petters used investor funds to purchase homes, yachts, and luxury vehicles).

[35] Sandholm, *supra* note 32.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] Drew Sandholm, *American Greed: The Rise and Fall of a Multibillion-Dollar Ponzi Scheme*, CNBC (Feb. 22, 2012, 12:23 PM), https://www.cnbc.com/2012/03/07/The-Rise-and-Fall-of-a-Multibillion-Dollar-Ponzi-Scheme.html.

[41] *Id.*

[42] *Id.*

[43] *Id.*

United States Attorney's Office in Minneapolis, MN were shocked at the revelation.[44] As part of the criminal investigation into the Petters Company, Ms. Coleman agreed to wear a wire throughout conversations with Mr. Petters.[45] These recordings, created by Ms. Coleman, and her subsequent testimony at trial, were the "smoking guns" that prosecutors needed to take down what was then the largest Ponzi Scheme recorded to date.[46] Her testimony and participation in the investigation led to the ultimate conviction of Mr. Petters[47], four of Petters' associates, five hedge fund managers, and the indictments of two others.[48]

C. Wells Fargo

Even Wells Fargo, the nation's largest commercial bank, is not immune from falling into the trap of corporate fraud. Since its inception, Wells Fargo had set the tone for a culture that is advanced by the desire to build "lifelong [customer] relationships."[49] Even throughout the banking crisis in 2008, Wells Fargo emerged nearly unscathed due to their unwavering commitment to their mission.[50] John Stumpf, CEO, and Carrie Tolstedt, head of Community Banking, were widely respected both inside and outside of the organization.[51] These two executives ranked among the most successful and accomplished of their time.[52] However, as the nation recovered from the 2008 banking crisis and ensuing economic collapse, and the pressure mounted for higher and higher revenues and returns, Wells Fargo resorted to less-than-savory sales methods.

For years, Wells Fargo engaged in a nationwide cross-selling scheme which resulted in at least two million fraudulent bank and credit card

---

[44] David Phelps, *Petters' Associate Deanna Coleman Freed after 11 Months in Prison*, STAR TRIB. (Aug. 25, 2011, 9:22 PM), https://www.startribune.com/petters-associate-deanna-coleman-freed-after-11-months-in-prison/128421168/.

[45] *Id.*

[46] *Id.*

[47] Mr. Petters was ultimately sentenced to fifty years in federal prison. *Id.*

[48] *Id.* (stating that two other hedge fund managers are awaiting trial).

[49] Brian Tayan, *The Wells Fargo Cross-Selling Scandal*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 6, 2019), https://corpgov.law.harvard.edu/2019/02/06/the-wells-fargo-cross-selling-scandal-2/.

[50] *Id.*

[51] Jeffrey Pilcher, *What Created Wells Fargo's Corrupt Cross-Selling Culture? Toxic Execs*, FIN. BRAND (Apr. 17, 2017), https://thefinancialbrand.com/64880/wells-fargo-cross-selling-culture-strategy/.

[52] *Id.*

accounts.[53] Cross-selling is a sales technique where a sales professional is tasked with selling a new product to an existing customer.[54] The leadership team set deliberately unattainable sales goals, and implemented strict supervisory practices, which pressured low-level employees to push unwanted products on customers.[55] If weekly sales goals were not met, employees faced termination. As a result of this pressure, employees who could not attain their weekly sales goals would open fraudulent accounts without the customer's consent. Contrary to statements made by Wells' top executives, it is now public knowledge that this scandal was perpetuated from the highest levels within the corporation. When all was said and done, Wells Fargo employees had opened millions of fraudulent accounts, and defrauded its own customers out of millions of dollars.[56]

The first grumblings of potential fraud emerged in 2013.[57] The LA Times reported that nearly thirty Wells Fargo employees had been terminated for forging customer signatures to open unauthorized accounts.[58] These fraudulent accounts were opened to meet the exceedingly unattainable sales targets set by Wells' corporate office.[59] However, at the time, Wells' public relations team blamed the scandal on a "breakdown in a small number of . . . team members."[60] The corporate office admitted that all team members had sales "goals," but did not admit to any excessive top-down pressure to meet these sales targets.[61]

By 2016, Wells Fargo had agreed to a settlement that resulted in $2.6 million dollars of restitution, termination of 5,300 employees, a $185 million dollar fine, and an independent investigation.[62] The board of directors engaged Shearman and Sterling to conduct this independent investigation and issue a public report. In its principal findings, the report states that "the root cause of the sales practice failures was the distortion of the Community

[53] Tayan, *supra* note 49.

[54] *What is Cross Selling?*, SALESFORCE, https://www.salesforce.com/eu/learning-centre/sales/cross-selling/ (last visited Mar. 14, 2021).

[55] Pilcher, *supra* note 51.

[56] Tayan, *supra* note 49.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] Tayan, *supra* note 49.

[62] *Id.*

Bank's sales culture and performance management system."[63] It placed blame on the Community Banking senior leadership team, inaction of the C-Suite executives to "investigate or critically challenge sales practices," and failure to truthfully disclose these concerns to the attention of the board.[64] To this day, there are still wide-ranging consequences affecting the business of Wells Fargo and its customers.[65]

III. THE LAWYERS

These three scandals represent a minute portion of corporate fraud that has occurred over the years. While each of these scandals were perpetuated by top business executives, the lawyers involved never raised any red flags. A lawyer's job, and utmost duty, is to protect the interests of their client. But, in the context of corporate law, the line between client and non-client can become all too blurred. Model Rule of Professional Conduct 1.13(a) states that a "lawyer employed . . . by an organization represents the organization."[66] This distinction seems obvious, yet a violation of this rule is a common factor among each corporate scandal discussed above. When a violation of Model Rule 1.13 results in assistance of a non-client's fraud, it can result in disciplinary action, or worse, a criminal conviction. But, what were the consequences for the lawyers from Enron, Petters, and Wells Fargo who were involved in some of the greatest frauds in United States' history? This section will describe the actions of the lawyers, explore the intentional wrongdoing, and illuminate the perils of willful blindness in the attorney-client relationship.

A. Enron

If Enron did not have a sophisticated team of legal advisors, it would be easy to understand how it transformed from a legitimate business into a

---

[63] *Independent Directors of the Board of Wells Fargo & Company Sale Practice Investigation Report* (Apr. 10, 2017), https://www08.wellsfargomedia.com/ assets/ pdf/about/investor-relations/presentations/2017/board-report.pdf [hereinafter Sale Practice Investigation Report].

[64] *Id.*

[65] Austin Weinstein, *Wells Fargo Small Business Clients Miss Out on Billions in Aid Due to Scandal Punishment*, CHARLOTTE OBSERVER (Apr. 8, 2020, 9:25 AM), https://www.charlotteobserver.com/news/business/banking/article241846121.html (explaining that Wells Fargo's customers have had difficulty obtaining access to "paycheck protection loans" during the COVID-19 outbreak due to the lending caps that were instituted on Wells Fargo as a result of this scandal. The Fed eventually loosened these restrictions, but not before it caused stress and anxiety to customers).

[66] MODEL RULES OF PRO. CONDUCT r. 1.13 (AM. BAR ASS'N 2021).

fraudulent Ponzi-esque scheme. However, Enron had a legal team of at least 250 in-house lawyers and employed over one hundred law firms.[67] Among these outside law firms, Vinson & Elkins, the second largest law firm in Texas, completed the bulk of Enron's legal work.

James Derrick, the General Counsel of Enron, had the stated objective of forming a "world class in-house law firm."[68] To accomplish this objective, Derrick formed individual legal teams within each business segment at Enron.[69] Each department had in-house attorneys, its own General Counsel, and direct reporting to Derrick himself.[70] Derrick also hired Rex Rogers as an Associate General Counsel tasked with ensuring compliance with all securities laws.[71] In addition to forming extensive and experienced legal teams, Derrick held weekly meetings between all in-house lawyers to discuss concerns about Enron's business dealings.[72] Despite holding these weekly meetings, no concerns were ever reported—including no reports of any concerns about Enron's compliance with SEC regulations or U.S. securities laws.[73]

In addition to 250 "world class" in-house lawyers, Enron employed Vinson & Elkins to structure its SPV partnerships.[74] These SPVs became the center of the SEC and governmental investigations that ultimately led to the convictions of Enron's CEO, CFO, and Directors.[75] In addition to assisting Enron in the formation of these SPVs, Vinson & Elkins went one step further and was retained by Enron's Board of Directors to investigate any wrongdoing by the corporation.[76] Max Hendrick III, a partner at Vinson & Elkins, provided an opinion letter to the General Counsel of Enron stating that he believed Enron had not engaged in any illegal conduct.[77] In essence,

---

[67] In re Enron Corp. et al., No. 01-16034 (AJG), at 15 (Appendix C (Role of Enron's Attorneys) to Final Report of Neal Batson, Court-Appointed Examiner).

[68] *Id.* at 16.

[69] *Id.* at 17.

[70] *Id.*

[71] *Id.*

[72] In re Enron Corp. et al., *supra* note 67, at 18.

[73] *Id.*

[74] *Id.* at 22.

[75] *It's the Lawyers' Turn to Answer for Enron*, FORBES (Mar. 14, 2002), https://www.forbes.com/2002/03/14/0314topnews.html#5630666e393e.

[76] *Enron's Lawyers: Eyes Wide Shut?*, FORBES (Jan. 28, 2002), https://www.forbes.com/2002/01/28/0128veenron.html#235839edfa88.

[77] *Id.* (explaining that the investigation was completed with significant restrictions on its scope).

Enron hired Vinson & Elkins to structure a fraudulent transaction, and then tasked the very same law firm with the investigation into any misconduct. While Vinson & Elkins has continued to disclaim any involvement in Enron's fraud, it ultimately settled with Enron's bankruptcy estate in the amount of $30 million dollars.[78]

B. Petters Company, Inc.

The historic collapse of PCI illustrates another example of the far-reaching consequences of ignorance. Not a single lawyer, auditor, or savvy hedge fund manager noticed the red flags.[79] While it is unclear if PCI had its own legal team, Petters Group Worldwide, PCI's parent company, had a sophisticated team of lawyers. Michael Phelps joined Petters Group Worldwide in 2004 with six years of experience at a large Minneapolis law firm, Leonard Street & Deinard.[80] David Baer, another former Leonard Street & Deinard lawyer, joined Petters Group Worldwide in 2006.[81] Not only did these men lead a successful practice, but Mr. Baer was even named a top-15 lawyer in the tate of Minnesota.[82] Additionally, PCI was represented by Fredrikson & Byron for more than ten years. While none of these lawyers or firms committed any criminal wrongdoing, or gross professional misconduct, it begs the question: where were the lawyers? This multibillion-dollar fraud is just another illustration of the shortcomings of our response following the historic fall of Enron.

When the Petters indictment first came down, both Mr. Baer and Mr. Phelps resigned from Petters Group Worldwide immediately.[83] Both of these successful attorneys denied any knowledge of criminal wrongdoing at PCI.[84] While they may not have affirmatively committed any wrongdoing, it highlights the perils of willful blindness in the attorney-client relationship.

For example, many of PCI's transactions were negotiated and approved by Petters' legal team.[85] In particular, Interlachen Harriet

---

[78] *Vinson & Elkins, Enron Reach Settlement*, HOUS. BUS. J. (June 2, 2006), https://www.bizjournals.com/houston/stories/2006/05/29/daily30.html.

[79] Jennifer Bjorhus & David Phelps, *Petters Co.: Many Watchers, but No One Watching*, STAR TRIB. (Nov. 16, 2008, 3:42 PM), https://www.startribune.com/petters-co-many-watchers-but-no-one-watching/34524834/.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] Bjorhus & Phelps, *supra* note 79.

Investments ("Interlachen"), an investment fund operating out of Minneapolis, agreed to invest money into PCI's resale business.[86] This deal was negotiated between Petters' lawyers and a lawyer for Interlachen.[87] During the initial meetings, Interlachen's attorney requested to inspect Petters' inventory.[88] This request was denied.[89] While this gave pause to Interlachen's lawyers, they ultimately went through with the deal based on Petters' promise to guarantee the investment with his own money.[90] It remains unclear why neither Phelps nor Baer questioned Petters' refusal to allow Interlachen to conduct a due diligence investigation into its business transactions. Not only was there no actual inventory, Petters would never stand up to his promise. By placing blind trust in a charming—yet fraudulent—businessman, Interlachen was bilked out of more than $60 million dollars.

C. Wells Fargo

In the case of Wells Fargo, the reputational damage that the corporation suffered can be blamed on the professional negligence and "willful blindness" of its in-house legal department. In the 110-page investigative report ordered by Wells' board of directors, Shearman and Sterling alleged that Wells' legal department underestimated the reputational risk that illegal sales methods could carry.[91]

Wells Fargo's legal department was aware of the cross-selling scheme, and possible illegal conduct, as early as 2002.[92] Following the first "mass termination" of low-level employees in 2002, Wells' legal department was only concerned with litigation risk associated with a wrongful termination lawsuit.[93] In its assessment of risk, the legal department only considered past settlements for wrongful termination.[94] It did not consider the reputational risk associated with potential illegal conduct. The practice of

---

[86] David Phelps, *Friday: Petters Pressed for Quick Deals, Investor Testifies*, STAR TRIB. (Mar. 24, 2011), https://www.startribune.com/friday-petters-pressed-for-quick-deals-investor-testifies/67622517/.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] Sales Practice Investigation Report, *supra* note 63.

[92] *Id.* at 73.

[93] *Id.* at 74.

[94] *Id.*

rubber-stamping questionable sales methods, while only calculating internal litigation risk, continued for the next ten years.[95]

Even as these wrongful termination lawsuits continued to plague Wells Fargo, its in-house legal department failed to question its sales methods.[96] The legal department believed, incorrectly, that the sales integrity issues were only affecting the termination of employees.[97] It never considered the possibility that its customers were being defrauded.[98] This unfounded belief led to the legal department's failure to do its most core function—protect its client from reputational risk and costly civil liability.

More strikingly, lower level attorneys in the legal department never raised any concerns to senior attorneys.[99] The head of the Employment Law Section of the legal department did not learn of any significant reputational risk until early October of 2013.[100] Even then, he only learned of these concerns when he started to receive phone calls from journalists at the LA Times.[101] Wells Fargo's General Counsel, James Strother, was not informed of any concerns until the end of October 2013.[102] Neither the low-level lawyers, the head of the Employment Law Section, nor the General Counsel ever reported "up the ladder" to the board of directors.[103]

Perhaps the most egregious act of legal malpractice was that, prior to the Los Angeles City Attorney's lawsuit in 2015, the legal department never considered the possibility that Wells Fargo's sales practices were adversely affecting its customers.[104] Not once. Even after Wells Fargo agreed to pay $185 million, the legal department never analyzed the potential for widespread reputational risk to the corporation.[105] To this day, the fundamental failure of the legal department has continued to significantly damage the business potential of Wells Fargo.

---

[95] *Id.*

[96] *Independent Directors of the Board of Wells Fargo & Company Sale Practice Investigation Report* 75 (Apr. 10, 2017) https://www08.wellsfargomedia.c om/ assets/pdf/about/investor-relations/presentations/2017,/board-report.pdf.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 76.

[100] *Id.*

[101] *Id.*

[102] Sales Practice Investigation Report, *supra* note 63.

[103] *Id.* at 77.

[104] *Id.*

[105] *Id.* at 78.

D. Where are the Lawyers Today?

One would think that the highly questionable, and likely illegal, conduct of the lawyers involved in these fraudulent schemes would lead to disbarment, criminal convictions, or at least professional discipline. However, the lawyers involved, for example Vinson & Elkins, remain strong staples in the legal community. This reality is largely because the legal profession's code of professional conduct is much different, and focuses much more on confidentiality, than any other profession.

After the downfall of Enron, conviction of its top executives, and the historic crumbling of Arthur Andersen, Enron's lawyers have continued to thrive. At first glance, one would believe that Vinson & Elkins was to blame for Arthur Andersen's illegal accounting practices. After all, Vinson & Elkins is the firm that guaranteed the legality of these same accounting practices.[106] However, unlike an accountant's professional responsibility, a lawyer's professional responsibility is to their client and not the public. While this duty does not apply if the lawyer is aware of the illegal conduct, it extends to the border between legal and illegal conduct.[107]

Today, Vinson & Elkins remains a staple. They employ 656 lawyers in eleven offices throughout the world.[108] This includes 125 equity partners, 72 non-equity partners and nearly 400 associates.[109] It is ranked 75th in the United States for size.[110] Additionally, it raked in nearly $800 million in revenue in 2019.[111] They generate more than $1.2 million per lawyer.[112] This makes Vinson & Elkins the 68th highest grossing law firm in the world.[113]

This is just one example of the disregard for wrongful conduct, accountability, and professional responsibility. No lawyers were indicted or disciplined in connection with Enron, Petters Company Worldwide, or Wells

---

[106] Julie Hilden, *Scummery Judgment: Why Enron's Sleazy Lawyers Walked While Their Accountants Fried*, SLATE (June 21, 2002, 10:45 AM), https://slate.com/news-and-politics/2002/06/how-enron-s-lawyers-wriggled-off-the-hook.html.

[107] *Id.*

[108] Vinson & Elkins, *2020 NLJ and AmLaw Survey*, Law.com (2020), https://www.law.com/law-firm-profile/?id=316&name=Vinson-%26-Elkins.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

Fargo.[114] Even though extensive investigations have found highly questionable conduct, it has resulted in nearly no action.

IV. WHAT THE PROFESSION HAS DONE

Many corporate scandals and frauds involve the private securities market. Prior to the Great Depression, there were virtually no protections for investors in the private securities market. Over time, Congress and the legal profession have adopted new legislation to address the accountability of primary actors for their fraudulent practices. Additionally, as public scrutiny has begun to amass, more and more protocols have been adopted to hold secondary actors (i.e. lawyers) accountable for their complicity in the frauds of their corporate clients. This section will explore the long-standing precedents under Section 10(b)(5) of the Securities Exchange Act of 1934, the seminal Supreme Court decision in *Central Bank of Denver v. First Interstate Bank of Denver*, the Private Securities Litigation Reform Act of 1995 ("PSLRA"), the Sarbanes-Oxley Act ("SOX"), and the adoption of new standards of professional responsibility for lawyers.

In the words of Senator Patrick Leahy, former Ranking Member of the Judiciary Committee, "the worst part about [these] travest[ies] would be if we do not learn from [them] and if we walk away."[115] While I do not believe the legal profession has "walked away," I do believe that we have a long way to go to earn back the trust of the public, and the right to remain a self-regulating profession. The sections discussed below highlight what the profession has done to address rampant fraud following major corporate scandals and economic disasters.

A. Section 10(b)(5) of the Securities Exchange Act of 1934

As the nation began to recover from the Great Depression, Congress enacted two major securities reform acts. The Securities Act of 1933 ("the '33 Act") and the Securities Exchange Act of 1934 ("the '34 Act"). Among the most important provisions are Section 10(b) of the '34 Act and SEC Rule 10b-5.[116]

Section 10(b) makes it unlawful to "use or employ . . . any manipulative or deceptive device . . . in contravention of . . . rules [or]

---

[114] *See* Hilden, *supra* note 106.

[115] *Accountability Issues: Lessons Learned from Enron's Fall, Hearing before the Committee on the Judiciary*: *Hearing before the Comm. on the Judiciary of the U.S. Senate*, 107th Cong. 2 (2002) (statement of Sen. Patrick Leahy).

[116] 15 U.S.C. § 78j(b) (2018).

regulations as the Commission may prescribe as necessary . . . for the protection of investors."[117] In interpreting this statute, the SEC adopted Rule 10b-5 which made three types of fraud unlawful.[118] An individual or entity may be held liable if it: (1) employs a scheme, (2) makes any false statement or omission, or (3) engages in any act which operates, or would operate, as a fraud.[119] The first and third bases of liability are known as "scheme liability," whereas the second basis is known as "false statement liability."[120] While these provisions clearly hold primary violators (i.e. those who actually employ a fraudulent practice) accountable, its effect on secondary actors, such as lawyers, remained unclear.

After the '34 Act was enacted and interpreted, federal courts were flooded with private securities litigation.[121] "Aiding and abetting fraud" was amongst the most prevalent cause of action. Nearly every lower federal court, including nearly every circuit, recognized an implied civil cause of action for aiding and abetting fraud under Section 10(b).[122] For nearly sixty years, this provision opened up secondary actors, such as auditors and lawyers, to civil liability for aiding a corporate client's fraudulent practices.[123] Based on this wide ranging acceptance, the Supreme Court rejected certiorari for every case raising questions of liability for aiding and abetting fraud under Section 10(b).[124] However, this long-standing acceptance changed dramatically with the Supreme Court decision in *Central Bank of Denver v. First Interstate Bank of Denver*.[125]

B. *Central Bank of Denver v. First Interstate Bank of Denver*

In 1994, for the first time since the enactment of the '34 Act, the Supreme Court granted certiorari to determine whether Section 10(b)(5) provided an implied cause of action against an individual or entity that aids

---

[117] *Id.*

[118] Jay B. Sykes, *Lies and Schemes: Supreme Court Expands Securities Fraud Liability*, FAS.Org (Apr. 24, 2019), https://fas.org/sgp/crs/misc/LSB10293.pdf.

[119] *Id.*

[120] *Id.*

[121] Richard C. Mason, *Civil Liability for Aiding and Abetting*, 61 BUS. LAW. 1135, 1140–42 (2006).

[122] *Id.* at 1141 (explaining that the only circuit court to not squarely recognize aiding and abetting as a private cause of action is the D.C. Circuit; however, that Court recognized that it likely existed).

[123] *Id.* at 1142.

[124] *Id.*

[125] *Id.*

and abets the commission of securities fraud.[126] The case arose when the Colorado Springs Public Binding Authority ("the Authority") defaulted on its bond payments.[127] The Authority had issued bonds to finance a real estate development program.[128] Soon after the default, the First Interstate Bank of Denver ("Plaintiff") alleged that the Central Bank of Denver ("Defendant") had aided and abetted the Authority in committing securities fraud.[129] The district court granted summary judgment in favor of Defendants.[130] Under the long-standing precedent that Section 10(b)(5) provided for a private cause of action for aiding and abetting fraud, the Tenth Circuit reversed and ruled in favor of the Plaintiff.[131]

In the first decision of its kind, the Supreme Court reversed the Tenth Circuit and held that there is neither an explicit—nor an implied—cause of action for aiding and abetting securities fraud under Rule 10b-5.[132] Even though aiding and abetting had been universally accepted, it must be supported by the text of the statute.[133] The Supreme Court declared that it was not. Now, the only remaining avenue for holding secondary actors accountable for their misfeasance would be to prove primary liability under Section 10(b).

C. Private Securities Litigation Reform Act

In response to the uproar created by the Supreme Court decision in *Central Bank*, Congress enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA").[134] Throughout the legislative process, the SEC urged Congress to expressly overturn *Central Bank* and restore the private cause of

---

[126] Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 191 (1994) (holding that because the text of the statute does not prohibit aiding and abetting, a private cause of action may not lie).

[127] *Id.* at 168.

[128] *Id.* at 167.

[129] *Id.* at 168.

[130] *Id.*

[131] *Id.* at 168.

[132] Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 191 (1994).

[133] *Id.*

[134] Brian H. Simmons, *Supreme Court Reaffirms Stance that no Private Cause of Action Exists Under Rule 10b-5 for Aiding and Abetting Securities Law Violations*, BUCHANAN, INGERSOLL & ROONEY (Apr. 5, 2011), https://www.bipc.com/supreme-court-reaffirms-stance-that-no-private-cause-of-action-exists-under-rule-10b-5-for-aiding-and-abetting-securities-law-violations.

action against secondary actors in the securities market.[135] SEC Chairman, Arthur Levitt, argued that *Central Bank* allowed secondary actors, such as lawyers, to "be insulated from liability to private parties if they act behind the scenes. Because this is conduct that should be deterred, Congress should enact legislation to restore aiding and abetting liability in private actions."[136] However, the PSLRA did nothing to assuage any misgivings by the public.[137] After thorough debate, Congress rejected the SEC's view and declined to overturn the Supreme Court's ruling in *Central Bank*.

Instead, Congress vested authority in the SEC alone to enforce violations of aiding and abetting fraud.[138] Section 104 of the PSLRA, titled "Authority of the Commission to Prosecute Aiding and Abetting," states that:

> any person that knowingly provides . . . substantial assistance to another person in violation of a provision of this title, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.[139]

Now, to have any recourse against a lawyer who aids its client with securities fraud, a private plaintiff still must prove that the lawyer is a primary violator of any of the three subsections of Rule 10b-5.[140] This distinction has led to a circuit split on how to define "primary violations."[141]

The "bright line" test, or majority view, only provides for liability of secondary actors who directly or indirectly "make" a false statement or omission.[142] This narrow interpretation is followed by the Second, Tenth, and Eleventh Circuits.[143] The "substantial participation" test, or minority view, provides for liability of secondary actors who "substantially participate" or are "intricately involved" in the preparation of a misstatement made by

---

[135] Tracy A. Nichols & Stephen P. Warren, *Aiding and Abetting Liability Under Section 10(b): Can Plaintiff's "Scheme" a Way Around Central Bank Under Subsections (a) and (c) of Rule 10b-5* 17–18, HOLLAND & KNIGHT LLP, https://www.hklaw.com/-/media/files/insights/publications/2005/05/aiding-and-abetting-liability-under-section-10b/46169.pdf?la=en (last visited Mar. 14, 2021).

[136] *Id.*

[137] *Id.*

[138] 15 U.S.C. § 78t(e) (2018).

[139] *Id.*

[140] Sykes, *supra* note 118.

[141] Nichols & Warren, *supra* note 99.

[142] *Id.*

[143] *Id.*

another party.[144] This massively broad interpretation is only followed by the Ninth Circuit.[145] A legislative reform that was intended to quell the public's concern about lawyer and accountant misconduct, has instead created even more confusion than the original *Central Bank* decision.[146]

D. Sarbanes-Oxley Act of 2002

For years, Congress believed that SEC enforcement under the PSLRA was sufficient to deter secondary actors from aiding and abetting fraud. However, the shocking events of Enron brought this conclusion into question once again. In 2002, in response to recent corporate fraud, Congress enacted the Sarbanes-Oxley Act of 2002 ("SOX"). [147] Interestingly, a proposal to reinstate a private cause of action for aiding and abetting fraud was once again rejected by Congress.[148] Instead, Congress asked the SEC to conduct a study to determine the number of securities professionals who had aided and abetted fraud from 1998 through 2001.[149] In its report, the SEC determined that there were 1,596 documented cases of securities professionals who had aided and abetted fraud.[150] Out of these cases, the SEC had only brought enforcement actions against thirteen secondary actors.[151] Despite these shocking discoveries, Congress has still rejected every legislative attempt to reinstate a private cause of action against secondary actors.

However, Sarbanes-Oxley does not let lawyers off the hook. Section 307 gave the SEC the authority to "prescribe minimum standards of professional conduct for attorneys appearing and practicing before the commission."[152] The "minimum standard" adopted by the SEC requires an attorney to report evidence of a material violation of securities laws "up the ladder" in the corporation to the general counsel and CEO.[153] In extreme circumstances, where neither the General Counsel nor the CEO remedy the

---

[144] *Id.*

[145] *Id.*

[146] Including the erroneous result that conduct occurring in California might result in liability, whereas identical conduct occurring elsewhere in the country would not.

[147] Nichols & Warren, *supra* note 99.

[148] *Id.*

[149] Section 703 of Sarbanes-Oxley was not codified by statute.

[150] Nichols & Warren, *supra* note 135.

[151] *Id.*

[152] 15 U.S.C. § 7245 (2018).

[153] *Id.*

violation, the lawyer has a duty to report to the Board of Directors.[154] This familiar duty has been adopted by nearly every state in its version of the Rules of Professional Conduct. A violation of this "up the ladder" mandate can result in professional discipline, such as a private admonition, or even disbarment.

E. Secondary Actor Liability Today

Even after Congress enacted the PSLRA and Sarbanes-Oxley, the Supreme Court has continued to stand by its precedent in *Central Bank*.[155] In fact, it has continuously narrowed the circumstances in which a lawyer may be held accountable for the fraud of their clients.[156] In *Stoneridge Investment Partners v. Scientific-Atlanta*, the Supreme Court reaffirmed that a private plaintiff cannot hold a secondary actor, such as a lawyer, liable by circumventing the holding of *Central Bank*. This case arose when Stoneridge alleged that Scientific-Atlanta had assisted Charter Communications in a fraudulent business scheme. [157] According to Stoneridge's complaint, Scientific-Atlanta would sell cable boxes to Charter for $20 over market price. Conversely, Charter would then overcharge Scientific-Atlanta for advertising time on its television networks. Charter charged Scientific-Atlanta the same price that Scientific-Atlanta charged them to create a "wash" transaction between the two corporations. In violation of Generally Accepted Accounting Principles, Charter then booked this fake transaction as revenue in its quarterly report. Scientific-Atlanta even provided fraudulent and backdated receipts of these transactions so that the transactions appeared legitimate.

The Court ruled that, to succeed in a private cause of action under § 10(b), the plaintiff must show that it relied on the defendant's deceptive practices.[158] A defendant's assistance in the deceptive practices of another entity is insufficient. Here, the fact that Scientific-Atlanta engaged in a fraudulent transaction with Charter, or assisted Charter with its fraudulent practice, does not rise to the level of liability under Rule 10b-5. In its opinion, the Court heavily relied on the fact that Congress rejected the opportunity to

---

[154] *Id.*
[155] Sykes, *supra* note 118.
[156] *Id.*
[157] Stoneridge Inv. Partners v. Scientific-Atlanta, 552 U.S. 148, 155 (2008).
[158] *Id.* at 159.

reinstate a private cause of action for aiding and abetting fraud.[159] While this case did not directly involve lawyer conduct, it likely extends to all secondary actors.

Further, in *Janus Capital Group, Inc. v. First Derivative Traders*, the Supreme Court narrowly construed "false statement liability" under Rule 10b-5(b).[160] The Court held that a defendant is only liable if it had "ultimate authority" over the "making" of a false statement or omission.[161] A defendant who merely assisted in preparing the false statement is a secondary actor and cannot be held liable.[162] It follows, then, that a lawyer, who ignorantly assisted their client in preparing a fraudulent statement, cannot be held liable under Rule 10b-5.

Even after the PSLRA, the Supreme Court has made it harder and harder for a private plaintiff to hold a lawyer liable for their participation in corporate fraud. However, the Court has made it clear that lawyers are not "off the hook." In *Lorenzo v. Securities & Exchange Commission*, the Supreme Court reiterated that a secondary actor may be held liable for aiding and abetting fraud.[163] But, only the SEC has this authority.[164] Today—even with the reforms adopted by the PSLRA, Sarbanes-Oxley, and the ruling in *Lorenzo*—the SEC is the only plaintiff that can truly hold lawyers accountable for aiding and abetting the fraud of their clients.

V. WHAT WE SHOULD DO TO MOVE FORWARD

The profession's focus on a regulatory patchwork for ex post facto solutions to problems that have already arisen is inadequate. Now, with a foundational understanding of the shortcomings of our profession, the ultimate question remains: what have we learned and how will we move forward? This section will address two prevailing theories on lawyer accountability, insights from highly respected lawyers and legal scholars, and my own views on how we can earn back the public's faith in our ability to be a self-regulating profession.

A. Lawyer as "Gatekeeper"

[159] *Id.* at 167.
[160] Janus Cap. Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 138 (2011).
[161] *Id.* at 142.
[162] *Id.*
[163] Lorenzo v. SEC, 139 U.S. 1094, 1103 (2019).
[164] Joel Haims, et al., *Does 'Lorenzo' Expand the Scope of Private Securities Litigation*, 261 N.Y.L.J. 105, 105–06 (2019).

In a highly controversial law review article, John C. Coffee advanced the idea that a lawyer should act as a "gatekeeper."[165] In simple terms, a gatekeeper is an independent professional who serves a vital role in protecting the interests of the client corporation and its investors.[166] Coffee suggested that a lawyer should owe a three-prong duty to their corporate client and the investing public.[167] First, a corporate lawyer should be required to certify that they have conducted a limited review of the corporation's disclosures.[168] Second, a corporate lawyer should be given the right to act independently from the board of directors when it is engaged in certain tasks—such as corporate investigations.[169] Third, a corporate lawyer should be subject to discipline for any negligence in conducting their limited review of the corporation's disclosures.[170]

Coffee argued that his first proposal, a certification requirement, would acknowledge the lawyer's role as a gatekeeper, but would have very little effect on the professional liability of the corporate lawyer.[171] Instead, he argues that the SEC should impose a "negative certification" requirement.[172] A negative certification is a requirement that the lawyer conduct a limited due diligence review of a corporation's disclosures and certify to investors that they have "no reason to believe" that the disclosure is false or misleading.[173] This requirement would ensure that a lawyer is at least minimally involved in scrutinizing their client's disclosures, but does not become overly burdensome on the lawyer or the corporation. He argued that the second proposal, independence from the board of directors, would drastically decrease the potential for conflicts of interest.[174]

Model Rule of Professional Conduct 1.13 states that the corporation is the client.[175] However, in practice, corporate lawyers have an inherent conflict of interest because the board of directors and officers control the

---

[165] John C. Coffee, *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U.L. REV. 301, 302 (2004).
[166] *Id.*
[167] *Id.* at 355.
[168] *Id.*
[169] *Id.* at 355–56.
[170] *Id.* at 356.
[171] Coffee, *supra* note 165, at 357.
[172] *Id.* at 358.
[173] *Id.*
[174] *Id.*
[175] MODEL RULES OF PRO. CONDUCT r. 1.13 (AM. BAR ASS'N 2021).

corporation.[176] If the SEC mandated independence for certain tasks, such as internal corporate investigations, the corporate lawyer would not have to answer to the Board.[177] Thus, the lawyer would be more likely to advocate for the best interest of the corporation itself, and not the board or its officers.[178]

Finally, Coffee advocates for the SEC to adopt a requirement of limited due diligence.[179] He argues that a negative certification requirement would be ineffective unless the SEC also required that a lawyer actually conduct a limited review of the corporation's disclosures.[180] Today, the SEC has already adopted standards which require an auditor to conduct a due diligence review of a corporation's financial disclosures.[181] The adoption of SOX and Section 307 seem to indicate that the SEC has the power to adopt a similar standard for securities lawyers.[182] While Coffee does not believe that a lawyer should be required to conduct a thorough investigation, he does believe that a limited review is absolutely essential to properly represent the interests of the corporation itself.

B. Demand-Side Reform

The "lawyer as gatekeeper" theory does not come without criticism.[183] As this theory of lawyer accountability has advanced, so has the concern that it would "chill" communication between the lawyer and their client.[184] If the corporate lawyer is compelled to disclose potentially adverse attorney-client communications to comply with rules of professional conduct, the corporate client may not reveal pertinent information to their lawyer for fear of prosecution.[185] Though, there has been significant debate about whether this concern should outweigh the lawyer's role in ensuring compliance with the law.

The Director of the Center for Corporate, Securities, and Financial Law at Fordham Law School, Jill E. Fisch, advocates for reforms that focus

---

[176] Coffee, *supra* note 165, at 358.
[177] *Id.* at 359.
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] Coffee, *supra* note 165, at 359.
[183] *Id.* at 361.
[184] *Id.*
[185] Maureen H. Burke, *The Duty of Confidentiality and Disclosing Corporate Misconduct*, 36 BUS. LAW. 239, 253 (1981).

on providing incentives to corporate officers and directors to seek more effective assistance from their counsel.[186] She argues that threatening corporate lawyers with civil liability will not only chill client communication, but that it is also a less effective means of preventing corporate fraud.[187]

As a preliminary matter, Ms. Fisch contends that the "up the ladder" approach adopted by the model rules of professional conduct, and Section 307 of SOX, is unclear.[188] Model Rule of Professional Conduct 1.13 requires that a lawyer, who has knowledge of their client's unlawful actions, refer such matters to the "highest authority" that can act on behalf of the corporation.[189] The comments to the rule clarify that the lawyer should only approach the board if the officers fail to respond appropriately.[190]

First, she argues that this mandate does not clearly define the scope of wrongdoing that is necessary to trigger the reporting requirement.[191] In other words, there is no guidance on when "up the ladder" reporting is or is not required. Second, a lawyer shall only report to the board of directors if the officers do not "sufficiently" respond.[192] But, Section 307 does not define what type of response is "sufficient." Finally, the SEC only has power to prescribe rules for lawyers who "practice before the commission." Thus, the SEC does not have authority to adopt rules that apply to every corporate lawyer.[193]

In addition to these application problems, Ms. Fisch highlights the practical implications that these requirements have on the practice of corporate law. In modern day corporate America, there is an increasing number of big law firms. Each of these firms are constantly battling for the business of large corporations. After all, clients choose their lawyers, and they may be fired at any time. This reality is followed with an inherent conflict of interest between the lawyer's duty to the corporation itself, and the lawyer's incentive to appease the officers of the corporation.

---

[186] Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097 (2003).

[187] *Id.* at 1101.

[188] *Id.* at 1113.

[189] MODEL RULES OF PRO. CONDUCT r. 1.13 (AM. BAR ASS'N 2021).

[190] *See* Comments to MODEL RULES OF PRO. CONDUCT r. 1.13 (AM. BAR ASS'N 2021).

[191] Fisch & Rosen, *supra* note 186, at 1113.

[192] *Id.* at 1114.

[193] *Id.*

This incentive applies with equal force to the individual lawyer. A lawyer's success is gauged by how much business they generate. Additionally, a potential partnership hinges on this metric. It is not a surprise then, that a lawyer may ignore their client's borderline—or not so borderline—misconduct to protect their own career. While Section 307, Model Rule of Professional Conduct 1.2, and Model Rule of Professional Conduct 1.13 attempt to de-incentivize individual lawyers, it may be necessary to incentivize corporate officers to act within the law as well.

While there is theoretical merit to this argument, its flaws have become clear as more and more corporate fraud has been discovered. Even though these propositions may be effective, there is a more obvious first step forward.

C. The Best Step Forward

While I do not claim to have a better answer to these questions than widely regarded legal scholars, I do believe that there are three common-sense reforms that the profession could adopt today: Coffee's limited due diligence requirement, increased professional responsibility enforcement, and education.

Few professions are as highly trusted as the legal profession. Yet, attorneys often accept their client's statements in blind faith. Requiring a lawyer to conduct a brief investigation into the statements of their client, before affirming their actions, would make the lawyer's representation more effective and would do little to "chill" client communication. Further, holding the lawyer accountable for their "willful blindness" would deter future misconduct and reinforce the public's faith in our profession. Finally, using past cases of lawyer misconduct and continuing legal education platforms to educate young law students would emphasize the ease with which one can fall into this trap if they are not careful and vigilant. While these ideas will not eradicate lawyer misconduct, it is a simple, inexpensive, and effective first step forward.

1. The Limited Due Diligence Requirement

The first step that the profession could implement would be to impose a limited due diligence and negative certification requirement on all lawyers. This new rule would require a lawyer—after a brief investigation—to publicly assert that they have "no reason to believe" that their client is violating the law. This move should not be controversial because, under Model Rule 1.1, a lawyer is already required to be competent in their

representation of the client.[194] Competent representation is not possible without a base-level knowledge of the client's business dealings. This new certification requirement would ensure that a lawyer remains up to date on the client's business but would not go as far as requiring expert knowledge of complex financial transactions. Most importantly, a lawyer could no longer remain willfully blind to the obvious misconduct of their clients. If a limited due diligence and negative certification requirement were in place before frauds like Wells Fargo and PCI, maybe the highly respected lawyers involved would have discovered these billion-dollar problems sooner.

The concept of "willful blindness" has been explored by many in the legal profession. It has been defined as "deliberate ignorance," "conscious avoidance," and "purposeful closing of the eyes."[195] It is a concept that has been discussed as early as mid-nineteenth century England in *Regina v. Sleep* and as recently as a jury instruction in modern-day felony trials.[196] While there is ample debate about whether to apply this principle in a felony jury trial, one thing should be clear: the legal profession would benefit if it imposed a penalty against willful blindness in the attorney-client relationship. We could accomplish this goal by requiring lawyers to have a base-level knowledge of their client's business practices, and by imposing harsher professional responsibility penalties on those who violate it.

2. Increased Professional Responsibility Enforcement

To adequately enforce this limited due diligence requirement, the legal profession and individual state ethics boards would have to impose harsher penalties for willful blindness. They could accomplish this task by universally adopting a limited due diligence requirement, a rule of professional conduct such as MRPC 1.13, and issuing more condemnations for lawyer misconduct.

For example, imagine a scenario where a toddler throws a tantrum. The parent has three choices: (1) ignore the tantrum and do nothing, (2) address the tantrum by giving in to the toddler's demands, or (3) address the tantrum and discipline the child. If you ignore the tantrum, the toddler will never learn and may even exhibit bad behavior for other children. If you reward the tantrum, by giving into the demands, the child will always throw

---

[194] MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2021).
[195] Henry "Hank" J. Shea, *Beware the Perils of Willful Blindness* (2010).
[196] *Id.*

a tantrum to obtain whatever it is they desire. But, if you discipline the child for throwing the tantrum, the tantrums will eventually cease, and other children will be deterred for fear of discipline.

This is the same in a corporate context. If a lawyer exhibits fraudulent or other misconduct, the legal profession has three choices: (1) ignore the misconduct, (2) "slap" the lawyer on the wrist for their misconduct, or (3) impose severe discipline that will deter future misconduct from that lawyer and others. Each time we ignore the misconduct, it is more likely that lawyers will inch closer to the line of fraud to maximize the value they can bring to their client. If we impose insignificant discipline, the lawyer might feel that they "got away with it" and the monetary return from their conduct outweighs the risk of discipline. Finally, if we impose severe penalties on lawyers that shirk their duties or assist their client's fraud, that lawyer, and all others, will be far less likely to commit overt acts of fraud because the return no longer outweighs the risk.

While I do not advocate for a punitive disciplinary system, the profession needs to address the scourge of lawyer misconduct in corporate settings. This is but one method of addressing that problem. In our age of mass media and free flow of information, the public may never regain their trust in our profession if we do not act soon.

3. Education

While legislative and professional responsibility reforms are often debated as the best tool to address lawyer accountability, there is another effective means that could be immediately implemented: education. From day one of law school, future lawyers are taught about some of the most egregious acts of misconduct committed by other legal professionals. These examples include scandals like Enron, where lawyers were at the helm of the fraudulent activity. However, as scandals like Wells Fargo and Petters Group Worldwide have shown, most legal misconduct occurs in the "gray zone." The competitive culture of law firms and corporations can encourage young lawyers to commit unethical acts. It is imperative that we, as a profession, educate aspiring lawyers about the potential perils of real-life legal practice through law school classes and life lessons from those who have made these very same mistakes. Similarly, as young law students, we must learn to recognize the red flags that lead us down the road of deceit and misconduct.

In his oft-cited law review article, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*[197], now-Judge Patrick J. Schiltz illuminated how young lawyers are unwittingly drawn into the unending cycle of misconduct.[198] He begins by describing the every-day life of a first-year associate at a big law firm. Between the stresses of learning a new profession, a new culture, and meeting seemingly unattainable billable-hour requirements, young associates feel pressured to "puff" their billable hours. He emphasizes that the associate will not blatantly forge these hours but will simply borrow them from the next week or month. While this action seems innocent, it inevitably leads the young lawyer to commit another small step down the path of misconduct. And each subsequent step will become easier and easier.

While Judge Schiltz's article focuses on the daily life of a law firm associate, the same perils are faced by corporate and in-house lawyers. When a corporate officer or director expects a certain result, the young in-house lawyer will feel pressure to comply even if the action seems unethical. And, like the lawyer described above, each subsequent unethical action becomes more and more likely.

These ethical traps are not limited to private lawyers with a thirst for wealth. Often, they happen to ordinary people just like each of us. Through his teaching at the University of St. Thomas School of Law and the University of Arizona, Professor Hank Shea has forged a curriculum that focuses on learning from the mistakes of others. As a former federal prosecutor, Professor Shea often invites convicted felons, most of whom he prosecuted, to talk with young law students about their past mistakes.[199] After planning many of these presentations, Professor Shea has distilled his list of lessons down to ten main points.[200] Included in this list of lessons is: avoiding the first intentional step of misconduct, never trying to bury your mistakes by committing more mistakes, leading by example no matter how junior you

---

[197] Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 907–10 (1999).

[198] The Honorable Patrick J. Schiltz is now a District Court Judge for the District of Minnesota.

[199] Professor Henry "Hank" J. Shea was a prosecutor with the United States Attorney's Office in Minneapolis. He is now a part-time professor of law at the University of St. Thomas School of Law and the University of Arizona Law School.

[200] Henry "Hank" J. Shea, *Top 10 List: Lessons Learned from White-Collar Criminals*, ST. THOMAS LAWYER 1 (Winter 2008).

are, and always acting with integrity, exhibiting courage, and doing the right thing no matter the consequences.[201] These presentations and lessons have proven to be just as valuable to the past-offenders and their restoration as they have been to educating the minds of young lawyers. These cost-free educational presentations are just one step the profession could take to prevent lawyers from committing the same misdeeds as Enron, Wells Fargo, and Petters Group Worldwide.

VI. CONCLUSION

If the legal profession had adopted a due diligence requirement, scandals like those described above may not have occurred. If the legal profession seriously enforced its own rules of professional conduct, the lawyers involved in these scandals would not have escaped all forms of liability. If the legal profession educated its young law students about the perils of legal practice, it would avoid the constant scrutiny of Congress and the American people following every major corporate scandal in the past, present, and future.

There are many lessons that can be learned from scandals like Enron, Petters Group Worldwide, and Wells Fargo, but none is more apparent than the notion that anyone could fall victim to the allures and pressures of greed—even us lawyers. But hope is not out-of-reach. If we finally live up to our moral mandate, if we finally hold one another accountable, and if we finally grapple with our ugly past of misconduct, fraud, and inadequate enforcement of our own rules of professional conduct—we may finally reach our desired destination. We may finally answer the ultimate question of "when are we going to learn?" We are going to learn early, we are going to learn often, and we are going to learn together.

---

[201] *Id.*