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Cover Page Footnote
Stuyvesant Comfort Professor of Law, New York University Law School. Many of the ideas in this paper were developed in conversations and joint work with Professor William Allen, to whom I express grateful thanks. I also thank Stephen Gillers for helpful comments.

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FROM CLUB TO MARKET: THE EVOLVING ROLE OF BUSINESS LAWYERS

*Geoffrey Miller**

INTRODUCTION

The Enron fiasco, along with other major corporate frauds and scandals of the past few years—WorldCom, Adelphia, Global Crossing, and HealthSouth come to mind—dramatically illustrates a longstanding issue about the role of business lawyers. To what extent can (or should) attorneys act as the "conscience" of their clients and guide them away from decisions that, while perhaps legally defensible, nevertheless raise questions about their propriety? In theory, the answer to this question has long been clear-cut. The American Bar Association's ("ABA's") Model Code of Professional Conduct enshrined the goal of representing a client "zealously" while remaining within the "bounds of the law" as one of the basic canons of lawyers' ethics.[1] How to carry out that obligation has been reasonably well understood at a more operational level as well. For example, the following propositions appear to enjoy consensus as descriptions of the attorney's professional responsibility (although some would advocate reforms to alter this basic pattern):[2]

1. The attorney's responsibility is to provide the client, on request, with information about the probable legal consequences of potential actions, and to do so with a reasonable degree of professional competence.

2. Unless the parties agree otherwise, the attorney is not responsible for advising the client as to business (as opposed to legal) considerations.

3. If requested by the client, the attorney can recommend legally appropriate means for structuring transactions in order to serve the client's legitimate objectives (which can include minimizing regulatory burdens, reducing taxes, or enhancing the client's public image).

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1. Model Code of Prof'l Responsibility Canon 7 (1980).

2. *See, e.g.*, William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083 (1988) (recommending that, in representing clients, attorneys exercise discretion to promote justice, even when doing so is in tension with the client's wishes or interests).

4. An attorney may assist a client in carrying out a course of action that skirts the edge of the permissible, so long as the attorney believes in good faith that the action is, in fact, legally valid and that the client has adequate awareness of the legal risks.

5. An attorney may not counsel or advise a client to commit fraud or otherwise act illegally, and may not assist the client in perpetuating a fraud or other violation of law.

6. When the client is an institution (such as a corporation), the attorney's obligations run to the institution as a whole, as embodied in its board of directors, and not to its senior managers in their personal capacities.

In general the principles listed above provide a framework that has proven relatively durable over time, and that—so far at least—has withstood the firestorm of criticism generated by Enron and similar scandals. Even the Securities and Exchange Commission ("SEC"), which, post-Enron, suffered withering criticism for alleged regulatory laxness, has retreated from using "noisy withdrawal" provisions[3] to insert the attorney into a complex, quasi-adversarial role towards any client the attorney believes has violated federal securities laws. It is probable that, when the dust of the current scandals settles, business lawyers' ethical obligations will not be radically different from what they were before. This does not mean that constructive reforms cannot be devised to correct shortcomings in the regulatory system. But before such reforms are implemented, it is important that we understand the problem and the dynamic forces that may have contributed to bringing it about.

This paper attempts to shed some light on why the gatekeeper function—that is, the role of independent attorneys in protecting the public against corporate malfeasance—seems to have broken down in several recent cases. The cause was not a sudden degeneration in the personal morality of business lawyers. Instead, the problems that have come to light over the past few years—to the extent that they are exceptional in light of historical experience—are the product of large-scale economic developments that profoundly influenced the environment within which these lawyers practiced. The paper focuses on two developments: (1) a far-reaching change in the economic organization of the legal profession from a "club" system to a competitive one, and (2) the unusual macroeconomic environment of the mid and late 1990s, exemplified by the stock market bubble which peaked at the beginning of the current century. These developments pressured attorneys to push the envelope of propriety when requested to do so by their clients. In light of these pressures, what is surprising is not that so many attorneys played a role in large-scale corporate scandals, but that so few did so.

3. *See infra* Part IV.B. These provisions were proposed pursuant to the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (to be codified in scattered sections of 11, 15, 18, 28, 29 U.S.C.).

Moving from descriptive to normative analysis, this paper asks whether, in light of this economic analysis, the system regulating the activities of attorneys and other gatekeepers should be revised to combat the risk of inappropriate behavior. To the extent that the problems were due to the stock market bubble and related economic conditions, reforms are unnecessary because this unusual economic climate is unlikely to recur anytime soon. Indeed, "reforms" may already have taken place in the form of basic changes in the norms of legal practice. Additional actions could be counterproductive if they impose too many constraints on the conduct of attorneys in the absence of the economic conditions that generated the problematic behaviors.

On the other hand, to the extent that the shift from club to competitive organization in the legal services sector caused these problems, reform is still needed, because the changes in organization are not a transient phenomenon. This Essay does not recommend a return to the club system, with all its coziness, exclusivity, and inefficiency. Like it or not, professional service providers operate in a competitive environment and will continue to do so. I do believe, however, that reforms might provide a useful corrective to the risk of inappropriate behavior that the move to a more competitive environment has created. The final section of this Essay discusses several of these suggestions.

I. THE SOCIAL ROLE OF BUSINESS LAWYERS

Ronald Gilson's influential paper, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, outlines an optimistic theory of the role of attorneys as transaction cost engineers.[4] In this view, business attorneys enhance the wealth of society as a whole when they serve the economic interests of their clients. Lawyers accomplish this by identifying arrangements that maximize the value of their clients' transactions.[5] For example, suppose that in a contract for sale the question arises as to who should bear the risk of loss between contract and closing. The traditional understanding of a lawyer's role in this situation is that the attorney either allowed the clients to negotiate the terms and merely embodied the agreement in legal form—the "scrivener" function—or the attorney negotiated for the client by attempting to win every deal point, thus often ruining the whole transaction. Gilson argues, however, that when attorneys negotiate a matter, they can perform a third, more valuable function: They can help clients allocate the costs and benefits of a transaction to the party who will make the best economic use of them, thus creating mutual benefits for all parties to the agreement.[6] The attorneys in the above example might conclude, for example, that the seller's existing insurance policy can cover

4. Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 Yale L.J. 239 (1984).
5. *See id.* at 249-56.
6. *See id.* at 255.

the risk of loss most cheaply for all concerned, and thus agree to impose the risk of loss on the seller with an appropriate adjustment of the sales price to reflect this allocation.

Gilson's picture of the social value of business lawyers applies best to negotiations between two parties with relatively equal bargaining power and sophistication. The picture has less force, however, when these conditions are relaxed. Two settings are especially problematic.

Negotiations with the Government. Suppose the transaction in question is not between two individuals, but between one person and the public as a whole. For example, in the absence of environmental regulation, companies would be tempted to discharge pollutants into the air or water, knowing that others will have to pay the cleanup costs. Attorneys who help a company engage in such pollution (for example, by negotiating the purchase of plant and equipment for the polluting facility) are not adding to the welfare of society by minimizing transaction costs; instead, they are reducing social welfare by taking advantage of the high transaction costs that allow the factory to pollute in the first place. Gilson's transaction cost engineer model of business lawyers has little relevance in this setting.

However, we do not simply allow businesses to pollute. We have environmental laws and agencies to counteract their incentive to spoil the environment in order to increase profits. Once laws and agencies with enforcement powers enter the picture, Gilson's model has more force than when the transaction is between corporate managers and a disorganized group such as the public at large.

But Gilson's theory is still an unsatisfactory description of the behavior of attorneys in this setting, even when legal regulation is included in the model. The dynamics and underlying premises of action are different than the one-on-one private bargaining for mutual advantage that forms the centerpiece of Gilson's theory. Among the most salient differences are the following.

First, while in a private bargaining situation everything is subject to negotiation, in the context of legal compliance, the baseline of applicable law is fixed in the short to medium term. The government agency is required to enforce the law, even if the agency's personnel believe that the requirement is unwise or impractical. If Congress tells the Environmental Protection Agency ("EPA") that it must meet environmental goals by a certain date, the EPA must attempt to achieve that objective even if doing so imposes onerous burdens on the economy or creates collateral environmental harms. Conversely, the government may be powerless against parties whose conduct constitutes a clear breach of the spirit of a law, so long as technical compliance is present. It is true that constructive violations can be tracked down and punished (e.g., the step transaction and business purpose rules in tax law),[7] but these filters do not deter all socially undesirable behaviors that are in technical compliance with the law.

7. *See, e.g.*, Gregory v. Helvering, 293 U.S. 465 (1935).

The incentives of government agents also differ in important respects from those influencing private parties. Government agents may act as effective representatives of their offices, but they typically do so for reasons other than financial gain—pride in work or belief in the agency's mission may substitute for a desire to accumulate wealth. It is clear that the incentive structure for government agents is different than that of agents in the private sector, and this difference may influence the dynamics and outcomes of negotiations between private agents and the government.

A third difference between government enforcement and private bargaining is that governments usually lack the resources to negotiate each transaction individually. A great deal of enforcement is voluntary, in the sense that citizens are asked to comply with the law without facing particularized scrutiny of their performance. Only a small percentage of tax returns get audited. The EPA does not have the ability to send inspectors to every factory and job site to check emissions levels. In these and many other settings, citizens can break the law with little fear of detection. On the other hand, while the government's resources are stretched thinner, it does have a more effective arsenal of enforcement techniques to punish noncompliance. Private parties do not have the ability to impose fines on defaulting counterparties—indeed, liquidated damages clauses will be invalidated if found to constitute a penalty. Jail time is not a consequence of a private party's breach, even when fraud is present.

Agency Costs of Management. The simple version of Gilson's model of attorneys as transaction cost engineers also does not take account of the agency cost problem within firms. Business lawyers typically do not represent individuals in a formal sense. Most often, they represent organizations, such as corporations, that have a fictional legal personality. Yet they are hired by and must answer to human representatives of these fictional persons. These representatives are not necessarily good agents of the companies they serve. Like everyone else, corporate executives might prefer to serve their own interests, including their desire to maximize their own compensation at shareholder expense. Even if the attorney knows or suspects that corporate officers are acting in a self-serving way, he or she may elect to ignore this inconvenient fact. Because the basic executive decisions—including the decisions to hire and fire counsel—are usually made by corporate managers, the attorney will not necessarily abide by the admonition that his or her duties run to the organization rather than its officers. Because of this, if business lawyers respond atavistically to the demands of corporate executives, they will not necessarily be serving the best interests of their clients. On the contrary, they could exacerbate agency problems, increase rather than decrease transactions costs, raise the firm's cost of capital, and facilitate business decisions by the firm that are not consonant with social welfare.

* * *

These problems mean that business lawyers in compliance and fiduciary duty settings may not maximize value for clients through transaction cost engineering to the same degree as would lawyers in bilateral contract negotiations between sophisticated parties. Lawyers representing private clients in relations with the government or with corporate shareholders may engage in any or all of the following types of behavior, only some of which is socially beneficial.

1. The lawyer can find a way to conserve the client's resources while still fully complying with the letter and spirit of an efficient law. In such cases, the value creation function is similar to that which Gilson posits for lawyers in the private sphere.

2. The lawyer can facilitate avoidance by the client of either the letter or spirit of the law, but the law itself is economically inefficient. Here, the lawyer has contributed (arguably) to value creation in Gilson's sense, but does so at the cost of subverting other values (e.g., respect for and compliance with laws) which we are likely to view as important.

3. The lawyer can facilitate avoidance by the client of either the letter or spirit of the law, and the law is economically efficient. Here, the lawyer's services have been used to advance the client's interests, but at the expense of society as a whole. Even from an economic point of view, the lawyer has engaged in value destruction rather than value creation. Some of the behavior by attorneys in recent corporate scandals may fall into this category.

4. The lawyer can serve the interests of corporate managers but does so in a way that is detrimental to the long-range best interests of the corporation. Here, again, the attorney has engaged in value destruction rather than value creation. Some of the conduct by corporate attorneys in recent corporate scandals also appears to fall into this category.

II. THE CHANGING CONDITIONS OF CORPORATE PRACTICE

The analysis so far suggests that attorneys representing corporate clients in the contexts of corporate governance and legal compliance will not always be subject to an effective check, and that, as a consequence, society is at risk that the lawyer's services will be value-destroying rather than value-creating. How should this risk be handled? A traditional answer is that lawyer independence will substitute for the lack of private controls. While the lawyer must be a faithful agent and zealous advocate, he is always required to exercise independence of judgment and action. The attorney's autonomy goes beyond merely recommending the best way to achieve the client's goals. The attorney must also preserve a professional distance from the client and eschew actions that cross over the line. To avoid even the "appearance of impropriety,"[8] the attorney may remonstrate with a client bent on questionable conduct, or, if the client persists, may (and in some cases must) withdraw from the representation.[9] If all attorneys actually exercised this degree of independence, the problems identified above would be mitigated. A client who wanted to cross the line would encounter an independent attorney obstinately blocking the path. And although the client could dispense with that attorney, doing so would be costly and any other qualified attorney would also refuse to sanction client misconduct.

Lawyer independence, however, is effective at checking client misconduct only if lawyers *actually* act independently. Underlying much of the contemporary misgivings, both among lawyers and in popular consciousness, is the concern that obligations of independence are too often honored in the breach. Critics believe that, however loudly attorneys may tout their independence, at the end of the day, money talks. Associated with this cynical view of attorney ethics is the nostalgic view that the problem of attorney venality is worse today than in times past. These critics believe that, at one time, professional norms significantly impacted lawyer behavior. However, today, such norms no longer protect against attorneys who are all too willing to compromise their integrity in order to curry favor with important clients.

To what extent is this perception justified? It is commonplace for individuals, as they grow older, to bemoan a perceived breakdown in standards. It is easy to forget that attorneys in the past have not always been paragons of virtue. Recall, in recent history, the Operation Greylord investigation in Chicago that disclosed massive corruption in the Cook County, Illinois, court system, or the Watergate scandal in which many of the villains were also members of the bar. Attorneys have been in bad odor with the public for hundreds of years and have often been seen as distressingly ready to sacrifice principle for avarice. But it is also possible that social conditions have changed in a way that makes independent lawyer behavior less likely today. This section explores that question.

A. *From Club to Competition*

If lawyers are less independent today than in the past, part of the reason may lie in a fundamental change in the organization of the legal profession. Gradually and fitfully, but unmistakably, the legal profession has shifted from a "club" style of organization to one dominated by competitive forces—a "free market" paradigm. As with any broad thesis about economic history, this one requires qualification at the outset. "Club organization" and "competitive organization" are not exclusive characteristics. At any given time, the legal profession may display both

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8. *See* Model Code of Prof'l Responsibility Canon 9 (1980) ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety").

9. *See* Model Rules of Prof'l Conduct R. 1.16 (2002).

club and competitive features. Competition was present in the bar even when club organization was dominant, and many features of club organization persist today even in an environment characterized by competition among service providers.

The club form of professional organization displays the following general features. First, the profession is exclusive, with significant barriers to entry into membership. Second, members often maintain associations with one another and with clients outside the context of their roles as professional service providers. Third, competition among service providers, when it occurs, is constrained by norms of politeness and courtesy. Fourth, there is little lateral mobility within the profession; people join firms and remain there absent unusual circumstances. Finally, relations between service providers and clients tend to be stable and long-lasting and are based on institutional history rather than the personal relationships of dominant individuals.

Looking back to the legal profession circa 1950, it is easy to see features of club organization.[10] Membership in the bar required graduation from college and law school, passage of the bar examination, and approval by the relevant committee on character and fitness. Family connections were often a ticket into a good college, and graduation from a good college was a significant factor improving chances for admission to a top law school. To get set up in a firm, it paid to know someone who could introduce you, and to obtain clients, it was desirable to have personal connections. Lawyers in a community would be members of the same country clubs and civic organizations as the business leaders, and they would socialize together in all sorts of different settings. Almost all elite attorneys—and almost all senior managers of corporate clients—were men of European backgrounds.[11] Jews could and did practice law, but tended to do so in firms characterized by ethnicity; "white shoe" firms had few Jews, no women, and no African-Americans.

At the same time, competition among lawyers, while inevitably present, was not emphasized as a professional value. On the contrary, it was generally disapproved, at least as a guiding principle for action. Lawyers who were too competitive would be stigmatized. Stealing another lawyer's clients violated strong norms of professional courtesy, and any lawyer who developed a reputation for poaching clients faced sanction from colleagues. Solicitation or advertising of any sort was prohibited. In the case of services to individuals and small firms, the constraints on competition were even more overt. Many bar associations imposed "minimum fee

10. For sociological accounts and historical discussion of one important bar, see John P. Heinz & Edward O. Laumann, Chicago Lawyers: The Social Structure of the Bar (1982); John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 Law & Soc'y Rev. 751 (1998).

11. *See* Richard L. Abel, American Lawyers 99 (1989). Even as late as 1989, a survey of large law firms found that over ninety percent of the partners were men and more than ninety-eight percent were white. Rita Henley Jensen, *Minorities Didn't Share in Firm Growth*, Nat'l L.J., Feb. 19, 1990, at 1.

schedules," which were nothing other than cartel prices backed by the threat of penalties for undercutting the prescribed tariff.

The club style of organization was also characterized by limitations on job mobility. An attorney who joined a large corporate firm would generally expect—or at least hope—to spend his entire professional life there. Movement by senior attorneys between firms was unexpected, even remarkable, and, perhaps, a source of concern about that attorney's stability or reliability. Junior attorneys who joined as associates would not be assured of becoming partners, but the expectation was that, if someone performed well, partnership would be the reward. Those deemed unworthy of elevation were also protected. Someone passed over for partnership could remain at the firm while seeking a new position, and could sometimes swallow his pride and accept a role as a "permanent associate" doing blue-sky or other work. Unsuccessful partner candidates would be out placed, frequently into the offices of the in-house counsel of major clients.

Associated with this lack of mobility among attorneys was a stable structure of attorney-client relationships. Major corporations would keep one law firm as their outside counsel for years. The relationship between the corporation and the law firm was cemented by personal bonds between senior managers and partners. Those bonds were further reinforced over time as junior executives and associate attorneys who came to know one another in their subordinate capacities were promoted to positions of authority. Sometimes, the law firm would take office space in the client's headquarters. Senior lawyers from the firm might serve on the client's board of directors. The firm would also frequently do the personal legal work of the senior executives of major clients. Some attorney-client relationships during this period were legendary: Shearman & Sterling, for example, was strongly identified in the public eye as Citibank's outside counsel.

The features of the club form of organization tend to be self-reinforcing. Social connections among attorneys, and between attorneys and clients, perpetuated exclusivity in the bar, while the profits guaranteed by such exclusivity made pursuing such social connections a priority for any ambitious attorney. Norms against advertising, solicitation and client poaching gave durability to firms, because once a firm's reputation and client base were established, other firms could not easily compete for these benefits. Low lateral mobility of attorneys at elite firms tended to solidify longstanding firm-client relationships, because attorneys would not leave and take clients with them. At the same time, long-standing relationships tended to discourage mobility, because no one attorney was likely to "own" a major account. Outplacement of failed partnership candidates at corporate counsel's office reinforced connections between firms and clients, as did the concessionary provision of personal legal services. Barriers to entry in the bar facilitated anticompetitive rules, such as minimum fee schedules and norms against client poaching, while the presence of such practices made barriers to entry valuable assets that attorneys wished to maintain. Long-standing relationships between attorneys and clients also tended to be self-reinforcing: The mere fact that a relationship had been in place for so long enhanced its stability, since a breach of relations between a firm and a client would raise serious questions about both and also be painful to the individuals involved. These self-reinforcing qualities help explain the club form's durability and far-reaching effects.[12]

A comparison between the characteristics of elite legal representation in the 1950s and the situation today illustrates a dramatic contrast in nearly all of the elements identified above. The practice of law evolved from a club form of organization to a competitive form. In consequence, law has increasingly become a "buyer's market" in which clients call the shots.[13]

Consider the barriers to entering the legal profession. It remains true that, to gain admission to a bar, a candidate must graduate from college and law school, pass the bar examination, and be approved by the character and fitness committee. These constraints, however, are much easier to satisfy than they were in the past. Law schools have proliferated and existing law schools have increased enrollments, spewing tens of thousands of additional attorney candidates into the bar admission system each year.[14] Character and fitness review, never very significant except as a filter to screen out undesirable characters such as communists and felons, has become little more than a ritual of initiation in which the chance of failure is about as high as that facing a bar mitzvah boy. The bar examination continues to operate as a screen, but if a person is persistent, he is likely to pass eventually, and, if he does not succeed in one state, he can always move somewhere with a higher passage rate. Overall, barriers to entry into legal practice have become less significant over time.

12. Although outside the scope of this Essay, other professions, and to some extent industry generally, exhibited features of club organization during this time. For example, the securities industry operated with fixed brokerage commissions until 1975. Real estate brokers maintained fixed commissions as well. Professional organizations other than the organized bar promoted norms of professional courtesy and discouraged advertising, solicitation, and poaching. Even outside the professional service industries, the horror of "ruinous competition" pervaded American industry. Cartels, price matching in oligopolistic markets, and government restraints on price competition were common. Insurance operated with explicit cartels until 1945, *see* Jonathan R. Macey & Geoffrey P. Miller, Costly Policies: State Regulation and Antitrust Exemption in Insurance Markets (1993), while banks enlisted the government to prohibit price competition for deposits, *see* Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 Stan. L. Rev. 1 (1977). The club form of organization in other industries also reinforced the overall system—if clients were characterized by club organization, they would also display features such as low mobility of personnel that could give durability to relationships with service providers. Thus, the phenomenon of club organization appears to be a relatively far-reaching feature of economic organization during the period in question.

13. F. Leary Davis, *Back to the Future: The Buyer's Market and the Need for Law Firm Leadership, Creativity and Innovation*, 16 Campbell L. Rev. 147, 148 (1994).

14. *Id.* at 152.

The reduced barriers to entry are reflected in bar admission statistics.[15] After a brief rise following World War II, the rate of new bar admissions remained stable at 8000 to 10,000 a year until the mid-1960s. Admissions then began to rise modestly, reaching just over 15,000 per year in 1971. In 1972, admissions rose sharply to over 20,000. The trend continued, and yearly admissions exceeded 30,000 in 1979. During the 1980s, new admissions averaged about 30,000 a year, but because the cohorts of young attorneys entering the profession were larger than the cohorts that were leaving, the attorney population continued to rise. Thus, the number of attorneys in the economy has soared, both in absolute terms and as a percentage of the population.[16] Increases in the number of attorneys may translate into enhanced competition in the bar.[17]

These increases in the attorney population tell only part of the story. The ability of attorneys to maintain the exclusivity of the franchise through the enforcement of unauthorized practice restrictions is also increasingly suspect. Non-attorneys are performing tasks previously monopolized by lawyers, and even computers can do some of the work.[18] The prospect of

15. *See* Clara N. Carson, The Lawyer Statistical Report: The U.S. Legal Profession in 1995 (1999).

16. This is illustrated in the following table:

U.S. Lawyer Population and Population/Lawyer Ratio in Selected Years

Year	Number of Lawyers	Lawyer/Population Ratio
1951	221,605	1/695
1960	285,933	1/627
1971	355,242	1/572
1980	542,205	1/418
1985	655,191	1/360
1988	723,189	1/340
1991	805,872	1/313
1995	857,931	1/303
2000	1,066,328	1/264

Id. at 1-2.

17. The demand side must be considered along with the supply side to establish this relationship with certainty. While the number of attorneys has grown, both in absolute terms and relative to population, so has the demand for legal services. Government regulation has increased for many business sectors. There is also a perception that plaintiffs' attorneys have become more active, better financed, and more sophisticated, and that trial lawyers have exercised political influence to obtain changes in liability regimes that generate increases in litigation exposure for large corporations. Whatever the cause, the data does substantiate significant increases in demand. Robert L. Nelson reports that "[b]etween 1977 and 1989, revenues devoted to legal services increased by some 480%"—a rate of expansion more than twice that of gross national product (which expanded by 260%), and greater even than health care (which grew by 370%). Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 Case W. Res. L. Rev. 345, 345 (1994). While the supply of attorneys is not going to shrink over the medium term, the demand for attorney services could easily do so as a result of fluctuations in market conditions or the business cycle.

18. *See* Herbert M. Kritzer, *The Future Role of "Law Workers": Rethinking the Forms of Legal Practice and the Scope of Legal Education*, 44 Ariz. L. Rev. 917 (2002); Herbert

multidisciplinary practice groups also poses a threat, as evidenced by the ABA's repudiation of the concept as a general model for American legal practice.[19]

Demographic changes have also dramatically altered the practice of law. Women now represent close to half of all new attorneys,[20] and as time passes, their representation in the bar as a whole should also grow to about fifty percent. African-American and Latino/Latina attorneys are entering the bar in substantial numbers.[21] Even though new lawyers still tend to come from relatively privileged backgrounds,[22] the era of the old-boy network, the country club connection, and the white shoe firm, if not eclipsed, is certainly fading.[23] The personal connections that once maintained the club system have given way to a varied, shifting, multifaceted pattern of relationships. Connections as a means for entry, acceptance, and advancement are not gone, of course, and probably will never disappear, but the exclusivity of the old system has been supplanted by a different, more flexible, and more open environment.

Legal constraints on competition in the market for legal services have also eroded. The old system of minimum fee schedules received its *quietus* in 1975, when the U.S. Supreme Court declared that such arrangements, if not required by state law, amounted to price fixing in violation of the Sherman Act.[24] The Court also took on restraints on attorney marketing. Restrictions on truthful attorney advertising are today generally outlawed as violations of the First Amendment if they significantly restrict commercial speech.[25] Even direct solicitation of clients is permitted if done for ideological rather than commercial purposes.[26] These changes in legal

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M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 Law & Soc'y Rev. 713 (1999).

19. *See generally* Charles W. Wolfram, *Comparative Multi-Disciplinary Practice of Law: Paths Taken and Not Taken*, 52 Case W. Res. L. Rev. 961 (2002).

20. *See* Ronit Dinovitzer et al., After the JD: First Results of a National Study of Legal Careers 19 (2004) (finding that forty-six percent of new attorneys are women).

21. *See id.* (finding that seventeen percent of new lawyers in survey were non-White).

22. *See id.* at 20 (finding that sixty-nine percent of new lawyers' fathers were managers or professionals, as compared with twenty percent in the general workforce).

23. *See id.* (reporting that Protestants no longer dominate the practice of corporate law as they once did).

24. *See* Goldfarb v. Va. State Bar, 421 U.S. 773 (1975).

25. *See, e.g.*, Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990) (plurality opinion); Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985); *In re* R.M.J., 455 U.S. 191 (1982); Bates v. State Bar of Az., 433 U.S. 350 (1977). *But see* Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (upholding a Florida Bar rule that prohibited personal injury lawyers from sending direct-mail solicitations targeted to victims and their relatives within thirty days of an accident).

26. *See* Edenfield v. Fane, 507 U.S. 761 (1993) (permitting in-person solicitation by accountants); *In re* Primus, 436 U.S. 412 (1978). *But see* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (holding that the state could sanction an attorney's "ambulance chasing" solicitation of vulnerable clients for financial gain).

doctrine have probably worked to increase competition in the market for legal services.[27]

Associated with these developments are perceived changes in the internal norms of the profession. The rule against poaching clients appears moribund today; any large firm is willing to offer its services to a desirable account, even if the client is known to be currently represented by another law firm. Many believe that professional courtesy has deteriorated in other respects as well. The bar, it is said, is plagued by an epidemic of incivility. Attorneys wait only for the judge to leave the courtroom before launching verbal assaults at one another or at the opposing counsel's client,[28] and litigation tactics appear calculated as much to impose inconvenience on the adversary as to advance the client's legal position in court.

Restraints on mobility have also become less binding. Today, it is not uncommon for attorneys to move from firm to firm several times during a career.[29] Frequently, when attorneys move, they take significant clients with them. Indeed, client portability is usually the reason such moves are feasible. And because bringing the client along is often the *sine qua non*, it is not unusual to find whole practice groups jumping ship. Often, too, the mobility takes the form of a whole-firm merger in which established firms are swallowed up by leviathans such as Skadden, Arps or Baker & McKenzie in the United States, or Freshfields or Lovells in the U.K. Sometimes mobility is the product of a firm's demise. Brobeck, Phleger & Harrison's closure in 2003, and the ensuing exodus of Brobeck attorneys to other firms, was only a recent example of a series of similar events in the past few years.

Loyalty between law firms and their longstanding clients has also faded. Whereas major clients would once have been content to use a single law firm for all important legal matters, today clients tend to diversify their portfolio of service providers. Most major companies have significant in-house legal offices which can perform sophisticated work to control costs and monitor the quality of services performed. When outside counsel is used, a large client is likely to diversify by using different firms for specialized services, such as regulatory work, tax planning, and litigation.[30] Large clients, moreover, have become more price-sensitive and may not hesitate to question bills or negotiate favorable retainer agreements. Contingency fees have become, if not common, at least an accepted part of

27. *See* Abel, *supra* note 11, at 121-22 (concluding that these changes did not reduce the price of legal services).

28. *See, e.g.*, *In re* The Discipline of Eicher, 661 N.W.2d 354, 358 (S.D. 2003) (noting that the attorney characterized the opposing client as "despicable" and "shockingly greedy").

29. For example, approximately a third of the attorneys who graduated from law school in 2000 had changed jobs at least once within four years. *See* Dinovitzer, *supra* note 20, at 53.

30. *See* Davis, *supra* note 13, at 164 (noting that in-house counsel increasingly seeks transactional rather than general assistance from outside law firms).

commercial representation;[31] such fees facilitate competitive bidding for legal work because they are clearly defined by outcomes, and therefore require less of a background of trust between lawyer and client.

Developments in the clients' industries also affect attorney-client relations. American business has become more competitive over the past half century. Globalization and competition by foreign suppliers have been important factors. But a number of changes in the law have also influenced many industries. The elimination of fixed commissions for securities brokers, deregulation of the airline, trucking, and telecommunications industries, and the dismantling of legal restraints on commercial banking have enhanced competition in those industries. Firms facing price competition are likely to try to cut costs, including legal bills. Since the 1970s, moreover, waves of mergers and divestitures have altered the identities of many corporations.[32] Even if a corporation did not want to switch lawyers, the company may not have a choice after a merger, due to conflicts of interest or because the merger partner wishes to use its own counsel. And companies are no longer squeamish about changing lawyers, even in the absence of structural changes. Although they may not switch law firms as often as advertising agencies, even long-standing client relationships are no longer sacrosanct.

Increases in mobility have altered the internal structure of law firms as well. Compensation systems are one area of change. The "Cravath" strategy of lockstep partner compensation has given way nearly everywhere to "performance-based" pay. And because attorneys these days can leave firms and take clients with them, control over billing has become the most important factor in divvying up the profits in performance-based systems. The "eat-what-you-kill" approach is commonplace. Some law firms have become little more than franchisors offering office space and secretarial services to practice groups.

Firm demographics have also changed. Firms providing representation to big corporations have grown much larger, in general, and have taken on legions of younger associates. The growth in size of major corporate firms has been due, in part, to the economics of partner compensation.[33] Mark Galanter and Thomas Paley, in their influential book *Tournament of Lawyers*, document and attempt to explain this trend.[34] Partners earn much

31. *See, e.g.*, Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866 (9th Cir. 1979), *cert. denied*, 444 U.S. 981 (1979) (involving a $1 million contingent fee in a commercial case).

32. *See generally* Neil Fligstein, The Transformation of Corporate Control 336 (1990).

33. *See* Ronald J. Gilson & Robert H. Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 Stan. L. Rev. 567 (1989); Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 Stan. L. Rev. 313 (1985).

34. Marc Galanter & Thomas Palay, Tournament of Lawyers: The Transformation of the Big Law Firm (1991); *see also* Robert L. Nelson, Partners with Power: The Social Transformation of the Large Law Firm (1988); Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 Law & Soc. Inquiry 431 (1989).

of their compensation by billing out associates at rates higher than what the associates cost the firm. To increase profits, partners maintain a high partner-associate ratio. However, as the ratio increases, partners face problems of monitoring associates for quality and ensuring that they work hard. Galanter and Palay's "tournament" model explains how the tension between monitoring and profitability is maintained. Some associates—those who work extremely hard and produce excellent work—will "win" the tournament by being promoted to partner and thus obtaining the financial rewards associated with that status. Because associates want to win the tournament, they are willing to work long hours and strive to do the best possible job, even with relatively light supervision. Whether or not the tournament model fully explains the relationship between partners and associates, only a fraction of the associates at large corporate firms will be made partners; most move on within five to seven years. Because of this, lateral job mobility at corporate law firms is as high—or higher—among associates as it is among partners.

Lawyers also face increasing costs. Overhead costs include office space rental and costs of technology (data processing, storage, and retrieval). Big law firms also carry big payrolls. Costs of associates have been high because salaries skyrocketed during the period of greatest growth, in the late 1980s to early 2000s.[35] Although associates usually are hired on an at-will basis, downsizing can be costly, not only because of the need to buy out redundant employees, but also because of the signal that layoffs send to the market. Many firms would probably prefer to wait out a down time, even at a loss, rather than incur the costs of cutting back.[36] Moreover, firms often finance these costs with borrowed money, adding the costs of debt service into the mix. Lenders demand to be repaid, and if law firms default, the partners are likely to face personal liability to make good the shortfall.

B. *The Share Market Bubble*

If the tectonics of the legal profession has been the slow drift from club to competitive organization, its meteorology was the share market bubble that impacted American financial markets between 1995 and 2000. The bubble and its painful aftermath affected elite legal services in ways which, if perhaps not significant in the long term, have had substantial short-term effects.[37]

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35. *See* Bruce M. Price, New Institutions of the Knowledge Economy: A Sociological Study of Equity Billing by Law Firms in Silicon Valley in 1998-1999, at 75-90 (Sept. 13, 2005) (unpublished Ph.D. dissertation, New York University) (on file with author).

36. Firms can cover themselves to some extent against the risk of a downturn by using temporary workers to cover peak demand, but temporary workers have costs of their own (they have to be brought up to speed and carefully supervised, and may not be as capable as regular employees).

37. For an interesting explanation of the relationship between the share market bubble and gatekeeper failure, *see* John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. Rev. 301, 323-27 (2004) [hereinafter

Just as the share market bubble was more pronounced in the high-tech sector than in the rest of the economy, so law firms serving high tech clients were most profoundly affected. The stratospheric trajectory of many high-tech initial public offerings created opportunities for firms working for fledgling high-tech clients to take an equity interest in the firms that they represented, in hopes that the expected increase in share price after the offering would more than compensate them for the lack of cash compensation at the time the services were rendered.[38] Wilson Sonsini was the best known—but not the only firm—to adopt this strategy. But because the bubble turned out to be market-wide, and not just restricted to tech stocks, the effect of the bubble was felt in the practices of many law firms. Any firm with clients in the financial sector stood to profit from increases in transactions and in the profits that financial market clients were earning during this period. Law firms in financial centers, notably New York, profited as well because of the effects of the financial market bubble on the economies of these areas.

The bubble economy disguised growing weaknesses in the underlying market for legal services. Law firms could get by on the profits they were making from financial markets-related work. When the boom ended, in 2000 and 2001, the bottom dropped out of this market. Firms that were heavily involved in the financial sector or in representing high-tech clients found themselves in free fall. A few—most notably Brobeck, Phleger & Harrison—were unable to recover. Despite being one of the leading firms in the country in profits per partner in 2000, Brobeck shut its doors permanently in 2003.[39]

The bubble economy also had important effects on the demands clients made of their attorneys. During a stock market bubble, underlying conditions in the real economy can, for a time, become hidden in the apparent prosperity of the equity price run-up. As market participants began to believe that share price increases would continue, it became possible for companies to finance themselves with equity—or even with warrants that could not be exercised until the stock reached even greater heights. Firms could become their own bankers; rather than turning to lenders for financing, they could simply issue stock to fund their acquisitions. Accounting measures of profitability became subject to manipulation because poor results from operations could be offset by sales of appreciated assets. It became nearly a fetish during this period for firms to show steadily increasing profits. Managers of firms turned to their lawyers to help them realize these objectives.

Gatekeeper Failure and Reform]; John C. Coffee, Jr., *What Caused Enron? A Capsule Social and Economic History of the 1990s*, 89 Cornell L. Rev. 269, 293-98 (2004).

38. For an interesting study of the phenomenon of equity investments by attorneys in dot.com clients, see Price, *supra* note 35.

39. *See* Ann Grimes, Brobeck Law Firm Could Dissolve As Merger Folds, Wall St. J., Jan. 31, 2003, at B2; Brenda Sandburg, Brobeck to End Turmoil by Going Out of Business, Nat'l L.J., Feb. 3, 2003, at A15.

Executive compensation also played a role. Part of the problem was tax-driven. In 1994, Congress, in a perhaps ill-considered bow to populist resentment, restricted the deductibility of executive salaries over $1 million per year in publicly traded companies.[40] This increased the desirability of using stock options for managerial compensation, since options did not cost the company anything out of pocket when issued, yet they provided real value to managers. (Options did, of course, potentially dilute the interests of the company's shareholders.) From the managers' point of view, options became desirable because share prices began to rise dramatically. As the bubble economy took hold, it looked like nearly any option could quickly be in the money. Furthermore, the use of options appeared to jibe with the ideology of free markets. By enhancing managers' equity interests in the companies they served, options appeared well designed to align the incentives of managers with those of shareholders, and thus promised to reduce the agency costs of management. Accordingly, companies engaged in massive issuance of options to their senior officers during the 1990s.[41]

Another effect of the bubble economy was psychological. As belief in the inevitability of share price increases grew, market participants disregarded ordinary caution about economic realities. They began to believe that things really were different, that the laws of gravity had been repealed when it came to share prices, and that old-fashioned warning signals such as price-earnings ratios could be ignored. The mood of the entire market became euphoric. It is possible that some attorneys came to share that effervescence, and accordingly found it necessary to maintain, in the public mind, a relentlessly upbeat picture of corporate performance, even when a realistic, sober assessment would encourage caution.

III. CHANGING INCENTIVES AND ATTORNEY INDEPENDENCE

Part I of this Essay illustrated how Professor Gilson's model of value creation does not fully apply to legal compliance and corporate governance activities by private attorneys. Part II identified both the bubble economy of 1995-2000 and the legal profession's evolution from club to competitive organization as salient factors affecting the incentives facing attorneys in elite law practices. This Essay now addresses the question posed at the outset of this article: How have changing economic conditions affected lawyers' independence in representing business clients? This part now argues that these developments significantly altered the cost-benefit calculation facing attorneys confronted with the question of whether to exercise independence.

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40. *See* I.R.C. § 162(m) (2000) (denying deductibility to chief executive officer and top officer pay in excess of $1 million annually unless the excess consists of options or is based upon the achievement of performance goals that have been established by a compensation committee composed solely of independent outside directors).

41. *See* Krista J. Berk et al., Board Practices 1997: The Structure and Compensation of Boards of Directors at S&P Super 1500 Companies 44 (1997) (finding that 80.3% of S&P 500 firms awarded directors stock or options in 1997).

Attorneys operating under competitive organization have lower incentives and ability to monitor one another to detect and deter misconduct. Because attorneys receive compensation today based partly on their own performance, their financial interests are not as closely tied to the actions of their partners as in years past. These lawyers have fewer incentives to ensure that their partners are serving other clients well. Further, maintaining the firm's reputation may not be as important in competitive organization as it was in the club system. In an "eat-what-you-kill" system, a partner's compensation depends on whether a client came to him personally, or to his practice group. If the firm gets a client because of the firm's reputation, the attorney is unlikely to receive as large a percentage of the revenues from that client, even if he becomes the billing partner. The likelihood that the attorney will eventually leave the law firm further reduces the attorney's connection to the firm's long-range interests. Because attorneys are likely to be less concerned with maintaining the firm's overall reputation, they have less incentive to check up on how other attorneys are conducting their practices.

Attorneys also have incentives to avoid exposing their own work to monitoring by other lawyers within a firm. In an "eat-what-you-kill" compensation environment, attorneys may avoid sharing details of their practices with others in the firm out of fear that weaknesses in their performance will lead to reduced compensation, or that other attorneys in the firm may poach their clients.

Increases in firm size also affect monitoring incentives. When a firm is relatively small, each attorney is likely to feel responsibility for others in the firm. When a firm grows large, however, the sense of obligation dissipates. Responsibility for monitoring attorneys becomes the job of the executive committee. And even executive committees may lack the ability to effectively monitor attorneys in mega-firms. In especially large firms, monitoring may take the form of reviewing billings and profitability—not the sort of scrutiny that is calculated to enhance ethical behavior by lawyers.

The transition from club to competitive organization also adversely affected the ability of lawyers to monitor their clients. To effectively oversee a client's activities, a lawyer must have knowledge of the client's conduct, the ability to influence the client's actions, and the proper incentives to influence the actions in the right way. The attorney-client relationships under the club system accomplished all three of these objectives. Under the club system, the longstanding relationship between lawyer and client often gave the lawyer a comprehensive understanding of the client's business—knowledge based not only on extensive involvement over time with the client's legal problems, but also on a long history of personal interactions with the client's senior managers. The rich network of relationships that existed under the club system also provided attorneys with a nuanced and effective palette of resources to employ in order to encourage the client to avoid testing legal limits. A word spoken on the golf course could sometimes accomplish as much as a formal memorandum to the board of directors. Further, the pattern of interactions between lawyers and client management made conflicts with the attorney costly to the client because valued friendships and personal business relationships might be jeopardized (although, because the attorneys would incur similar costs, the risk of a breach might also deter counsel from threatening to sever the relationship).

Attorneys operating within the club system also had good incentives to use their knowledge and influence in a constructive way. Because of their long-standing relationship, lawyers identified emotionally with the client's long-range institutional interests. Counsel also had economic interests in the client—in the form of an anticipated income stream—that promoted a long-range perspective on the client's affairs. Attorneys under the club system were not likely to be swayed by the prospects for a quick fix of the company's financial statements if the result was only to put off even more serious problems until another day.

These advantages of the club system dissipated under competitive organization. In a competitive market, relationships between attorneys and clients are more transitory and based only on the lawyer's work on formal legal matters. Since lawyers do not develop a deeper relationship with the client from personal interactions, attorneys under the competitive system are likely to operate with less knowledge of the client's affairs and institutional processes. The client may also be less willing to share information with the attorney, because the two are operating at arms length on compensation and retention matters, and because the client may not want to provide the attorney with facts that could complicate matters if the client wishes to change counsel. The attorney's influence with the client is also less substantial under the competitive system. Without extensive interpersonal bonds, the attorney may not know how to manage the political forces within a client in order to achieve legal compliance and avoid questionable activities.

Moreover, under the competitive system, attorneys' interests are not aligned with the long-range best interests of the client. Lawyers today are less likely to identify emotionally with the client as an institution and more likely to perceive their interests as tied to the particular officers who allocate legal work—individuals whose own interests may not be fully aligned with those of the institution. Moreover, because under competitive organization the law firm cannot be confident of being retained by the client indefinitely, the firm's perspective is foreshortened: The lawyers will discount their expectation of receiving a future income stream by the probability of being replaced by other counsel, and thus they will focus more on producing short run results for the client than on the client's long term well-being. These factors suggest that attorneys under competitive organization are likely to be less effective monitors than they were under club organization.

Competitive organization also increases the bargaining power of clients against their attorneys. Clients possess a realistic ability to switch counsel, even when they have a longstanding relationship with a firm. The elaborate network of contacts, loyalties, and obligations that bonded law firms and corporate clients together under club organization has largely disappeared. In today's competitive environment, there are always plenty of firms eager to bid for a client's business. Thus, as the market for legal services has grown more competitive, the social structure that enables lawyers to act as an independent "conscience" for their clients has dissipated. When it comes to relationships between law firms and their corporate clients, no-fault divorce is now the standard.

The threat of client defection can be a powerful antidote to attorney independence in an "eat-what-you-kill" environment. Each attorney's welfare in such a system is tied to billings from a few clients. The risk of losing a client is not as diversified for that attorney as it would be under a lockstep system in which client losses and gains are spread among all the partners. Thus, losing a major client can be personally devastating. Clients, knowing this fact, can exercise leverage over the attorney by threatening to leave the firm—or even by requesting reassignment to a different partner within the firm.

The fear of losing a client also applies to firms as a whole. It is true that, under the "eat-what-you-kill" system, each attorney is less exposed to losses of clients by other attorneys, and it is also true that, as law firms grow in size, the risk of losing a client becomes more diversified. Nevertheless, no firm wants to lose a major client, both because the reduction in billings will affect all attorneys' compensation to some extent, and because defection of a big account can be demoralizing within the firm and damaging to its reputation outside. Moreover, even when firms become very large, major clients can still represent a significant share of their billings.

The financial structure of law firms in a competitive environment also reduces a firm's bargaining leverage vis-à-vis clients. The huge base of associates at large firms creates a payroll obligation which, as noted above, is not particularly flexible in the short run. Firms also face other financial commitments, including office leases and debt service. The need to satisfy these obligations generates an imperative to maintain billings. Further, the "tournament of lawyers" works only if there is, in fact, a tournament. Even if they have some flexibility at the margin to cull out weaker candidates in tough economic times, law firms must continue to promote associates. Unless the firm is in the position to boast that it turns away more work than it accepts, the threat of losing a significant source of billings carries with it the possibility of financial repercussions. These considerations make it dangerous for a law firm to exercise independence in representing a client if doing so risks losing the client's business.

Moreover, even if a law firm did attempt to exercise independence, the exercise might be futile. Clients can easily find other firms willing to do their work, and they can probably find a firm that is more willing to test the edges of the permissible. A firm that exercises independence may find itself simply losing billings without deterring the client's wrongful conduct. If a firm perceives that resisting the client's demands would only be self-defeating, the firm may be less likely to attempt the exercise in the first place. And if clients understand that they can easily change counsel, they may be more inclined to push for actions that approach the line of what is legally permissible.[42]

Even if attorneys have experienced a significant reduction in their bargaining leverage against clients over matters of legal compliance, this would not necessarily be problematic so long as clients did not want attorneys to assist them in questionable actions. However, evidence from Enron and other similar cases indicates that some clients do want their attorneys to push the envelope. Such client pressure can be understood, in part, as a product of the same economic conditions discussed throughout this Essay. Just as the legal business has become more competitive, so has the business of many clients. Pressed to make profits in a competitive environment, clients may pressure attorneys to test or bend the law.

The bubble economy also played a role. During the boom years, companies tended to advance employees who were relentless optimists and risk takers, and who sometimes had a deaf ear for cautionary signals. The risk preference and capacity for denial displayed by these individuals was further accentuated when stock options became important aspects of executive pay. Managers holding large portfolios of options benefited from increasing the volatility of their firms. Thus, managers with significant option compensation were encouraged to take inappropriate risks—a feature of option-based compensation that was perhaps noted but little appreciated during the heyday of the bubble. Even more troubling, these individuals found it to be in their interests to manipulate public perceptions of the performance of their companies to enhance the value of their options and to reinforce the perception that all was well in their firms. The temptation to use any means, fair or foul, to achieve this result sometimes proved irresistible.

The manipulability of financial statements in a bubble economy also generated imperatives for managers to present ever-improving financial statements to the investing public. While some degree of earnings smoothing may be legitimate to avoid misleading the market, the process of adjusting earnings can easily turn into deception. "Smoothing" becomes a euphemism for fraud. The pressure to present positive financial results every quarter leads officers of some public companies to go over that line. To achieve such desired results, they need to enlist the services of lawyers.

42. The analysis of whether attorney withdrawal is in fact relatively painless for the client is complicated, however, by the question of the signal that such withdrawal might communicate to others—a matter discussed in the final section of this Essay.

Finally, the intoxicating gas that inflated the share market bubble also may have played a role. It is possible that some attorneys were so caught up in the euphoria of soaring stock prices that they were able to persuade themselves that any questionable activities would never come to light, or that, if discovered, it would be understood as justified by the spirit of the times.

Overall, the far-reaching economic developments—the evolution from club to competitive organization in the legal services industry and, during the late 1990s, the share market boom—had more to do with causing the problems at Enron and other companies than any erosion in the private ethics of corporate lawyers.[43] Given the enormous pressures that these developments created, it is not surprising that some lawyers failed to exhibit the ideal degree of independence for counsel in such important positions. What is perhaps noteworthy is that more attorneys did not fall into the trap. Nevertheless, it is unfortunate that any went over the line. It would serve the public interest to deter such conduct, if this could be done without creating greater costs than the harms being prevented. The next part of this Essay offers tentative and preliminary thoughts about possible reform strategies.

IV. RECOMMENDATIONS FOR REFORM

Since changing economic conditions have reduced the ability of business lawyers to stand up to corporate clients when necessary, the question becomes whether the regulatory system should respond. Should business lawyers be placed under obligations to protect the public interest, even at some cost to their undivided loyalty to clients?

A natural but facile argument against such reform efforts is a visceral defense of zealous advocacy. An advocate, Lord Henry Brougham famously observed, "knows but one person in all the world, and that person is his client."[44] Under this strong view of undivided loyalty, the attorney is bound to defend the client with every legitimate means at his disposal. In the criminal context, this means attempting to raise doubts of guilt even by sophistry, innuendo, and deception short of falsehood. Even in the civil context, the lawyer can and should use all available means to advance the client's interests. The ideal of pure and energetic loyalty resonates with lawyers.

However appealing these images might be, they are misplaced in the context of corporate representation. In the case that generated Lord Brougham's encomium, Queen Caroline was accused of cuckolding the King of England; she faced the resources of the Crown in his divorce suit against her and needed all the help she could get.[45] The lawyer's undivided

43. Whether attorneys at Enron or other fraud-ridden companies in fact went over the line of permissible legal representation will presumably be determined in the legal process.

44. Trial of Queen Caroline 3, *in* 2 Causes Célèbres 1 (1874).

45. *See generally* Roger Fulford, The Trial of Queen Caroline (1967).

loyalty to the client was a means of leveling the playing field in which the adversarial contest occurred. Similarly, we accept some level of sophistry as appropriate for criminal defense counsel, because of the perceived imbalance between the resources of the state and those available to the defendant, and because the defendant's liberty is at stake. But this is not the setting of recent corporate frauds. When attorneys represent corporate clients in compliance matters or in corporate cases where the agency costs of management are high, the imbalance is reversed. The risk in these settings is that the attorney's skills will be employed to take inappropriate advantage of the public at large or of disorganized and unrepresented shareholders. Strong norms of loyalty to clients may not be necessary to protect the public interest in these settings.

How, then, should the incentives of attorneys be adjusted to achieve optimum behavior from a societal point of view? Ideally, attorney's interests would be aligned with the public's interest. If this were the case, there would be no need to worry about enforcement, because the attorney's own self-interest would take care of the public's interest as well. However, it is difficult to achieve this alignment. The "public interest" is notoriously difficult to identify. Moreover, the public interest, whatever it is, would not necessarily be served if attorneys ensured that their clients never tested the limits of the law; there is no fence around the law to avoid close encounters with the impermissible. "[T]he very meaning of a line in the law," Justice Oliver Wendell Holmes observed, "is that you intentionally may go as close to it as you can if you do not pass it."[46] And because the law is not always clear, even good legal representation will result from time to time in clients going too far. If lawyers always dissuaded their clients from even approaching the line, companies would be over-deterred, because lawmakers set legal standards with the premise that anything short of overstepping the boundaries of the law is permissible. Lawyers who too zealously guard the law's outer boundaries will often be "deal-killers" who harm rather than help the public interest.

One could imagine an attempt to set up an incentive-compatible compensation system for lawyers that would at least align their interests with the long-range best interests of their corporate clients. Such a system might help if the expected income stream from the client was sufficiently extended in time. For example, attorneys might be paid in the form of options with strike dates spread out over a period of years, or might receive vested rights to receive treasury stock at periodic intervals. Because the compensation would be tied to the performance of the company over time, the recipient would have the incentive to take the company's long-range best interests into account in formulating his advice. Service providers in such a case might be less willing to assist managers in deceiving financial markets in the short run at the cost of the company's welfare in the long run. Such compensation systems might be worth exploring, although it is

46. Superior Oil Co. v. Mississippi, 280 U.S. 390, 395-96 (1930) (citation omitted).

not clear they would be feasible.[47] Moreover, even if a compensation system could align the incentives of service providers with the long-range best interests of their clients, this would not necessarily equate with service to the public interest, because a client's long-range interests might differ from those of the public.

An alternative approach is to formulate concrete behavioral rules governing attorney conduct. Such rules hold some promise for addressing the perceived deficit in attorney independence. They must, however, be designed cautiously. For example, the share price bubble of 1995-2000 contributed to some of the worst recent cases of attorney misconduct. This phenomenon should not provide a justification for reforms. While the bubble's effects were no doubt profound, they were also limited in time. It is unlikely that a similar share price boom will occur for a considerable period. Reforms that might be appropriate in a boom setting are unlikely to be desirable in normal times. It would be a mistake to overreact to the events of the bubble economy by adopting structural reforms whose long-range costs may exceed their benefits.[48]

The transition from club to competitive organization, however, does provide justification for structural reform, since the development is profound, long-standing, and unlikely to change. The question is whether and to what extent this development warrants structural changes in the rules governing legal representation of corporate clients. The remainder of this part briefly addresses four such recommendations, each of which has been put forward as a possible policy response to the problems that manifested themselves in Enron and other disasters. The goal is not to comprehensively analyze each of these four proposals, but rather to draw out implications for these proposals given the legal profession's evolution from club to competitive organization.

A. *Up-the-Ladder Reporting*

One such reform is the adoption of express instructions to attorneys to engage in "up-the-ladder" reporting of client misconduct. Such a requirement has recently been imposed for lawyers representing clients before the SEC. The SEC's final rule implementing section 307 of the Sarbanes-Oxley Act[49] requires that lawyers who become aware of "evidence of a material violation" must report their discovery to

47. Among other problems, they would be costly to the client because the service provider would have to be compensated for the significant loss of liquidity and increase in undiversified risk.

48. *See Gatekeeper Failure and Reform, supra* note 37, at 330 (observing that to the extent gatekeeper failure was due to the share market bubble, "the problem may be self-correcting").

49. *See* Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8185, Exchange Act Release No. 47,276, Investment Company Act Release No. 25,919, 68 Fed. Reg. 6296 (Feb. 6, 2003) [hereinafter Adopting Release], *available at* http://www.sec.gov/rules/final/33-8185.htm.

successively higher levels of authority within the client company.[50] An attorney who discovers such evidence may report the evidence to the company's Chief Legal Officer ("CLO") and, if appropriate, the company's Chief Executive Officer ("CEO"). Upon receiving such a report, the CLO is required either to investigate the report or to refer the evidence to the company's Qualified Legal Compliance Committee ("QLCC"), if such a committee exists. If the CLO investigates and concludes that there is an ongoing material violation, he must notify the reporting attorney and take all reasonable steps to ensure that the company responds appropriately. If the CLO refers the matter to the QLCC, it is then the committee's job to take the appropriate action. If the reporting attorney receives an appropriate response from the CLO, no further action is required. If, however, the reporting attorney does not receive an appropriate response, he or she must go up the corporate ladder by reporting the matter to the audit committee, a different committee of independent directors, or the full board. If the reporting attorney reasonably believes that it would be futile to report evidence of a material violation lower in the corporate hierarchy, he may report the matter directly to the QLCC or the full board of directors.

These rules apply only to attorneys who practice before the SEC. Under ABA Model Rule 1.13(b), if an attorney for an organization knows that a corporate officer is engaged in (or intends to engage in) a violation of a legal obligation to the company or an illegal action that might be imputed to the company, and the conduct in question is likely to result in substantial injury to the organization, the attorney must "proceed as is reasonably necessary in the best interest of the organization." Unless the lawyer reasonably believes it is not necessarily in the best interest of the organization to do so, he must refer the matter "to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law."[51]

Up-the-ladder reporting can be a constructive reform in light of the legal profession's shift from club to competitive organization. As we have seen, under competitive organization, law firms have less bargaining leverage with clients than under club organization. Clients that wish to test legal limits can select law firms that are willing to overlook problems. And because law firms need clients, they will face competitive pressures to offer lax supervision.[52] One means for testing the limits is for the client's board

50. As used in the rule, "evidence" means "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur." *Id.* § 205.2(e). A "material violation" means "a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law." *Id.* § 205.2(i).

51. Model Rules of Prof'l Conduct R. 1.13(b) (2003).

52. This is not to say that all law firms would give in to these pressures. In fact, law firms that do not bend to a client's wishes can develop valuable reputations as rigorous

of directors to be kept uninformed. Senior executives who have the most to gain can keep the information to themselves. If up-the-ladder reporting is not mandatory, law firms that want to assist clients in limit testing will not report. But mandatory up-the-ladder reporting would disrupt the current incentive structure, because all firms have the obligation to inform higher authority. Although some law firms might elect to ignore this obligation, they would face sanctions if their failure to report ever came to light (as it would, for example, if the client declared bankruptcy or otherwise fell into the hands of new management). Thus, mandatory up-the-ladder reporting could be a sensible means for enhancing firms' bargaining leverage with corporate clients on compliance and fiduciary duty matters.[53]

B. *Noisy Withdrawal*

Another type of reform measure is requiring "noisy withdrawal" if a client fails to take remedial action after being alerted of a problem by the attorney. The metaphor of "noise" is used for two somewhat conflicting purposes. On the one hand, noise commands attention. The idea suggests that the attorney's action gives regulators a signal that all is not right with the client's legal compliance. On the other hand, noise interferes with communication by crowding out meaningful information with signals that are not meaningful. The term thus conveys the idea that the withdrawal disguises whatever attorney-client confidences may have precipitated the lawyer's decision.

The SEC proposed a noisy withdrawal obligation as part of its regulations implementing section 307 of the Sarbanes-Oxley Act,[54] but the

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monitors. By employing these law firms, clients can signal to regulators, the investment community, and other interested parties that they are willing to subject themselves to an independent legal audit. However, only a limited number of law firms can occupy this market niche. Among other things, such a law firm needs to be able to demonstrate that it is selective about work. When a law firm boasts that it turns away clients, it signals that it can afford to be a rigorous monitor because it can withdraw from any of its accounts without incurring unacceptable financial costs. But not many law firms are in this position.

53. Much depends, of course, on the specific definitions and text of the requirement. For example, the Securities Exchange Commission's ("SEC's") rule is considerably more stringent than the American Bar Association's ("ABA's"). Under the ABA rule, attorneys have an "out" if they conclude that a referral would not be in the best interests of the organization, a feature that is lacking under the SEC approach. *See* Model Rules of Prof'l Conduct R. 1.13(b). The ABA rule, moreover, applies only when an attorney "knows" of an actual or intended violation. The SEC rule does not require knowledge of facts or conclusions of law, but only "evidence of a material violation." Adopting Release, *supra* note 49, § 205.2(e). Thus, the general up-the-ladder reporting requirement under ABA Rule 1.13 is weaker than under the corresponding SEC rule. This difference may be justified because the ABA rule applies across the board to many different forms of legal representation, whereas the SEC rule applies in a special context that has proven to be especially problematic in recent years.

54. Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release 8150, Exchange Act Release No. 46,868, Investment Company Act Release No. 25,829, 67 Fed. Reg. 71,670 (Dec. 2, 2002), *available at* www.sec.gov/rules/proposed/33-8150.htm. For a generally favorable analysis of the SEC's proposal, see John C. Coffee, Jr.,

agency omitted the requirement from its final rule.[55] However, contemporaneously with issuing the final rule, the SEC extended its request for comments on the noisy withdrawal proposal.[56] Under the proposed rule, when an issuer's attorney complies with the obligations of the up-the-ladder reporting requirement but does not receive a satisfactory response, and the attorney reasonably believes that a material violation is ongoing (or is about to occur) and is likely to result in substantial injury to the company or to investors, the attorney would be required to withdraw from the representation on the grounds of "professional considerations." Within one business day, the attorney would be required to give the SEC written notice of the withdrawal that indicates that the withdrawal was based on "professional considerations." The attorney would also be required promptly to disaffirm to the SEC any opinion or other writing that the attorney had prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading.

Noisy withdrawal obligations have also been proposed at the state level. California experimented with one, but the idea was rejected by the state supreme court as inconsistent with statutory requirements.[57] The recent amendments to ABA Model Rule 1.13 also contain a "muted" form of noisy withdrawal. If an attorney is discharged or withdraws, and the attorney knows or has reason to know of a legal violation by a person associated with the client (as more specifically defined in the rule), the attorney "shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal."[58] This provision is muted because the attorney is only required to make noise internally: She must ensure that the highest authority in the corporate client is informed, but she need not inform any external agency.

Noisy withdrawal proposals can make sense, given the legal profession's evolution from club to competitive organization. For the same reasons as those pertaining to up-the-ladder reporting, it is important that the noisy withdrawal provision be mandatory rather than permissive. If the noisy withdrawal provision is permissive, clients could still seek out law firms willing to provide assurance that misconduct will not be reported. Two perverse consequences would follow: Permissive withdrawal would tend to reward law firms that are willing to assist clients in evading legal

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The Attorney as Gatekeeper: An Agenda for the SEC, 103 Colum. L. Rev. 1293, 1307-10 (2003).

55. *See* Adopting Release, *supra* note 49.

56. *See* Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8186, Exchange Act Release No. 47,282, Investment Company Act Release No. 25,920, 68 Fed. Reg. 6324 (Feb. 6, 2003), *available at* www.sec.gov/rules/proposed/33-8186.htm.

57. *See* John W. Amberg & Jon L. Rewinski, *Ethics Roundup: Issues of Loyalty and Confidentiality Continue to Dominate Developments in Legal Ethics*, L.A. Law., Apr. 2003, at 31.

58. Model Rules of Prof'l Conduct R. 1.13(e).

compliance or engaging in arguable breaches of fiduciary duty, and would also reduce rather than increase the constraints on the conduct of the very parties whose behavior we wish to control—risk-preferring managers who want to test the limits of the law. Under competitive organization, some law firms will be compelled to assist clients in questionable behavior, because clients have sufficient bargaining leverage to pressure them to do so. Thus, in light of the competitive pressures under which attorneys operate today, noisy withdrawal rules should be mandatory.

The question remains whether such rules should be implemented at all. Although noisy withdrawal is debated today as something new, it is only a variation of ordinary withdrawal, an option that has always been available, and sometimes required, when attorneys cannot resolve tensions between client loyalty and the obligations incident to being an officer of the court. Ordinary (as opposed to noisy) withdrawal is an important structural element of the existing rules of professional responsibility. Withdrawal is permitted or required in many circumstances.[59] Most importantly for present purposes, it is the traditional solution for cases in which the client demands that the attorney pursue a course of conduct which the attorney considers to be illegal or unwise.[60]

While the legal consequences of ordinary withdrawal are only that the attorney no longer represents the client, it has other effects. Withdrawal is expensive for both the attorney and the client: The attorney loses a profitable source of billings, and the client loses an attorney familiar with the client's affairs. Withdrawal also conveys a signal to third parties. That an attorney no longer represents a client is not easily hidden. People who know of the withdrawal will draw inferences about the reasons for the split. The law firm and the client may agree to a bland explanation and might adhere to that agreement. Even if third parties cannot ascertain the reason for the split, however, they are likely to conclude that the event itself does not speak well for either party. A split between an attorney and a significant client is often the subject of gossip. Moreover, some information about the disassociation is likely to come out. Whichever party considers itself to be in the "right" is particularly likely to disclose reasons for the breakup in order to deflect adverse public perceptions onto the other party. If the attorney has been fired for incompetence or questionable billing practices, for example, the client is likely to make that fact known. Similarly, although attorneys must take care to avoid disclosing privileged information, they may find ways to suggest that the severing of relations was due to some fault in the client. Thus, when an attorney withdraws

59. *See* Model Rules of Prof'l Conduct R. 1.16 (2002).

60. *See id.* R. 1.16(a)(1) (requiring withdrawal when "the representation will result in violation of the rules of professional conduct or other law"); *id.* R. 1.16(b)(2) (permitting withdrawal when "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent"); *id.* R. 1.16(b)(4) (permitting withdrawal when "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement").

because a client insists on actions that are close to or over what the attorney considers the line of permissible behavior, that fact may become generally known or believed. The reputational damage that both lawyers and clients suffer after a split makes withdrawal costly for both parties.

The practical effects of withdrawal have changed, however, as the legal profession has evolved from club to competitive organization. Under the club system, withdrawal by outside counsel conveyed a particularly powerful signal to third parties. Because law firms represented clients on a long-term basis, and because lawyers were connected with client management on many levels, withdrawal imposed high costs on both parties. Persons who observed the severing of relationships would know that something significant had occurred. Moreover, because withdrawal was uncommon, when it did occur it would be a focus of intense interest.

Under competitive organization, in contrast, the practical consequences of withdrawal are different. Although withdrawal remains costly for both parties, it is less burdensome for clients than before, because clients are not as firmly tied to any particular firm. When the parties do part ways, the signal to third parties may not be as detrimental to clients. Because clients and law firms frequently end their relationships under competitive organization, withdrawal by an attorney will not necessarily provoke intense interest—it is no longer "news" when an attorney and a client part ways. For the same reason, a split does not necessarily indicate that something fundamental has occurred. Many separations between attorney and client occur for reasons that do not reflect adversely on either party. Moreover, since competitive organization gives clients bargaining leverage vis-à-vis their attorneys, the severing of relations implies that the impetus for the change came from the client. On the other hand, if the reason for the separation came out, and that reason turned out to be that the attorney had withdrawn rather than been discharged, the adverse inferences about the client might be stronger: Because attorneys incur a high cost from severing relations with a client, the fact a split has occurred at the attorney's insistence may lead an observer to conclude that there is something wrong with the client. Overall, the signal conveyed by a separation between attorney and client is less detrimental to the client under competitive organization than under the club system.

Given this analysis, enhancing the effect of withdrawal appears justified. The rules of ethics have relied on withdrawal as a counterpoise to the danger of client overreaching. But if withdrawal has become less of a sanction as a result of changes in economic organization, then client malfeasance may become more of a concern. To address the current problems in corporate representation, the regulatory system could increase the "sting" of withdrawal for the client. Noisy withdrawal would accomplish this by magnifying the attorney's withdrawal signal and by directing this signal to the attention of whoever is in the best position to sanction the client. Noisy withdrawal, in this sense, can correct the reduction in attorney independence caused by the evolution of the legal profession to club organization.

The propriety of this remedy depends, of course, on how strong the enhancement of the signal is. The mantra of "professional considerations" found in the SEC's proposed rule threatens to be a powerful signal indeed. The words "professional considerations" sound innocuous, but when contained in a written communiqué to the SEC pursuant to section 307 of the Sarbanes-Oxley Act, they attain magical potency. Because the proposed rule mandates use of this phrase, professional considerations will not be cited except in contexts contemplated under the rule. Accordingly, the SEC's proposal essentially requires a lawyer who practices before the agency to inform it of probable legal violations by a client. While the SEC may be left guessing about what those violations might be, there is nothing to stop the agency from investigating the client to ferret out the problem. This is "noisy" indeed. Whether the noise is too great in light of the risks is a question that the regulatory system must address and resolve over the coming years.

C. *Disclosure of Client Confidences*

The ABA task force also recently adopted important changes to the rules on confidentiality. Revised Rule 1.13(c) provides that, if the attorney fulfills his responsibility of up-the-ladder reporting and the organization's highest legal authority fails to take appropriate action, and if the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation to the extent that the lawyer reasonably believes necessary to prevent substantial injury to the organization.[61] The information can be revealed even if it would otherwise be protected under the basic confidentiality provisions of ABA Model Rule 1.6.[62]

This Essay suggests a reason for concern about this rule. As explained above, the bar has moved from a club to a competitive system of economic organization. Because of this, attorneys now have less bargaining power vis-à-vis corporate clients. I argued above that in light of this development, reforms such as up-the-ladder reporting and noisy withdrawal, to be effective, must be mandatory. Otherwise they could have the perverse effect of exacerbating the situation, because managers of firms who wish to

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61. Model Rules of Prof'l Conduct R. 1.13(c) (2003).

62. New Rule 1.6 permits (but does not require) an attorney to reveal information relating to the representation of a client to the extent the lawyer reasonably believes it necessary "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services" or "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services." Model Rules of Prof'l Conduct R. 1.6(b) (2003).

test the limits will deliberately seek out attorneys who will exercise only minimal control. Similar concerns are present in the context of disclosing client confidences. If a client's senior management wishes to test the law's limits, management will want assurances that their lawyers will not disclose their conduct to the authorities. If the confidentiality rules permit such disclosures, management at the firms that need to be controlled—i.e., individuals with a taste for risk and a well-developed ability to deny inconvenient facts—will be especially careful to seek out attorneys who promise not to divulge their confidences. Permissive disclosure can, ironically, reward attorneys whose independence is low, and such attorneys can develop a profitable market niche as lawyers who will not "rat out" client misconduct. Moreover, even reputable law firms may find it hard to resist the pressures to remain mum. Few law firms would want to take up the invitation of Rule 1.13 to voluntarily disclose client confidences, because they would gain a reputation as a firm that cannot be relied on in a pinch. In short, given competitive organization, permissive disclosure under Rule 1.13 could do more harm than good. Making such disclosure mandatory, however, would solve this problem. But the costs of a mandatory disclosure rule, such as creating distrust and lack of communication between attorneys and clients, would potentially exceed any perceived benefits. An analysis of the underlying economic trends in the industry suggests reasons for concern about the utility of Model Rule 1.13 insofar as it allows, but does not require, attorneys to disclose client misconduct when up-the-ladder reporting has proved ineffective.

D. *Changes in Professional Identity*

A final potential reform is to influence business lawyers' sense of professional identity. Such reforms could include, for example, changes in legal education to stress the value of independence, changes in training programs for younger attorneys in practice, enhanced emphasis on professional independence in continuing legal education programs, and public commitment to the concept of attorney independence by influential bodies such as the ABA.

Changing the professional self-identity of attorneys is appealing because, if successful, it is self-policing. If lawyers internalized a particular sense of identity, it would no longer be crucial to control them from outside. The control occurs internally, because people experience uncomfortable feelings when asked to do something that conflicts with their self-concept.[63]

Should the organized bar attempt to influence professional identity formation in order to enhance ethical lawyer action? Efforts to enhance a sense of the value of independence among corporate lawyers probably would not hurt, but can only be expected to have a modest impact. Efforts by the government or other organized interests to change professional

63. For an extended discussion of the role of identity as a form of social control, see Geoffrey P. Miller, *The Legal Function of Ritual*, 80 Chi.-Kent. L. Rev. 1181 (2005).

identities are not always successful. Indeed, the organized bar has already attempted the exercise. After the Watergate scandal, the ABA required that law schools provide instruction in the history and norms of the legal profession. The purposes of this reform were to promote more ethical conduct among attorneys and to counteract the negative public image of attorneys that the scandal had triggered. It is not clear that the reform had any lasting effect on lawyer behavior beyond forcing thousands of law students to take upper-level mandatory courses in legal ethics, thus giving many of them a decidedly negative view of the whole subject. It is likely that all of the attorneys involved in the most recent spate of corporate scandals were instructed in legal ethics and passed the professional responsibility section of the bar examination. This and other examples suggest the need for caution about what can be accomplished when the government or organized bar seeks to shape professional identities.

At the same time, altering professional identities may already have been accomplished in part by Enron and other corporate scandals. These scandals may result in devastating liabilities for law firms. Some firms associated with the scandals have already suffered losses of clients and defections of partners and associates. The mistakes that may have been made by attorneys in these cases stand as object lessons for all lawyers in business law practice—lessons that probably will do more to shape behaviors than any number of hours of continuing legal education. At the same time, clients also have learned from the recent fiascos. It is unlikely that attorneys and other professionals will face the sorts of pressures to manage financial statements or cover up questionable conduct that they faced during the bubble economy years. While these lessons cannot be expected to last forever, they at least promise to operate, for a substantial period of time, as inoculations against behavior that tacks too close to the wind. Circumstances have already accomplished much of the work.

CONCLUSION

This Essay argues that corporate lawyers do not always engage in value creation when they represent clients in compliance matters or in decisions implicating the fiduciary duties of management. The traditional protection against socially undesirable representation was the attorney's independence from the client, backed by the threat of withdrawal. That protection, however, has eroded as the legal services market evolved from club to competitive forms of organization. The problems of reduced lawyer independence have come to the fore because of the corporate scandals related to the bubble economy—Enron, WorldCom, Adelphia, and HealthSouth being prime examples. Although we do not yet know the full facts in those cases, it is possible that if counsel had exercised a higher degree of independence, some of the harms might have been mitigated. This Essay addressed several proposals for reform: up-the-ladder reporting, noisy withdrawal, enhanced permission to reveal client confidences, and changes in the self-identity of the profession. Understanding the background economic developments provides helpful insights into the policy arguments for and against these proposed changes.

Notes & Observations