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## **Public Law and Legal Theory Research Paper Series**

**September 2004**

### **Lawyers as Gatekeepers**

**Fred C. Zacharias**

## LAWYERS AS GATEKEEPERS

Fred Zacharias

Three recent legislative and regulatory proposals seek to enlist lawyers in thwarting crime.<sup>1</sup> Outraged opponents have relied on flamboyant rhetoric.<sup>2</sup> They challenge the notion that

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<sup>1</sup> These proposals are in varying stages of existence. The American Bar Association (ABA) recently adopted an amendment to its model rule on confidentiality that would allow lawyers to disclose information “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.” *ABA Amends Ethics Rules on Confidentiality, Corporate Clients, to Allow More Disclosures*, 19 ABA/BNA LAW. MANUEL ON PROF’L CONDUCT 467, 467 (2003) (reporting the adoption of Model Rule 1.6(b)(2)) [hereinafter *ABA Amends Ethics Rules*]. The ABA adopted a parallel provision allowing lawyers to disclose to “prevent, mitigate or rectify substantial injury” caused by the prohibited conduct in the past. *Id.* (reporting adoption of Model Rule 1.6(b)(3)). States have yet to respond to the new model rules that are, in effect, proposals for state action.

In 2002, Congress required the Securities and Exchange Commission (S.E.C.) to promulgate some regulations governing securities lawyers. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §307, 116 Stat. 745, 784 (“[T]he Commission shall issue rules . . . setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission.”). In response, the S.E.C. adopted rules that require securities lawyers who become aware of “credible evidence” that a client is violating a federal or state securities law or is materially breaching a fiduciary duty arising under federal or state law to report the matter to the chief legal officer, the chief executive, or to a legal compliance committee, and ultimately to take further steps. 17 C.F.R. §§ 205(b)(2), (e) & 205.3(b) (2003) [hereinafter S.E.C. Final Rule]. The S.E.C. proposed, but held in abeyance pending further comment, a rule that would require attorneys who have gone up the ladder within a corporation and who still “believe that the reported material violation is ongoing or is about to occur and is likely to result in substantial injury to the financial interest of the issuer or of investors . . . to withdraw from the representation, notify the Commission of their withdrawal, and disaffirm any submission to the Commission that they have participated in preparing which is tainted by the violation.” Implementation of Standards of Professional Conduct for Attorneys, 67 FED. REG. 71,670, 71,705 (proposed Dec. 2, 2002) [hereinafter Proposed Rule]; *see* Implementation of Standards of Professional Conduct for Attorneys, 68 FED. REG. 6296 (Feb. 6, 2003) (noting deferral of implementation and stating “we are still considering the ‘noisy withdrawal’ provisions of our original proposal under section 307”) [hereinafter Final Rule Discussion Section].

The ABA’s most recent revisions to the Model Rules includes a revised Model Rule 1.13, quoted *infra* notes 57 & 85, that parallels the adopted and proposed S.E.C. regulations. Revised Model Rule 1.13(c) is a permissive provision that would allow organizational lawyers who have gone up the ladder to disclose information, but only when disclosure is necessary to prevent “‘substantial injury’ to the organization.” *ABA Amends Ethics Rules, supra*, at 468.

Finally, an international task force is considering a range of proposals that would, in some form, enlist the help of lawyers in reporting client money-laundering and other unlawful activity. *See* authorities cited *infra* note 93. American agencies have postponed their own consideration of regulations to the same effect pending the task force’s report.

<sup>2</sup> *See, e.g.*, Jonathon Peterson, *SEC Examines Lawyers’ Rules; Attorneys Fighting Codes to Make Them Whistleblowers*, AKRON BEACON J., June 1, 2003, at 1 (“Critics are using such terms as ‘orwellian’ to describe the [Sarbanes-Oxley] proposal.”); Seth Stern, *Attorneys Face New Rules on Secrets*, CHRISTIAN SCI. MONITOR, Aug. 13, 2003, at 2 (quoting William Paul, former ABA President, as stating that the recently adopted ABA rules paralleling

lawyers should act as gatekeepers<sup>3</sup>—which some of the opponents deem equivalent to operating like the “secret police in Eastern European countries.”<sup>4</sup>

This article makes a simple, and ultimately uncontroversial, point. Lawyers are gatekeepers and always have been. Whatever one’s position on the merits of the specific reforms currently being proposed, it is important to avoid the misconception that lawyers should have no role to play in preventing client misconduct.

The gatekeeper rhetoric conflates several separate concepts. At one level, everyone will agree that lawyers are clients’ agents and that lawyers’ traditional role in the adversary system is to help clients pursue lawful goals through those lawful means that are available. But that is

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the Sarbanes-Oxley proposals are “bartering away a piece of our professional soul to gain some hoped-for public approval”); *ABA Amends Ethics Rules*, *supra* note 1, at 469 (quoting Lawrence Fox’s claim that proposed rules requiring a corporate lawyer to respond to client misconduct make the lawyer an “uberdirector”); *id.* (quoting Judah Best’s characterization of the proposed 1.13(c) as “utterly wicked”); *ABA Update of Model Ethics Rules All But Completed in Philadelphia*, 18 ABA/BNA LAW. MANUAL ON PROF’L CONDUCT 99, 101 (2002) (“Stephen A. Saltzburg . . . told the delegates that the ‘gatekeeper initiative’ is the ‘single most alarming threat to the attorney-client privilege to be seen in a long time.”); *cf.* W. Bradley Wendel, *How I Learned to Stop Worrying and Love Lawyer-Bashing: Some Post-Conference Reflections*, 54 S.C. L. REV. 1027, 1044 (2003) (“Debevoise & Plimpton worried that ‘the [S.E.C.] would be using the attorney as the Commission’s eyes and ears to build a case against the client.’”).

<sup>3</sup> Howard Stock, *S-O’s Lawyer Rule May Chill Information Flow*, INVESTOR REL. BUS., Aug. 18, 2003 (quoting Professor Jill Fisch to the effect that “[t]here are plenty of watchdogs already in place, and lawyers are poorly positioned to be gatekeepers”); David E. Rovella, *Going from Bad to Worse: Defense Bar Fears Jail over Tainted Fees*, NAT’L L.J., Mar. 11, 2002, at A1 (quoting practitioners who argue that efforts “to make lawyers ‘gatekeepers’ of the financial system may further impede the ability of criminal defense lawyers to properly represent their clients”); *cf.* *Corporate Counsel Critique SEC Proposal On Lawyer Reporting Mandated by New Law*, 18 ABA/BNA LAW. MANUAL ON PROF’L CONDUCT 698 (2002) (reporting the criticism that, in close cases, the Sarbanes-Oxley regulations put attorneys “in the role of judge rather than advocate”).

<sup>4</sup> *Programs Explore Concern that Government is ‘Federalizing’ Professional Ethics Rules*, 19 ABA/BNA LAW. MANUAL ON PROF’L CONDUCT 320 (2003) (quoting comment regarding the proposed gatekeeper initiative “Doesn’t that conjure up a sort of East German notion of reporting all ‘suspicious’ behavior?”) [hereinafter *Programs Explore Concern*]; *see also* Bruce Moyer, *The Dawn of Federal Regulation of Attorney Conduct?*, 50 FED. LAW. 5 (2003) (“Corporate law firms and bar associations had levied a barrage of criticism at the SEC’s proposed ‘noisy withdrawal’ rule, saying it threatened to turn lawyers into a police force”); Wendel, *supra* note 2, at 1044 (“Sullivan and Cromwell resists the [S.E.C.’s alleged] requirement that lawyers ‘police and pass judgment on their clients.’”); *ABA Amends Ethics Rules*, *supra* note 1, at 467 (“[William Paul] charged that the [proposed Model Rule] changes threaten to turn lawyers into ‘policemen, prosecutors, judges, and regulators.’”); *cf.* John C. Elam, *Lawyers Shouldn’t Be Police Agents: ABA Must Preserve Client Confidentiality*, NAT’L L.J., Aug. 1, 1983, at

quite different from saying that lawyers should do whatever clients want, assist clients in achieving illegal pursuits, or have no business shaping client ends.

Let us consider, as a starting point, the famous statement of Elihu Root that “half of the practice of a decent lawyer consists in telling would-be clients that they are damn fools and should stop.”<sup>5</sup> We should remember that Root, among his other accomplishments, was a high-powered lawyer noted for representing notorious corporate and political clients.<sup>6</sup> One biographer has characterized Root’s practice as “tempered by a failure to regard law as a living organism and by a reluctance to look beyond its letter to its implications for society as a whole.”<sup>7</sup> In one famous case, Root and his co-counsel were nearly held in contempt for representing a corrupt politician, and were lectured by the presiding judge as follows:

I ask you young gentlemen, to remember that good faith to a client never can justify or require bad faith to your own consciences, and that however good a thing it may be, to be known as successful and great lawyers, it is even a better thing, to be known as an honest man.<sup>8</sup>

Root, to his death, protested the importance of aggressive advocacy. In a speech to graduates of Columbia Law School, he stated: “One obligation I want to impress upon you. You must support the law even when in particular cases its justice seems doubtful. . . . The inviolability of constitutional and statutory rights is more valuable than the punishment of any

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20 (“[A]n attorney should . . . not be cast in the role of policeman or watchman over his client.”).

<sup>5</sup> 1 PHILLIP C. JESSUP, ELIHU ROOT 133 (1938).

<sup>6</sup> See RICHARD W. LEOPOLD, ELIHU ROOT AND THE CONSERVATIVE TRADITION 12, 14-18 (Oscar Handlin ed., 1954) (discussing Root’s participation in defending Boss Tweed and noting that this “did brand Root for all time as the defender of a corrupt boss and persuaded many persons that he would accept anyone as a client”).

<sup>7</sup> *Id.* at 19.

<sup>8</sup> 1 JESSUP, *supra* note 5, at 88.

one criminal.”<sup>9</sup> Given this commitment to partisanship, what did Root mean by emphasizing the duty to stand in the way of client conduct and how did he anticipate that lawyers should accomplish the half of their practice that consists of telling their clients no?

There are four broad aspects of lawyers’ traditional role that necessarily involve lawyers regulating client conduct; each will be discussed below. Categorized broadly, the lawyer functions that might require a lawyer to seek to prevent client behavior include: (1) advising clients, (2) screening cases and legal arguments, (3) avoiding personal participation in improper behavior, and (4) disclosing confidences, when permitted by rule, to serve interests that trump the client's.

## I. THE ADVISING FUNCTION

Lawyers’ alliance with clients and lawyers' duty to serve client interests do not require lawyers either to agree with client aims<sup>10</sup> or to assume that clients always wish to maximize their own economic interests.<sup>11</sup> Thomas Shaffer<sup>12</sup> and others<sup>13</sup> have written that lawyers have both a

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<sup>9</sup> *Id.* at 93.

<sup>10</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2002) (“A lawyer’s representation of a client . . . does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”) [hereinafter MODEL RULES].

<sup>11</sup> See Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1341 (1995) (questioning the practice of lawyers who “assume that their sole mission is to maximize the clients’ chances of obtaining their desired results”); see also Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 504-05, 538 (1985) (empirical study suggesting that lawyers in large law firms enthusiastically seek the maximization of client interests without attempting to discuss the goals first); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 30 (discussing the framework from which lawyers approach client counseling).

<sup>12</sup> E.g., Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319, 328 (1987); Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME LAW. 231 (1979).

right and an obligation to engage in a moral dialogue with their clients.<sup>14</sup> At a minimum, lawyers owe clients information, including information that suggests that the client's proposed or completed conduct is criminal (or wrongful in other respects).<sup>15</sup> Especially where a client may initially be uninformed, lawyers owe it to the client to identify and explain all the ramifications of particular behavior, including the moral consequences for the client and the effects of the behavior on third persons who may subsequently blame the client.<sup>16</sup> Many professional codes make the duty to keep clients informed explicit.<sup>17</sup> Presumably, the option of acting morally is one that a client might wish to consider.<sup>18</sup>

The spirit of the codes goes further, however, encouraging lawyers to express their own moral positions<sup>19</sup> and to attempt to persuade clients to act well.<sup>20</sup> One of the traditional

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<sup>13</sup> See, e.g., Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 630-32 (discussing the importance of moral discourse for lawyers who emphasize client autonomy in decisionmaking); Zacharias, *supra* note 11, at 1357-62 (discussing the possibility of codifying a duty to engage in a moral discourse with clients).

<sup>14</sup> Even Monroe Freedman, the strongest proponent of partisan lawyering, acknowledges the importance of discussing objectives with clients. See Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 200 (1977) (warning lawyers against "assum[ing] the worst regarding the client's desires"); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1478 (1966) (arguing that lawyers have a duty to remonstrate with clients who wish to commit perjury).

<sup>15</sup> The client must know this information at least in order to make informed judgments regarding whether pursuing the objective is worth the potential consequences. Citation??

<sup>16</sup> A lawyer who fails to do so ultimately may subject the client to reactions that disadvantage the client and that the client did not anticipate. Citation??

<sup>17</sup> See, e.g., MODEL RULES, *Supra* note 10, R. 1.4 (requiring communication with clients).

<sup>18</sup> See Robert F. Cochran, Jr. et al., *Symposium: Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591, 608 (2003) ("Survey evidence suggests that lawyers significantly underestimate the extent to which clients would welcome non-legal advice").

<sup>19</sup> Many jurisdictions follow MODEL RULES, *supra* note 10, R. 1.7(b), which requires a lawyer to obtain a conflict waiver when her representation might be limited "by a personal interest of the lawyer," including her moral

justifications for strict attorney-client confidentiality and privilege is that the guarantee of secrecy enhances the lawyer's ability to learn what the client plans to do and facilitates the lawyer's task of encouraging law compliance.<sup>21</sup> Other aspects of the codes emphasize the importance of lawyers maintaining independent judgment<sup>22</sup> and avoiding giving any assistance to illegal and fraudulent client misconduct.<sup>23</sup> The essence of these provisions is that lawyers should not act simply as clients' alter egos. Lawyer independence can help serve client interests, but it comes freighted with personal moral responsibility that lawyers must recognize within the confines of the rules governing confidentiality and loyalty.<sup>24</sup>

One recent case suggests that a lawyer's responsibility to counteract client misconduct has legal ramifications as well. Traditionally, the crime-fraud exception to attorney-client privilege has been interpreted to mean that client communications are unprivileged when uttered for the purpose of involving, or using, the attorney in committing a crime or fraud.<sup>25</sup> In *In re Public Defender Service*, the District of Columbia Court of Appeals held that this exception

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interests.

<sup>20</sup> For example, MODEL RULES, *supra* note 10, R. 2.1 provides:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

<sup>21</sup> See *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) (justifying attorney-client privilege by reference to the need to facilitate lawyers' ability to promote law compliance by clients).

<sup>22</sup> *E.g.*, MODEL RULES, *supra* note 10, R. 2.1.

<sup>23</sup> *E.g.*, MODEL RULES, *supra* note 10, R. 1.2(d) & cmt.

<sup>24</sup> *Cf.* Cochran, Jr. et al., *supra* note 18, at 608 ("As officers of the court and gatekeepers in imperfect regulatory processes, lawyers have obligations that transcend those owed to any particular client . . . [N]either legal nor market systems can function effectively if lawyers lack a basic sense of social responsibility for the consequences of their professional acts.").

<sup>25</sup> See, *e.g.*, CAL. EVID. CODE §956 (West 2003) ("There is no privilege . . . if the services of the lawyer



applies only when a lawyer has been unsuccessful in dissuading the client from committing the intended misconduct.<sup>26</sup> In other words, by exercising the gatekeeping function of dissuasion, the lawyer can retroactively convert potentially damaging discoverable statements into privileged communications. Consider the ramifications of the court's conception; if the court's analysis is correct, lawyers in these circumstances have a professional *obligation* to dissuade because that is the only way to maintain the client's legal rights.<sup>27</sup>

To be clear, let me neither understate nor overstate my position. There is a hard question; what is the extent to which lawyers should investigate clients' motives and conduct in an effort to uncover illegality that they should counteract? Robert Gordon recently has written a forceful argument that lawyers' conscious effort to avoid learning the true facts is (I would say the "conscious efforts ... are what made lawyers..." –V)what made lawyers complicit in the Enron scandal.<sup>28</sup> The effect that an investigative role might have on the lawyer-client relationship underlies the legitimate controversy surrounding the Gatekeeper Initiative that may ultimately lead to a requirement that lawyers investigate or report suspicious client activity.<sup>29</sup> I focus here,

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were . . . obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.”).

<sup>26</sup> 831 A. 2d. 890, 902 (D.C. 2003) (“[A]n ill-motivated client communication that ‘goes nowhere’—as where the client consults an attorney with an evil purpose but the attorney quashes the venture before anything further is done to promote it—is not sufficiently in furtherance of a crime or fraud to fall within the crime-fraud exception.”).

<sup>27</sup> *Cf. id.* at 901 (“The existence of the attorney-client privilege encourages clients to make . . . unguarded and ill-advised suggestions to their lawyers. The lawyer *is then obliged, in the interests of justice and the client's own long-term best interests*, to urge the client, as forcefully and emphatically as necessary, to abandon illegal conduct or plans.”) (emphasis added).

<sup>28</sup> Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1199-1200 (2003); *cf.* KENNETH MANN, *DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 17, 103-05 (1985) (discussing the conscious practice of criminal defense lawyers of avoiding learning the actual facts).

<sup>29</sup> *See infra* text accompanying notes 91-93.

however, on the simpler question of whether lawyers have any gatekeeper role to play.

The lawyer's role, and all of the lawyer's professional obligations, should be read against the backdrop of agency law. As clients' employees and agents, they have significant responsibility to serve their masters.<sup>30</sup> Yet agency law also sets boundaries, recognizing limitations concerning what agents must do for their masters and authorizing agents to react to superior third party interests.<sup>31</sup> The lawyer codes fine tune agency law for the special functions lawyers serve, but the codes do not change the underlying axiom: principals are not entitled to the help of their agents in committing wrongs, and agents' personal moral responsibility is not extinguished by virtue of their agency status.

## II. THE SCREENING FUNCTION

Lawyers serve most clearly as gatekeepers in screening the legal claims clients make.<sup>32</sup> There are various aspects to the screening function, all of which have been recognized explicitly in the codes or other law. Lawyers must, for example, screen the filings clients make before

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<sup>30</sup> See RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. e (Tentative Draft No. 2, 2001) (“[A]n agent must act in the principal's interest as well as on the principal's behalf.”).

<sup>31</sup> RESTATEMENT (SECOND) OF AGENCY § 395 cmt. f (1958) (“An agent is privileged to reveal information confidentially acquired by him in the course of his agency in the protection of a superior interest of himself or of a third person.”).

<sup>32</sup> Lawyers, of course, screen client claims for a variety of reasons, some of which rest on economic self-interest and some of which rest on their obligations to exercise independent judgment. Cf. Teresa Stanton Collett, *The Common Good and the Duty to Represent: Must the Last Lawyer in Town Take Any Case?*, 40 S. TEX. L. REV. 137, 171-72 (1999) (arguing that a lawyer may reject a case for moral and political reasons even if he is the “last lawyer in town”); Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22 (1997) (“[C]ontingency fee lawyers generally turn down at least as many cases as they accept, most often because potential clients do not have a basis for their case.”).

courts<sup>33</sup> and administrative agencies.<sup>34</sup> If they do not, the lawyers are subject to sanctions that can take the form of personal civil liability,<sup>35</sup> discipline,<sup>36</sup> or fines.<sup>37</sup>

Post-filing, tribunals continue to rely upon lawyers to screen client arguments, perceiving that to be an essential aspect of efficient judicial administration. At the simplest level, lawyers may not take frivolous positions.<sup>38</sup> But the dependence on lawyers as gatekeepers goes further. Rules like Fed. R. Civ. P. 11 anticipate that lawyers should also prevent clients from filing nonfrivolous claims for an improper purpose.<sup>39</sup> Courts expect lawyers to cull the arguments clients wish them to pursue with deference to the need for judicial efficiency in responding to the

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<sup>33</sup> See, e.g., FED. R. CIV. P. 11(b) (“By presenting to the court . . . a pleading, written motion, or other paper, an attorney . . . is certifying that . . . (1) it is not being presented for any improper purpose, . . . (2) the claims, defenses, and other legal contentions therein are warranted by existing law . . . (3) the allegations and other factual contentions have evidentiary support or . . . are likely to have evidentiary support . . . and (4) the denials of factual contentions are warranted on the evidence or . . . are reasonably based on a lack of information or belief.”); see also Evan A. Davis, *The Meaning of Professional Independence*, 103 COLUM. L. REV. 1281, 1283 (2003) (“Even a litigator is a gatekeeper who typically makes a representation of due inquiry and colorable merit when he or she signs a pleading.”).

<sup>34</sup> Some of the federal regulations requiring lawyers to screen positions taken before agencies are collected and discussed in Fred C. Zacharias, *Understanding Recent Trends in Federal Regulation of Lawyers*, 2003 SYMP. ISSUE PROF'L LAWYER \_\_\_, \_\_\_-\_\_\_(2004).

<sup>35</sup> The S.E.C. has always treated attorneys who participate in the preparation of documents that violate federal securities laws as aiders and abettors. *E.g.*, S.E.C. v. Nat'l Student Mktg. Corp., 457 F.Supp. 682, 715 (D.D.C. 1978); *cf.* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 191 (1994) (holding attorneys civilly liable under Rule 10b-5 when they are “primary” violators of the rule). In the notorious *Kaye, Scholer* case, the Office of Thrift Supervision imposed financial liability upon attorneys, establishing its position that lawyers who file documents as agents for clients assume the clients' reporting obligations. See Zacharias, *supra* note , at \_\_\_ and authorities cited at \_\_\_ nn. 14-16. Other federal agencies have followed suit. See *id.* at \_\_\_ and authorities cited at n.17.

<sup>36</sup> See, e.g., MODEL RULES, *supra* note 10, R. 3.1 (forbidding lawyers to assert frivolous positions).

<sup>37</sup> See, e.g., FED. R. CIV. P. 11(c)(2)(authorizing monetary penalties for violations of Rule 11).

<sup>38</sup> MODEL RULES, *supra* note 10, R. 3.1.

<sup>39</sup> FED. R. CIV. P. 11(b)(1) (prohibiting filing court documents “presented for any improper purpose”).

arguments.<sup>40</sup> And the professional codes impose candor to tribunal regulations that sometimes requires lawyers to disclose information that clients want to keep secret.<sup>41</sup> In some instances, the lawyer must turn on the client directly in order to preserve interests that society has deemed more important than the client's.<sup>42</sup>

### III. THE PERSONAL SEPARATION FUNCTION

There are both broad and narrow legal principles that impose on lawyers the obligation to separate themselves from unlawful or fraudulent client activity. In doing so, lawyers influence client conduct. The lawyer's refusal to take a particular action on a client's behalf (such as filing a fraudulent claim in a matter in which the lawyer is known to represent the client) can effectively prevent the client from succeeding in the action. The lawyer's threat of withdrawal, or actual withdrawal, may be enough to prevent the client from pursuing his plan.<sup>43</sup> In some instances, the lawyer's ability to disavow actions that she<sup>44</sup> has taken or documents that she has prepared is tantamount to allowing the lawyer to disclose a client's wrongdoing.

The professional codes do not mince words. Lawyers may not engage in dishonest

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<sup>40</sup> See, e.g., *Jones v. Barnes*, 463 U.S. 745, 746 (1983) (noting the importance of allowing lawyers to “winnow” the arguments made to the court, even when the client disagrees).

<sup>41</sup> E.g., MODEL RULES, *supra* note 10, R. 3.3(a).

<sup>42</sup> E.g., MODEL RULES, *supra* note 10, R. 3.3(b).

<sup>43</sup> See Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J. L. ECON. & ORG. 53 (1986) (considering whether liability should be imposed on lawyers for failing to “disrupt misconduct by withholding their cooperation from wrongdoers”).

<sup>44</sup> To avoid confusion, this essay refers to prosecutors as female and to other actors in the system as male.

behavior.<sup>45</sup> More specifically, they may not participate or assist illegal conduct;<sup>46</sup> and the ABA has interpreted the term “assist” very broadly.<sup>47</sup> To the extent the client insists upon a lawyer’s participation in forbidden conduct, the lawyer must withdraw.<sup>48</sup> After withdrawing, she may also disavow documents that reflect her unwitting complicity in improper actions.<sup>49</sup>

Professional codes are only the tip of the iceberg. Criminal laws apply to lawyers as well.<sup>50</sup> Lawyers may not conspire with clients,<sup>51</sup> aid or abet illegal conduct,<sup>52</sup> or participate directly in client crimes or frauds.<sup>53</sup> Moreover, fees they receive that were a product of illegal

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<sup>45</sup> MODEL RULES, *supra* note 10, R. 8.4(c) (forbidding “conduct involving dishonesty”).

<sup>46</sup> *Id.* R. 1.2(d).

<sup>47</sup> ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 87-353 (1987) (interpreting the term “assisting” broadly to include more than “criminal law concepts of aiding and abetting or subornation”); *see also* ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 93-376 (1993) (reaffirming Formal Op. 87-353’s broad interpretation of “assisting”).

<sup>48</sup> MODEL RULES, *supra* note 10, R. 1.16(a)(1).

<sup>49</sup> *Id.* R. 1.6 cmt.

<sup>50</sup> *See, e.g.*, Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 *FORDHAM L. REV.* 327, 330-52 (1998) (discussing the interaction of criminal law and professional regulation); Charles W. Wolfram, *Lawyer Crimes: Beyond the Law?*, 36 *VAL. U. L. REV.* 73, 79-91 (2001) (analyzing the notion that lawyers’ professional activities are “beyond the law”); Zacharias, *supra* note , at \_\_\_ (noting that lawyers have always been subject to criminal prosecution for criminal acts related to their practice).

<sup>51</sup> *See, e.g.*, *United States v. Cueto*, 151 F.3d 620 (7th Cir. 1998) (upholding a lawyer’s conviction for conspiracy to defraud the government); *United States v. Enstam*, 622 F.2d 857 (5th Cir. 1980) (upholding a lawyer’s conviction for conspiracy to defraud the government by impairing the collection of taxes).

<sup>52</sup> *See, e.g.*, *United States v. Kaplan*, 832 F.2d 676 (1st Cir. 1987) (upholding a conviction for aiding and abetting mail fraud); *United States v. Arrington*, 719 F.2d 701 (4th Cir. 1983) (upholding a lawyer’s conviction for aiding and abetting a conspiracy to receive and sell stolen property).

<sup>53</sup> *See, e.g.*, *United States v. Feaster*, No. 87-1340, 1988 WL 33814 (6th Cir. Apr. 15, 1988) (upholding a conviction of a lawyer for participating in the preparation of false tax returns); *United States v. Cintolo*, 818 F.2d 980 (1st Cir. 1987) (upholding a lawyer’s conviction for obstruction of justice).

conduct may be subject to seizure.<sup>54</sup> Therefore, lawyers are required to make themselves aware of the nature of client conduct<sup>55</sup> and, by their reactions, play a significant role in shaping subsequent client behavior.

#### IV. THE DIRECT GATEKEEPER FUNCTION

In certain situations, the professional codes already impose upon lawyers the precise type of gatekeeper function that has proven so controversial in the recent reform proposals. Corporate and other organizational lawyers, for example, are required to “take remedial measures” upon learning of corporate illegality and some other kinds of wrongs.<sup>56</sup> In most jurisdictions, the implementation of this obligation is subject to significant discretion on the part of the lawyer.<sup>57</sup> Unlike under some of the recent proposals,<sup>58</sup> a lawyer typically may not disclose corporate

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<sup>54</sup> See, e.g., Comprehensive Forfeiture Act, 21 U.S.C.A. § 853(a), (c) (1982 & Supp.IV 1986) (providing, *inter alia*, for the forfeiture to the U.S. of property derived from particular crimes and rendering transfers of such property to attorneys subject to seizure by the government); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623-35 (1989) (holding that the forfeiture of fees paid to an attorney was consistent with §853 of the Comprehensive Forfeiture Act of 1982 and was constitutional).

<sup>55</sup> See, e.g., *United States v. Monsanto*, 491 U.S. 600, 604 (1989) (rejecting the argument that attorneys who do not know a client’s property is subject to forfeiture should be allowed to retain fees paid with forfeitable assets); *United States v. Raimondo*, 721 F.2d 476, 478 (4th Cir. 1983) (holding that an attorney should have known that his client’s property and profits might be subject to forfeiture by virtue of the client’s indictment); *United States v. Badalamenti*, 614 F.Supp. 194, 196 (S.D.N.Y. 1985) (rejecting a lawyer’s claim that he did not know of the forfeitability of legal fees, based on the conclusion that the lawyer should have suspected the possibility because of the client’s indictment in a matter in which the client’s assets were subject to forfeiture).

<sup>56</sup> E.g., MODEL RULES, *supra* note 10, R. 1.13(b).

<sup>57</sup> Under rules like Model Rule 1.13(b), lawyers are given a menu of possible actions that they can take. Some jurisdictions expand the menu, or make certain actions mandatory. See, e.g., MD. RULES PROF’L CONDUCT, R. 1.13(c) (2002) (allowing some disclosures of otherwise confidential information); MICH. RULES PROF’L CONDUCT, R. 1.13(c) (2002) (allowing some disclosures); MINN. RULES PROF’L CONDUCT, R. 1.13(c) (2002) (allowing disclosure of criminal conduct); N.J. RULES OF PROF’L CONDUCT, R. 1.13(c) (2002) (providing that remedial action may, under some circumstances, include disclosure of confidential information).

<sup>58</sup> E.g., Proposed Rule, *supra* note 1.

wrongdoing to authorities outside the organization.<sup>59</sup> But the implication nonetheless is clear: the lawyer does play a significant role in preventing client misconduct.

More importantly, the issue of whether a lawyer should have a direct gatekeeper role in preventing client misconduct is a red herring. The attorney-client privilege has always excluded client communications made for the purpose of involving a lawyer in a criminal or fraudulent enterprise.<sup>60</sup> All American jurisdictions recognize that society's need to prevent particular kinds of client conduct sometimes trumps the client's interests in confidentiality and his lawyer's loyalty.<sup>61</sup> All lawyer codes have confidentiality exceptions<sup>62</sup>—some discretionary,<sup>63</sup> some mandatory.<sup>64</sup> In either event, the code rules are a matter of degree because it is not whether a

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<sup>59</sup> *E.g.*, MODEL RULES, *supra* note 10, R. 1.13 cmt.; CAL. RULE PROF'L CONDUCT, R. 3-600(B)(2). As noted in note 57 *supra*, a few jurisdictions do allow disclosure.

<sup>60</sup> *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 82 (2000) (identifying the crime-fraud exception to attorney client privilege).

<sup>61</sup> *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §6.7 at 301 (1986) (“[T]he normal expectation of lawyer loyalty to a client's interests is hardly an absolute. It does not purport to be a reason why a lawyer must always maintain silence regardless of the claims and interests of third persons.”); Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U. L. Rev. 199, 211 (2001) (discussing “‘social compact rules,’ under which third party or societal interests simply trump client autonomy”).

<sup>62</sup> Until recently, California's confidentiality provision seemed to be absolute. CAL. BUS. & PROF. CODE §6068(e) (West 2003); *see* San Diego County Bar Ass'n Legal Ethics and Unlawful Practices Comm., Op. 1990-1, at 3 (1990) at <http://www.sdcb.org/ethics/ethicsopinion90-1.html> (interpreting §6068(e) as being absolute); *see generally* Fred C. Zacharias, *Privilege and Confidentiality in California*, 28 U.C. DAVIS L. REV. 367 (1994) (analyzing the status of confidentiality and privilege in California). The provision was recently amended, however, to include a future crime exception roughly similar to the one in the pre-2003 Model Rules. *See* AB 1101 (August 25, 2003), amending CA BUS. & PROF. CODE 6068(e) (allowing an attorney to “reveal confidential information to the extent that the attorney reasonably believes disclosure is necessary to prevent a criminal act likely to result in death or substantial bodily harm to an individual”) (effective July 1, 2004).

<sup>63</sup> *E.g.*, MODEL RULES, *supra* note 10, R. 1.6(b) (allowing certain disclosures); MODEL CODE OF PROF'L RESPONSIBILITY, DR 4-101(c) (1969) (allowing disclosure of client's intent to commit a future crime or fraud) [hereinafter MODEL CODE].

<sup>64</sup> *E.g.*, FLA. RULES OF COURT, R. 4-1.6(b) (2003) (requiring the disclosure of information necessary to prevent a crime or serious bodily harm); ILL. COURT RULES & PROC., R. 1.6(b) (2003) (requiring disclosure to prevent certain harms); N.J. RULES OFCOURT, R. 1.6(b) (2004) (requiring disclosure to prevent certain criminal and

lawyer may ever disclose client misconduct, but rather in what situations such disclosure is appropriate.

## V. THE RECENT CRITICISMS AND THE MODERN REFORMS

The observations above illustrate that the modern critics are simply wrong in the rhetoric they have selected. Requiring lawyers to respond to client misconduct is not automatically equivalent to enlisting lawyers as “secret police.”<sup>65</sup> Indeed, the lawyer’s role has always included a substantial gatekeeper aspect.<sup>66</sup>

Older conceptions of professionalism probably envisioned greater involvement by lawyers in preventing client wrongdoing<sup>67</sup> than the partisan conceptions that developed in the 1970’s.<sup>68</sup> But even the latter, and their developed forms that are encapsulated in modern professional codes, had lawyer gatekeeping in mind. The modern tradition of ultra-partisan criminal defense lawyering may encourage lawyers to think of their relationship with clients

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fraudulent acts).

<sup>65</sup> See *supra* text accompanying note 4.

<sup>66</sup> For an interesting discussion of the constraints upon lawyers in exercising their gatekeeper role with respect to “strategic litigation” by clients, see generally Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 885 (1990).

<sup>67</sup> see Susan D. Carle, *Lawyers’ Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 L. & SOC. INQUIRY 1, 10-12 (1999) (characterizing David Hoffman’s 1836 “Resolutions for Professional Development” as being based, in part, on the notion that a lawyer should act as a “gatekeeper”); Gordon, *supra* note 28, at 1208-09 (citing the 1908 ABA Canons for the proposition that a lawyer must “observe and advise his client[s] to [follow] the . . . law” and discussing conceptions of the corporate lawyer as a “wise-counselor-lawyer-statesman” that endured until the 1970’s); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 241-42 (1992) (suggesting the limitations on partisanship in early American professional norms).

<sup>68</sup> See Zacharias, *supra* note 11, at 1314-27 (discussing the evolution of partisanship in lawyering and the changing emphases on objectivity during different periods of American history) and authorities cited at 1319-20 nn. 54-57.



primarily in terms of an alliance. But even the most active partisan advocates, upon reflection, should be willing to concede that the alliance has limits.<sup>69</sup>

This brings the discussion to the real, important question—one from which the modern rhetoric deflects attention. Assuming that lawyers *sometimes* have *some* role to play in shaping or responding to illegal or improper conduct, what is that role? More specifically, where on the spectrum of potential lawyer gatekeeping do the recently proposed reforms fall? Do they require anything new or anything that is inconsistent with the essential attorney-client relationship that society should wish to protect?

To the extent criticism of the proposals is fair, it must fall in one of two categories. First, it may be that a proposal simply goes too far in emphasizing the gatekeeping role. In other words, the proposals may weigh societal interests in disclosure or preventing client misconduct too heavily, or shortchange the societal benefits achieved by safeguarding partisanship. The second possible criticism is related to the first. The proposals may undermine essential aspects of the lawyer-client relationship in a way that unduly interferes with the lawyer's ability to fulfill the functions that the adversarial system depends upon her to undertake and accomplish.

Consider, for example, the change to Model Rule 1.6 recently adopted by the A.B.A., based on a recommendation by the ABA Corporate Responsibility Task Force.<sup>70</sup> The new rule effectuates one significant change. It would *permit* lawyers whose services are being, or have

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<sup>69</sup> See *supra* note ; see also Davis, *supra* note 33, at 1283 (opposing recent reform proposals, but conceding that lawyers sometimes act as gatekeepers); *Lessons from Enron: A Symposium on Corporate Governance*, 54 MERCER L. REV. 683, 719 (2003) (“Now, Sol said a couple of things that reminded me that lawyers are not only gatekeepers; lawyers are watchdogs. We fill both roles.”) (comments of former ABA President Alfred P. Carlton).

<sup>70</sup> See *ABA Amends Ethics Rules*, *supra* note 1 (reporting the amendments); see also \_\_\_\_\_, 19 ABA/BNA LAW. MANUAL ON PROF'L CONDUCT 263 (2003) (reporting the ABA Task Force proposals to amend the

been, used to perpetuate a financial crime or fraud upon a third person to disclose the fraud *to the extent necessary* to prevent or rectify the injury.<sup>71</sup> Is this a revolutionary change? Does it, as one opponent has asserted, “turn lawyers into the new cops on the beat, auditors of their clients, whistleblowers for the government. . . . [and] destroy the very core values that preserve the lawyer-client relationship”?<sup>72</sup>

This is hardly the case. The ABA’s 1969 Model Code of Professional Responsibility, which used to apply in most states, allowed disclosure for ongoing or future financial crimes.<sup>73</sup> The comments to the 1983 Model Rules already allow lawyers to “disavow” documents in circumstances similar to those contemplated by the new rule.<sup>74</sup> The current change was only narrowly defeated both when the 1983 rules were initially proposed<sup>75</sup> and again two years ago, when a similar amendment was proposed to the ABA House of Delegates.<sup>76</sup>

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model rules).

<sup>71</sup> MODEL RULES, *supra* note 10, R. 1.6(b)(2) (2003) (permitting lawyers to disclose “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”), *quoted in ABA Amends Ethics Rules*, *supra* note 1, at 467; *see also* MODEL RULES, *supra*, R. 1.6(b)(3) (2003) (permitting lawyers to disclose “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”), *quoted in ABA Amends Ethics Rules*, *supra* note 1, at 467.

<sup>72</sup> Lawrence J. Fox, *On the Proposed Changes in ABA Model Rules: Frontal Assaults on the Profession*, 229 LEGAL INTELLIGENCER 7 (Aug. 6, 2003).

<sup>73</sup> MODEL CODE, *supra* note 63, DR 4-101(c) (allowing lawyers to disclose a client’s intention to commit any crime).

<sup>74</sup> MODEL RULES, *supra* note 10, R. 1.6 cmt.

<sup>75</sup> *See* Lisa H. Nicholson, *A Hobson’s Choice For Securities Lawyers in the Post-Enron Environment: Striking a Balance Between the Obligation of Client Loyalty and Market Gatekeeper*, 16 Geo. J. Legal Ethics 91, 141-144 (2002) (noting that, in February 1983, “the ABA House of Delegates voted to eliminate from Model Rule 1.6 the two provisions relating to the prevention and rectification of client fraud, by a vote of 207 to 129”).

<sup>76</sup> *ABA Stands Firm On Client Confidentiality, Rejects ‘Screening’ For Conflicts of Interest*, 17 ABA/BNA LAW. MANUAL ON PROF’L CONDUCT 492 (2001) (reporting the rejection of proposed revisions to the Model Rules).

Moreover, the change is narrow; it is discretionary. It does not allow lawyers to blow the whistle on client frauds or crimes unless the lawyers' services are being used, essentially, to make them co-conspirators. The permitted disclosures are limited to those necessary to prevent the injury. They parallel disclosures permitted under the crime-fraud exception to attorney-client privilege,<sup>77</sup> so clients have no right to perceive the information to be sacrosanct. To summarize, in most situations, the attorney-client relationship continues as usual; the client simply must be forewarned that there are limits to what he can expect the lawyer to do for, or with, him.

Consider next the recently adopted Sarbanes-Oxley regulations, which have been echoed, in part, in a new version of Model Rule 1.13 just adopted by the ABA.<sup>78</sup> In essence, the S.E.C. regulations require corporate lawyers<sup>79</sup> who are aware of particular types of prospective corporate misconduct<sup>80</sup> to report the issues to the organization's "chief legal officer or a chief executive officer"<sup>81</sup> or to a "qualified legal compliance committee."<sup>82</sup> Lawyers who do not

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<sup>77</sup> See *supra* text accompanying note 25. somewhere around 25 perhaps? Author?

<sup>78</sup> MODEL RULES, *supra* note 10, R. 1.13(b), (c) (requiring lawyers who know that a corporate officer is engaging in a violation of law that is likely to substantially injure the organization to take remedial steps and permitting the lawyers to disclose outside the organization under certain circumstances), *quoted in ABA Amends Ethics Rules, supra* note 1, at 468.

<sup>79</sup> The proposed rule's definition of the term "attorney" seemed to broadly encompass non-securities lawyers who simply prepare or review limited portions of a filing, lawyers who respond to auditors' letters or prepare work product unrelated to securities matters that may later be used in connection with filings, and lawyers preparing documents that eventually may be filed as exhibits. Proposed Rule, *supra* note 1, at 6298. The final rule provides that, to be covered, an attorney must at least have notice that his work will be submitted to the Commission. Final Rule Discussion Section, *supra* note 1?, General Overview, at 16 ("[A]n attorney must have notice that a document he or she is preparing or assisting in preparing will be submitted to the commission to be deemed to be 'appearing and practicing' under the revised definition").

<sup>80</sup> The covered misconduct is not limited to violations of federal securities laws. The regulations address broader breaches of fiduciary duties, particularly breaches of duties to pension funds. S.E.C. Final Rule, *supra* note 1, § 205.2(d).

<sup>81</sup> *Id.* § 205.3(b).

receive an “appropriate response”—one that avoids the misconduct or convinces the lawyer that her assessment was erroneous—must refrain from participating in the misconduct and continue to report up the ladder. In some cases, they also may disclose information to the S.E.C..<sup>83</sup>

These gatekeeping requirements are extensions of rules that already exist. They require specific remedial action by lawyers,<sup>84</sup> whereas most state codes only require some action and leave the specific response to lawyer discretion.<sup>85</sup> They make the duty not to participate in wrongdoing explicit, but that duty already exists under the professional codes.<sup>86</sup> To the extent they represent statements by the federal agency that lawyers are personally responsible for statements they make in filings before the agency, that also is nothing new at all.<sup>87</sup> The most that

<sup>82</sup> *Id.* § 205.3(b), (c).

<sup>83</sup> The S.E.C.’s rule provides:

An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary: (i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors; (ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury . . . ; suborning perjury . . . ; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or (iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

*Id.* § 205.3(d)(2). For an interesting recent discussion of the likely effects of the S.E.C. regulations, see generally Jill E. Fisch and Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097 (2003).

<sup>84</sup> S.E.C. Final Rules, *supra* note 1, § 205.3(b)(1), (3), (9) (imposing mandatory internal reporting requirements on attorneys with knowledge of a potential violation); *Id.* § 205.3(d) (authorizing some disclosures to the S.E.C.).

<sup>85</sup> *See, e.g.*, MODEL RULES, *supra* note 10, R. 1.13 (requiring the lawyer to “proceed as is reasonably necessary in the best interest of the organization” and providing examples of possible remedial measures). Of course, the recent amendments to Model Rule 1.13 making certain actions mandatory are likely to influence some states to adopt a similar change for their own professional codes.

<sup>86</sup> *E.g.*, MODEL RULES, *supra* note 10, R. 1.2(d); *id.*, R. 1.16(a).

<sup>87</sup> *See Programs Explore Concern*, *supra* note 4, at 320 (“Although Sarbanes-Oxley certainly presents new nuances and challenges, [Bryan J. Redding] said, it is for all intents and purposes ‘just another aiding and abetting

critics can fairly argue about these new rules is that their extension of existing requirements go too far and are bad public policy.

That is different than what might be argued with the provision of the Sarbanes-Oxley regulations that the S.E.C. has held in abeyance, pending further comment. This provision would require lawyers “who reasonably believe that the reported material violation is ongoing or is about to occur and is likely to result in substantial injury to the financial interest of the issuer or of investors . . . [to] notify the Commission of their withdrawal, and disaffirm any submission to the Commission that they have participated in preparing which is tainted by the violation.”<sup>88</sup> The ABA recently has adopted a revision to Model Rule 1.13 that puts a somewhat similar, but permissive, requirement into effect.<sup>89</sup>

These reforms are more than a matter of degree. The S.E.C. proposal, in particular, potentially changes the lawyer-client relationship because the lawyer is almost required to blackmail the client into law compliance; if the client does not abide by the lawyer’s view of correct behavior, the lawyer effectively must notify the S.E.C. of the dispute, subjecting the client to investigation and likely sanction. Although this type of blackmail is possible under the traditional (and new) exceptions to attorney-client confidentiality, those exceptions cover far

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problem.”); Zacharias, *supra* note , at \_\_\_ (discussing various federal regulations imposing personal responsibility on lawyers for their federal filings); *cf.* Davis, *supra* note 33, at 1283 (“As for the idea of the securities lawyer as gatekeeper, the general concept is noncontroversial since, under typical contractual arrangements, securities issuances cannot go forward without a host of opinions from the attorneys involved.”).

<sup>88</sup> Proposed Rule, *supra* note 1, deferred by S.E.C. Final Rule Discussion Section, *supra* note 1. In-house attorneys would not be required to withdraw, but would have to “disaffirm any tainted submission they have participated in preparing.” *Id.*

<sup>89</sup> See *ABA Amends Ethics Rules*, *supra* note 1, at 468 (reporting the adoption of a provision stating that an organizational lawyer who has not received an appropriate response to an up-the-ladder report “may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization”).

more limited and extreme circumstances. And because the traditional exceptions typically are discretionary, like the existing S.E.C. disclosure rule,<sup>90</sup> they do not envision the lawyer adopting the dominant role as routinely as the proposal would. Nevertheless, the fair criticism of this proposal, again, is not that it is unique in requiring gatekeeping conduct, but rather that its effect would unduly interfere with the lawyer's traditional role as confidant and advisor.

Perhaps the most interesting of the recent reform proposals is the Gatekeeper Initiative. It is fair to say that the impetus for the initiative is to change lawyers from client allies to sources of information for government agents investigating terrorism and money laundering.<sup>91</sup> Accordingly, an ABA task force has already gone on record as opposing any proposal that would require the disclosure of confidential information "or otherwise compromise the lawyer client relationship or the independence of the bar."<sup>92</sup>

What is interesting about the ABA Task Force's noble sentiments is that they have been expressed *before* any proposal actually has issued. One can imagine *possible* proposals that would undermine the role of lawyers—such as a rule requiring lawyers to investigate clients and report any suspicious activity to law enforcement authorities, including suspicions about past

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<sup>90</sup> S.E.C. Final Rule, *supra* note 1, § 205.3(d)(2), quoted *supra* note 83.

<sup>91</sup> The Gatekeeper Initiative is described in Sally Baghdasarian, Comment, *Gatekeepers: How the Broad Application of Anti-Money Laundering Statutes and Strategies May Open An Attorney's Gates to Prosecution*, 32 SW. U. L. REV. 721, 725-26 (2003); Kevin L. Shepherd, *USA Patriot Act and the Gatekeeper Initiative: Surprising Implications for Transactional Lawyers*, 16 PROB. & PROP. 26, 27 (2002); Zacharias, *supra* note , at \_\_\_ ; Bruce Zagaris, *Gatekeepers Initiative: Seeking Middle Ground between Client and Government*, 16 CRIM. JUST. 26, 30 (2002) (discussing the Gatekeeper Initiative more thoroughly).

<sup>92</sup> *ABA Delegates Vote Opposition to Proposals to Make Attorneys Report Shady Transactions*, 19 ABA/BNA LAW. MANUAL ON PROF'L CONDUCT 99 (2003).

wrongdoing.<sup>93</sup> In contrast, if all that the reforms ultimately require is for lawyers to avoid aiding and abetting client crimes, this conduct already is required.<sup>94</sup> The intermediate possibility—that lawyers may be asked to report future crimes—easily would fit within the traditional conception of the lawyer’s role,<sup>95</sup> but (like all confidentiality exceptions) should be subjected to a policy analysis of its countervailing benefits for society and its costs to clients and the efficiency of the adversary system. None of the possible formulations are vulnerable to the criticism that the proposed reforms are *per se* invalid because they turn lawyers into gatekeepers.

## VI. CONCLUSIONS

At root, it is a good thing for lawyers to screen client misconduct. It keeps lawyers, themselves, honest. It serves societal interests in preventing harm. It enhances judicial administration. And it makes lawyers think about the morality and legality of clients’ conduct as well as their own, thus encouraging them to help clients recognize and pursue appropriate behavior. All of these are valid functions for lawyers, and they have always been understood to play a part in the lawyer’s everyday dealings with clients. The recent reform proposals simply

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<sup>93</sup> Some observers, based in part on the reactions of other countries to the Gatekeeper Initiative, have assumed that the forthcoming proposals for U.S. lawyers might well include a requirement that lawyers inquire into or report suspicious transactions by their clients or both. *E.g.*, Baghdasarian, *supra* note 91, at 726; Susan R. Martyn, *In Defense of Client-Lawyer Confidentiality . . . And Its Exceptions*, 81 NEB. L. REV. 1320, 1348-49 (2003); Zagaris, *supra* note 91, at 28; ABA *Creates Task Force on Gatekeeper Regulation and the Profession*, 17 CRIM. JUST. 31 (2002); *cf.* Nicole M. Healy, *The Impact of September 11th on Anti-money Laundering Efforts, and the European Union and Commonwealth Gatekeeper Initiatives*, 36 INT’L LAW. 733, 735 (2002) (“The effects of [European] directives on U.S. lawyers practicing or doing business in EU or Commonwealth nations will bear watching, because these gatekeeper initiatives may conflict with U.S. lawyers’ ethical obligations of confidentiality.”).

<sup>94</sup> *See supra* text accompanying note 52.

<sup>95</sup> *See supra* text accompanying note 67. **is this the right footnote?**

address some regulators' perceptions that lawyers' own understanding and implementation of these functions has not been adequate in recent times.

But gatekeeping is only one part, and a relatively small part, of the lawyer's role. If lawyers are to put the adversary system into effect—with all its societal benefits—society must protect lawyers' ability to obtain information, ally themselves with lawful client ends, and even serve unpopular client causes. Indeed, lawyers' ability to act as gatekeepers, in some respects, depends on their partisanship.<sup>96</sup>

The key to evaluating reform proposals that emphasize gatekeeping is to avoid rhetoric that ignores both aspects of the balance. Characterizing any shift as an end to lawyering as we know it only serves to strengthen the case for reform. **Footnote for quote? Or not a quote? See redlines for changes** That characterization suggests that its proponents misunderstand the limits of partisanship and require reforms that will reeducate them about those limits.<sup>97</sup>

Elihu Root was an aggressive, ultrapartisan lawyer.<sup>98</sup> Yet he warned us that the lawyer's job consists as much of standing in the way of misguided client pursuits as of implementing

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<sup>96</sup> This is one of the standard justifications for strict attorney-client confidentiality. Arguably, only if the client understands that the lawyer is a complete ally and will not disclose confidences will the client inform the lawyer of intended misconduct and thereby provide an opportunity for the lawyer to dissuade the client. See Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 359 (1989) (reviewing the justifications for strict confidentiality); cf. John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1307 (2003) (justifying a gatekeeper role for lawyers, in part, on the basis that “the ultimate goal of the law is to achieve law compliance, not to maximize uninhibited communications between the attorney and client. Client confidentiality is a means to an end, not an end in itself. Thus, the law has long placed some limitations on attorney-client communications . . .”).

<sup>97</sup> An interesting example of this phenomenon is discussed in Baghdasarian, *supra* note 91, at 731, which suggests that one of the two reasons not to emphasize lawyer gatekeeping is the mere fact that such an emphasis might lead to the government pursuing “criminal sanctions against an attorney.” Of course, there is nothing inherent in the lawyer's role that should immunize lawyers from prosecution for aiding and abetting client crimes. See authorities cited *supra* note 52.

<sup>98</sup> See LEOPOLD, *supra* note 6, at 18 (“[W]hile he would not prostitute himself to abet illegal action, he did



client desires. No one except misguided practitioners and cynical criminal clients truly envision the lawyer's role as assisting wrongful ends. We *are* gatekeepers, and we should never forget it.

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believe he should help businessmen operate to the fullest advantage within the letter of the law.”).