

Enron, Watergate and the Regulation of the Legal Profession

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I. INTRODUCTION

The most famous scandal of the twentieth century was the Watergate scandal, which most notably led to the resignation of Richard Nixon as President of the United States. The significance of Watergate, however, extends further than the resignation of Nixon. Because Watergate involved so many lawyers, it had a great impact on the regulation of the legal profession.¹ Although the twenty-first century has just started, the strongest contender for this century's most famous scandal is the Enron scandal. Although the Enron scandal is identified mostly with misconduct by accountants and corporate officials, it too involved lawyers and has impacted on the regulation of the legal profession.² Although the two scandals differ in that Watergate was a political scandal involving the misconduct of government officials, and Enron was a financial scandal involving misconduct of accountants and corporate officials, the issues involving lawyers are identical. Most significant to this symposium is that both scandals involve important issues concerning the role of an attorney for an organization when the attorney learns of information indicating misconduct by those working for and/or in charge of the attorney's organizational client. The purpose of this article is to discuss these issues as presented by the Watergate and Enron scandals, and to analyze how

* Professor, University of Baltimore School of Law. Professor Rochvarg is the author of *WATERGATE VICTORY: MARDIAN'S APPEAL* (1995), which is the source of much of the factual discussion of the Watergate scandal in this article. Professor Rochvarg served as a member of the legal defense team for Robert C. Mardian, former Assistant Attorney General of the United States, who was convicted of conspiracy to obstruct justice along with former Attorney General John Mitchell and former Nixon White House aides John Ehrlichman and H.R. Haldeman at the Watergate conspiracy trial before Judge John Sirica. Mardian's conviction was reversed on appeal.

1. When John Dean testified before the Senate Watergate Committee, he was asked about "stars" he had placed next to certain names on a list he had compiled. Dean responded that he had placed "a little asterisk beside each lawyer, and that his reaction was how in God's name could so many lawyers get involved in something like this." *Presidential Campaign Activities of 1972: Hearing on Watergate and Related Activities: Phase I: Watergate Investigation Before the Select Comm. on Presidential Campaign Activities of the United States Senate*, 93d Cong., 1053-54 (1973) (statement of John Dean, White House Counsel). See Donald T. Weckstein, *Watergate and the Law Schools*, 12 *SAN DIEGO L. REV.* 261 (1974). When Weckstein wrote his article, he identified himself not only as Dean and Professor of Law at University of San Diego, but also as an "unindicted lawyer." *Id.* at 261.

2. Harvey Pitt when he was chairman of the Securities and Exchange Commission (SEC) in a speech to the Business Law Section of the American Bar Association (ABA) asked regarding Enron, "Where were the lawyers?" and "What were the lawyers doing to prevent violations of the law?" Harvey Pitt, Speech to the Business Law Section of the American Bar Association (Sept. 20, 2002), *quoted in* Rachel McTague, *Pitt Says SEC Will Take on Assignment of Disciplining Lawyers if State Bars Do Not*, 18 *Laws. Man. on Prof. Conduct (ABA/BNA) No. 20*, at 591 (Sept. 25, 2002).

the responses by the legal profession and the federal government have impacted the regulation of the legal profession. The article will first discuss how issues involving the role of an attorney when representing an organizational client that has engaged in misconduct were central to the Watergate scandal. The article will then discuss reforms of the legal profession that were made in response to Watergate. These reforms were primarily the efforts of the legal profession itself. Next, the article will discuss the similarity of the Enron scandal to the Watergate scandal. Enron also involved issues of an attorney's role when representing an organizational client that has engaged in misconduct. As the article will discuss, the reform efforts in response to the Enron scandal differed from those in response to Watergate in that after Enron, the federal government through the Sarbanes-Oxley Act, and various actions by the Securities and Exchange Commission (SEC), sought to control various aspects of the regulation of the legal profession. As the article will demonstrate, the Enron scandal has brought forth changes that seriously challenge the traditional view of the legal profession as self-regulating.

II. ORGANIZATIONAL CLIENTS, CONFIDENTIALITY AND WATERGATE

Two of the defendants at the Watergate conspiracy trial became involved in the Watergate scandal through their roles as attorneys for the Committee to Re-elect the President (CRP). CRP was the organization formed by President Nixon and Attorney General John Mitchell to run Nixon's re-election campaign. Although CRP was not a for-profit corporation, CRP's entity status is analogous to the corporate status of Enron with regard to the issues relevant to this symposium.

On June 17, 1972, a group of men were arrested at the Democratic National Committee (DNC) offices in the Watergate office complex in Washington, D.C. Among those arrested was James McCord who was an employee of CRP. A few days later, a civil suit was filed against CRP by the DNC seeking damages for invasion of privacy based on the tort doctrine of respondeat superior. Robert Mardian, a campaign official at CRP, was assigned by John Mitchell, now Director (the top official) of CRP, to serve as CRP's lawyer in defense of the DNC civil suit. Mardian had previously served as an Assistant Attorney General at the Justice Department under Mitchell. Because of his campaign duties, Mardian was not expected to handle the actual litigation, and a few weeks later, with Mitchell's concurrence, Mardian

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hired Kenneth Parkinson, a partner in a Washington, D.C. law firm, to take over the representation.³

Neither Mardian nor Parkinson had any first-hand knowledge of any of the facts relating to the Watergate break-in. In order to carry out their duties as attorneys for CRP, both Mardian and Parkinson met with various employees of CRP in order to learn the facts to prepare CRP's litigation defense. Among the persons that Mardian and Parkinson interviewed were Gordon Liddy and Jeb Magruder, both of whom had personal knowledge of matters relevant to the Watergate break-in. Perhaps most significant was Mardian's meeting with Gordon Liddy.⁴ At this meeting, held a few days after the break-in, Liddy was so concerned about confidentiality that Liddy turned on the radio to avoid any possible recording of their conversation. At first, Liddy tried to establish that he was talking to Mardian as his personal attorney. Mardian, however, told Liddy that he was the lawyer for CRP and was not acting as Liddy's personal attorney. Mardian did tell Liddy that since Liddy was an employee of CRP, Liddy's communications were confidential except that Mardian would be obligated to report what he learned to John Mitchell.⁵ Thereupon, Liddy told Mardian many of the details of the planning of the Watergate break-in. These details included facts about his own involvement as well as the involvement of others who were CRP employees. Liddy also asked Mardian whether CRP would pay the bail for the arrested burglars. Following his meeting with Liddy, Mardian immediately reported to Mitchell what Liddy had told him. Mitchell reacted with shock and denial. Mitchell told Mardian that CRP would not provide any money to the burglars. Subsequent to his meeting with Mitchell, Mardian arranged a meeting between Liddy and Parkinson. At this meeting, Liddy offered Parkinson a one-dollar bill as a retainer to supposedly establish an attorney-client relationship between Parkinson and Liddy. When Parkinson refused to take the dollar bill, Liddy refused to speak with Parkinson.

Also relevant was a meeting which Mardian arranged between Parkinson and Jeb Magruder, Deputy Director of CRP. At this meeting, Magruder told Parkinson about his own involvement in the planning of the Watergate break-in and about the involvement of others including Mitchell. Parkinson then went to Mitchell and told him

3. Mardian could be viewed as CRP's inside counsel; Parkinson could be viewed as CRP's outside counsel or litigation counsel.

4. Liddy's official title during the campaign was General Counsel for the Finance Committee.

5. Mardian did not warn Liddy that Mitchell would be free to disclose what Liddy said, but "[t]hat was a risk Liddy had to take." ARNOLD ROCHVARG, *WATERGATE VICTORY: MARDIAN'S APPEAL* 39 (1995).

what he had just been told by Magruder. Mitchell responded that Magruder's story "was not true and was nonsense."⁶

In the invasion of privacy lawsuit filed by the DNC, the defense presented by CRP through its attorneys was that CRP had no liability for the break-in because any CRP employees involved in the break-in were on a "lark or frolic of their own."⁷ We, of course, now know that this was not true. In fact, Mitchell and Magruder, the top two persons at CRP, were fully aware of the plans for the break-in. If Mardian or Parkinson, the attorneys for CRP, had reported the misconduct that they had learned from Liddy and Magruder to the FBI in the summer of 1972, the nation would have been spared the nightmare of Watergate. But the attorneys did not reveal their client's misconduct. Instead the attorneys kept the information confidential and argued to the court (and the nation) that CRP had not engaged in wrongful conduct.

Both Mardian and Parkinson were indicted for conspiracy to obstruct justice with co-defendants John Mitchell and White House aides H.R. Haldeman and John Ehrlichman.⁸ At the Watergate conspiracy trial before Judge Sirica, a key component of the defense of both Mardian and Parkinson was that they had been acting as attorneys, not conspirators. Both defendants justified their meetings with conspirators Jeb Magruder and Gordon Liddy as an attorney's responsibility to investigate the facts. No disclosure to persons outside of CRP of what the attorneys learned during their investigation had been made because of their ethical duty of confidentiality. Both Mardian and Parkinson went to the head of CRP, John Mitchell, and reported to him what they had learned. Both had been told by Mitchell that these facts were not true and that there was no CRP involvement in the Watergate break-in. Both attorneys argued that the arrested CRP employees had been on a "lark of their own" because this was a plausible, non-frivolous defense based on what they learned during their investigation on behalf of their client, CRP.

Mardian's defense that his duty of confidentiality to Liddy prohibited Mardian from making disclosures to anyone except Mitchell was challenged by the prosecution as a façade behind which Mardian was trying to hide. In response, Mardian's lawyers requested that an instruction be given to the jury based on the Code of Professional Conduct as it was in effect in Washington, D.C. during the relevant time period. In response to this request, Judge Sirica gave the following instruction to the jury:

6. *Id.* at 68.

7. *Id.* at 70.

8. Parkinson was also indicted for obstruction of justice. Richard Nixon was named an unindicted co-conspirator.

Two defendants, Messrs. Mardian and Parkinson, claim to have participated in or directed the legal representation of the Committee to Re-elect the President in response to a civil suit filed by the Democratic National Committee. This fact may have some bearing on the specific intent of these two defendants. In weighing and evaluating the evidence relating to the element of intent, you should consider whether the actions taken by each of these defendants were undertaken with a criminal intent and in furtherance of the conspiracy charged.

Let me point out that a lawyer has a duty to become fully informed of all facts of the matter he is handling.

The relationship between a lawyer and his client is absolutely confidential, requiring a high degree of trust and good faith. An attorney is ethically required to preserve the confidences and secrets of his clients. This is the basis of the so-called attorney-client privilege.

It is well settled, however, that this attorney-client privilege which we are talking about does not extend to communications between an attorney and client which are in aid of or in furtherance of a crime or fraud. The privilege does not apply to shield such criminal conversations.

What all this boils down to is a question of intent. If you find, based on the evidence and what I have told you about the duties and limits on the duties of a lawyer, that either or both of these defendants (Mr. Mardian and Mr. Parkinson) lacked the criminal intent to join and further the conspiracy charged in Count One because he was merely doing his job as a lawyer, you must find that defendant not guilty of Count One. But if you find that either Mr. Parkinson or Mr. Mardian, or both of them, were acting with the intent to participate in the alleged conspiracy, then the fact that he happened to be active as a lawyer also is no defense, and he should be found guilty provided all the other elements are also established beyond a reasonable doubt.⁹

The jury acquitted Parkinson but convicted Mardian. Mardian was sentenced to a prison term of ten to thirty-six months.

In his appeal, Mardian presented a few arguments to the Court of Appeals that focused on his role as attorney for CRP:

- Whether the jury instructions were inadequate because they failed to instruct the jury on an attorney's professional obligations when the client is an organization;
- Whether the jury instructions were inadequate because they failed to instruct the jury that an attorney's professional obligations required him to resolve doubts about credibility in favor of his client; and
- Whether the jury instructions were inadequate because they failed to instruct the jury about Mardian's professional obligation to keep Liddy's communications confidential.

Although the Court of Appeals rejected Mardian's arguments that the jury instructions were inadequate, it did reverse Mardian's conviction

9. ROCHVARG, *supra* note 5, at 250-51.

on the ground that Mardian's trial should have been severed from the others.¹⁰

III. REFORMS TO THE LEGAL PROFESSION IN RESPONSE TO WATERGATE

Throughout the period of the Watergate scandal, the legal profession was heavily criticized for its seemingly unethical behavior. It was frequently noted that many of the Watergate defendants were lawyers. Although many of the Watergate culprits were lawyers, the only defendants who had actually acted in a capacity as a lawyer in the Watergate matter were Mardian and Parkinson. Nevertheless, Watergate led to increased attention to the regulation of the legal profession.

During the Watergate period, most states based their rules of professional conduct on the Code of Professional Responsibility which had been adopted by the American Bar Association (ABA) House of Delegates in 1969. The ABA, a private, voluntary organization of lawyers, first adopted rules of professional conduct in 1908 when it approved the Canons of Professional Ethics (Canons). The Canons originally were adopted as the rules of conduct for those lawyers who were members of the ABA, which at the beginning of the twentieth century represented only a small percentage of the lawyers in the United States. Despite their original purpose, shortly after their adoption by the ABA, the Canons became a model set of guidelines which most states adopted as binding rules for their state courts. These rules were enforceable through the states' official disciplinary processes. Thus, although drafted by the ABA, the Canons became binding law through their adoption by state governments, most notably the supreme courts of each state. During the 1960s, the ABA decided that a wholesale revision of the Canons was appropriate. This led the ABA to draft the Code of Professional Responsibility (Code). The ABA Code was extremely influential. Just about every state amended its attorney professional responsibility rules from ones based on the Canons to ones based on the Code by the early 1970s. At the time of the Watergate scandal, the ABA Code was the prevailing model upon which states based their rules.

The ABA Code offered little guidance on the professional responsibilities of an attorney representing an organization such as CRP or any other business organization. The only provision in the ABA Code relevant to organizational clients was in Ethical Consideration 5-18.¹¹ This section provided that an attorney for an entity owed his

10. *United States v. Mardian*, 546 F.2d 973, 983 (D.C. Cir. 1976). Subsequently, the Office of Special Prosecutor decided not to retry Mardian, and the charges were dropped.

11. MODEL CODE OF PROF'L RESPONSIBILITY EC 5-18 (1969) [hereinafter MODEL CODE].

allegiance to the entity and not any individual of the entity, i.e., not to any director or employee. No other guidance on organizational clients was provided. The Code did provide more guidance on the confidentiality issues raised in the Watergate case. Disciplinary Rule 7-102(B)(1) of the Code provided that if a lawyer received information “clearly establishing” that his client has “perpetrated a fraud upon a person or tribunal,” the lawyer “shall promptly call upon his client to rectify” the fraud, and if the client refused to rectify the fraud, the attorney was required to reveal the fraud.¹² The District of Columbia, however, had not adopted the mandatory disclosure provision; the rule adopted in the District of Columbia only required that the attorney tell his client to rectify the fraud. If the client ignored his attorney, the attorney was not permitted to make any disclosures. Because the law of the District of Columbia was the relevant law at the Watergate conspiracy trial, Mardian relied on the District of Columbia version to support his position that he had acted properly, or at least without criminal intent, when he made no disclosure to the authorities of what had been communicated to him by Liddy and Magruder.

Partly as a result of the Watergate scandal, persons both within and outside the legal profession in the mid-1970s believed that the ABA Code was inadequate. Even though the ABA Code had only recently been adopted by the ABA and had only recently been relied upon by the states in updating their rules of professional conduct for attorneys, the prevailing view was that change in the legal profession was needed. The opinion was expressed that if lawyers had acted differently during Watergate, the nation would have been spared the trauma of the Watergate scandal. The opinion was also expressed that the lawyers involved in Watergate, and in fact all lawyers, relied upon the rules of professional conduct to avoid their responsibility to society. The phrase “Watergate defense” was used to describe a position of absolute confidentiality arising from the attorney-client relationship which lawyers honored no matter what illegal actions had been committed or contemplated by their clients and no matter what consequences to the public these illegal actions would cause.¹³ State attorney disciplinary boards also came under attack for their failure to adequately police the legal profession. Not to be left out were the law schools. Legal education was criticized for its failure to instill the proper values in its graduates. From all these criticisms, new emphasis on legal ethics began after Watergate.¹⁴ Many saw the Watergate

12. MODEL CODE DR 7-102(B)(1).

13. *The ABA's "Watergate Rules,"* WASH. POST, Apr. 15, 1981, at A20.

14. Former Vice President Spiro Agnew, who was forced to resign as vice president, coined the phrase “post-Watergate morality.”

scandal as an opportunity for meaningful reform of the legal profession.¹⁵

The legal profession responded to Watergate in a few ways. New emphasis was placed on professional responsibility courses in the law schools. For the first time, by the late 1970s, 100% of law schools offered a course on professional responsibility.¹⁶ Bar examiners increasingly added Professional Responsibility to those subjects tested on the bar exam. The ABA, which had only a few years earlier adopted the Model Code of Professional Responsibility, embarked on a project that would lead to the wholesale revision of the ABA Code. A prominent group of lawyers headed by Robert Kutak worked for six years, holding open hearings throughout the country and eliciting views from the entire profession in order to develop a new set of model rules for the legal profession. The Kutak Commission's work sparked a debate over lawyer ethics and professional responsibility that had never been seen before. The ABA's work also led most states to reevaluate their rules of professional conduct. Bar committees at the state level were formed to comment on the Kutak Commission's work and to make recommendations to the state courts.

Most significant to this symposium are the ABA's post-Watergate positions on an attorney's professional obligations when the client is an organization and an attorney's duty of confidentiality. The Kutak Commission recommended to the ABA House of Delegates that it adopt a rule which would specifically cover an attorney's professional obligations to an organizational client, both for-profit corporations and non-business entities. This was a significant step in the regulation of the legal profession. Although the ABA Code, adopted in 1969, had a section that provided that when representing an organization, the lawyer's client was the organization, this section did not set forth any special professional responsibilities for a lawyer representing an organization. After extensive discussion, the Kutak Commission recommended a new rule, numbered 1.13 and titled "Organizations as the Client." The Kutak Commission's proposal sought to deal with what an attorney could and should do if the attorney for an organization learned of misconduct within the organization. The Kutak Commission's proposal provided in relevant part:

- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the

15. Weckstein, *supra* note 1, at 263 ("Out of the debris of these fallen idols an opportunity for professional reform, more favorable than perhaps at any other time in our history, has arisen.")

16. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 39 (1992).

- organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:
- (1) asking reconsideration of the matter;
 - (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
 - (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.
- (c) When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by Rule 1.6 [the confidentiality rule] only if the lawyer reasonably believes that:
- (1) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interest of the organization; and
 - (2) revealing the information is necessary in the best interest of the organization.¹⁷

If this had been the prevailing standard during the Watergate scandal, it could have been argued by the prosecution that Mardian and Parkinson, as CRP's attorneys, could have ethically reported the misconduct by CRP's employees to persons outside of CRP, i.e., to the FBI. The first step under proposed Rule 1.13 was for Mardian and Parkinson to report to CRP's head, John Mitchell, what they had been told about the involvement of CRP employees in the break-in. When Mitchell refused to act because of his own personal interest, the next step authorized by the proposed rule was "revealing the information"

17. THOMAS D. MORGAN & RONALD D. ROTUNDA, 2003 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 65 (2002).

if this was necessary in the best interests of the organization even if otherwise protected by the rule of confidentiality.¹⁸

When Rule 1.13, as proposed by the Kutak Commission, was presented to the ABA House of Delegates, the part of subsection (c) which permitted a lawyer for an organization to take remedial steps outside the client organization, including disclosure of confidential information to government authorities, was rejected. Subsection (c) was redrafted and approved by the House of Delegates to provide as follows:

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.¹⁹

By rejecting the Kutak Commission proposal, the ABA adopted permissive withdrawal, not disclosure, as the appropriate response when an attorney's organizational client is engaged in wrongdoing, and the top organizational officials refuse to remedy the wrongdoing. This response had been Mardian's response in Watergate. He withdrew as counsel for CRP in the DNC civil suit and returned to full-time campaign duties after making disclosure to Mitchell.

To many, the ABA's decision on Rule 1.13 was disappointing. They argued that the ABA had failed to respond adequately to those critics of the legal profession who had argued that attorneys do not do enough to protect society from the wrongdoing of their clients. Despite the ABA's rejection of the Kutak Commission's proposal to permit disclosure of wrongdoing outside the organization when the organization's highest officials have failed to respond to the wrongdoing, some states did adopt the Kutak Commission's version of Rule 1.13 after reexamining the rules of professional conduct to be applied in their states, and thus disclosure was permitted in these states.²⁰

The Model Rule governing confidentiality that was eventually adopted by the ABA was also disappointing to those critics of the legal profession who had hoped for greater reform in the post-Watergate era. Again after much study and debate, the Kutak Commission proposed a rule which expanded a lawyer's duty of confidentiality beyond what had been in place under the Model Code during the Watergate years. This was somewhat surprising because many believed a lawyer's duty of confidentiality was too broad already and that confi-

18. This does not necessarily mean that such disclosure would have been clearly required. For example, Mardian's position at trial was that he did not "know" the true facts, and that based on Mitchell's reputation and friendship, Mardian was more inclined to believe Mitchell's denials than the allegations from Liddy and Magruder.

19. MODEL RULES OF PROF'L CONDUCT R. 1.13 (2001).

20. Such states include Maryland, Michigan and New Jersey.

confidentiality was one reason permitting the Watergate scandal to occur. The confidentiality rule proposed to the ABA by the Kutak Commission was as follows:

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
 - (1) to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;
 - (2) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used;
 - (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim, or disciplinary complaint against the lawyer based upon conduct in which the client was involved; or
 - (4) to comply with other law.²¹

As just discussed, this proposal reflected the Kutak Commission's position that the protections of confidentiality under the already existing Model Code were not broad enough. This proposal expanded client confidentiality protections in a few ways. First, confidentiality attached to all information about a client relating to the representation. Under the Model Code, confidentiality only attached to information "gained in" the professional relationship that the client requested to be held inviolate or the disclosure of which would be embarrassing or detrimental to the client.²² The new rule sought to protect information even if it was acquired before or after the attorney-client relationship existed. Moreover, the new rule did not require the information to be embarrassing or detrimental to the client; all information was covered. Second, under the old Model Code, a lawyer was permitted ("may reveal") to reveal the intention of the client to commit any crime and to reveal the information necessary to prevent any crime.²³ The proposed rule only permitted the lawyer to reveal information about the client to prevent the client from committing a crime that would result in death, substantial bodily harm, or substantial financial injury. Third, under the Model Code, the lawyer was required to reveal information necessary to rectify a fraud upon a person.²⁴ The

21. MORGAN & ROTUNDA, *supra* note 17, at 25.

22. MODEL CODE DR 4-101(A).

23. MODEL CODE DR 4-101(C)(3).

24. MODEL CODE DR 7-102(B)(1).

new proposed rule only permitted disclosure in such a situation; it did not require disclosure.

Despite the fact that the Kutak Commission's proposed Rule 1.6 expanded the confidentiality obligations of an attorney from those of the Model Code, proposed Rule 1.6 was rejected by the ABA House of Delegates because it did not go far enough in expanding the duty of confidentiality. The final rule as adopted by the ABA deleted the exceptions in (b)(2) and (b)(4). Most significant to this symposium is that the ABA rejected requiring an attorney to make disclosure of a client's fraud in order to rectify the consequences of such fraud. Instead the ABA adopted a rule that prohibits such disclosure. This shift in position was not without controversy. Many believed it was inconsistent with the prevailing post-Watergate view that more secrecy was not preferable. The position that prevailed within the ABA, however, was that a broad confidentiality rule best served the public interest. The Comments to Rule 1.6 included the following points:

- A broad confidentiality rule facilitates the full development of facts essential to the proper representation of the client;
- A broad confidentiality rule encourages people to seek early legal assistance;
- A broad confidentiality rule encourages clients to communicate fully and frankly;
- A broad confidentiality rule leads to better compliance with the law because almost all clients follow the advice given by their attorney; and
- The public is better protected if full and open communication by the client is encouraged.²⁵

These arguments did not convince everyone that Model Rule 1.6 as adopted by the ABA was the appropriate solution. Those within the ABA who supported a broader disclosure rule were able to have the following comment adopted: "Rule 1.6 [does not prevent] the lawyer [when required to withdraw under Rule 1.13 "Organization as Client"] from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like."²⁶ This comment is known as the "noisy withdrawal comment." Although ABA Model Rule 1.6 does not permit disclosure of any information regarding the reason for withdrawal, the comment permits the lawyer to disclose the fact of withdrawal. This disclosure in fact may serve as a warning that a problem exists, but the actual problem cannot be disclosed.

25. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. (2001), reprinted in MORGAN & ROTUNDA, *supra* note 17, at 26-32.

26. See Letter from Thomas D. Morgan, Professor, George Washington University Law School, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Apr. 7, 2003), at <http://www.SEC.gov/rules/proposed/s74502/tdmorgan040703.htm>.

The ABA's position on confidentiality as adopted in Model Rule 1.6 was generally not well received. The majority of states refused to adopt Model Rule 1.6.²⁷ Some states adopted the Kutak Commission's proposal as their rule. Other states adopted a confidentiality rule based on the Model Code which required disclosure in certain situations. In 1991, based in part on the negative response which Model Rule 1.6 had received since its adoption, a special committee of the ABA recommended to the ABA House of Delegates that it adopt a new Model Rule 1.6 which would add the language permitting disclosure of client fraud as originally proposed by the Kutak Commission. The House of Delegates once again rejected this proposal.

Another ABA Commission, known as the Ethics 2000 Commission, was formed near the end of the 1990s to reevaluate the Model Rules. This Commission found that the current Model Rule 1.6 as adopted in 1983 was "out of step with public policy and the values of the legal profession as reflected in the rules currently in force in most jurisdictions."²⁸ The Ethics 2000 Commission's recommendation was that disclosure should be permitted (but not required) "to the extent the lawyer reasonably believes 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."²⁹ When this proposal was presented to the ABA House of Delegates, it too was rejected.

Along with the legal profession, Congress reacted to the Watergate scandal. The federal government's response to Watergate focused on reform of the election process and the prosecution of those involved in political corruption. For example, Congress in 1974 amended the 1971 Federal Election Campaign Act.³⁰ The 1974 amendments created a new federal administrative agency, the Federal Election Commission. The 1974 amendments also imposed limits on contributions by individuals to federal political campaigns. Watergate also led Congress to pass the Ethics in Government Act of 1978³¹ which created a special process to appoint an independent counsel (special prosecutor) to investigate and prosecute violations of federal

27. Forty-one states did not adopt ABA Model Rule 1.6. See STEPHEN GILLERS & ROY D. SIMON, *REGULATION OF LAWYERS, STATUTES AND STANDARDS* 83-87 (2003).

28. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670, 71,693 n.72 (proposed Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205), available at <http://www.sec.gov/rules/proposed/33-8150.htm>.

29. GILLERS & SIMON, *supra* note 27, at 81.

30. See Federal Election Campaign Act Amendments, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431-455 (2000)).

31. Pub. L. No. 95-521, 92 Stat. 1867 (codified as amended at 2 U.S.C. §§ 118a, 288, 288a-288m, 5 U.S.C. App. 4 §§ 101-111, 401-408, 501-505, 28 U.S.C. §§ 49, 528, 529, 591-598, 1365 (1994)).

law by certain high-ranking federal government officials.³² Watergate also led Congress to pass amendments to the Freedom of Information Act³³ with the complementary goals of creating a more open government and providing journalists with a statutory tool to aid their investigative reporting which had been so significant in unraveling the Watergate story. Statutes such as the War Powers Resolution³⁴ and the Presidential Records Act of 1978³⁵ can also be traced in part to the post-Watergate attitude toward the Office of the President.³⁶ The post-Watergate years also saw a push for an increase in penalties for those convicted of white collar crimes, especially for those who had been involved in misconduct as public officials.³⁷

Significant to this symposium is that despite all the reform efforts by the federal government after Watergate, and despite the strong criticism of lawyers during Watergate, the federal government did not itself seek to regulate the legal profession. Rather, as discussed above, reforms in the legal profession in response to Watergate were spearheaded by the ABA, the state courts and the state bar associations. During the post-Watergate period, the federal government did not attempt to displace the traditional regulators of the legal profession despite the attacks aimed at lawyers during this time. Although some of the decisions of the traditional regulators were criticized by persons inside and outside of government, the legitimacy of the state courts and the state and national bar associations as the rightful regulators of the legal profession was not challenged by the federal government.

IV. ENRON AND THE FEDERAL GOVERNMENT'S REGULATION OF LAWYERS

Thirty years after the Watergate scandal, the nation learned of another scandal — this one not involving government officials but corporate officials who along with their accountants, bankers, and perhaps attorneys, engaged in financial misconduct. This misconduct led to the loss of billions of dollars by investors, especially employees who had their retirement accounts invested in their employer's stock. While the Enron scandal primarily involved misconduct by corporate management and accountants, lawyers also came under scrutiny for

32. *Id.*

33. Pub. L. No. 93-502, §§ 1-3, 88 Stat. 1561, 1563-64 (1974) (codified as amended at 5 U.S.C. § 552 (2002)).

34. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (2002)).

35. Pub. L. No. 95-591, 92 Stat. 2523 (codified at 44 U.S.C. §§ 2201-2207 (2000)).

36. See Carl M. Cannon, *Why Reagan Papers Aren't Being Released*, NAT'L J., May 19, 2001.

37. See generally George D. Brown, *Putting Watergate Behind Us — Salinas, Sun Diamond, and Two Views of the Anticorruption Model*, 74 TUL. L. REV. 747 (2000).

their role in the fraudulent schemes of their corporate clients. Reminiscent of the Watergate era, lawyers were criticized for not doing more (or anything) to prevent the scandal and the losses that resulted. Some argued that the lawyers should have disclosed to the authorities, in particular the SEC, the corporate misconduct of which the lawyers must have been aware or, at least, should have been aware. Once again, as during Watergate, two central issues were at the forefront: what is the role of an attorney for an organization, and what is the proper rule of confidentiality in the situation where counsel for an organization is aware of misconduct that will cause substantial injury to others.

Congress' major response to the Enron scandal was the Sarbanes-Oxley Act of 2002³⁸ which was signed into law by President Bush on July 30, 2002. Reminiscent of Congress' creation of the Federal Election Commission after Watergate, the Sarbanes-Oxley Act created a new administrative agency — the Public Company Accounting Oversight Board.³⁹ The Sarbanes-Oxley Act also required enhanced disclosures about financial matters and conflicts of interest⁴⁰ comparable to the disclosure laws involving campaign finance enacted after Watergate. Additionally, the Sarbanes-Oxley Act mandated increased penalties for white-collar crimes,⁴¹ again similar to Congress' response to Watergate. But, Congress in the Sarbanes-Oxley Act did something which was not part of the post-Watergate reform — direct federal regulation of the legal profession. It is this aspect of Congress' reaction to the Enron scandal that is most significant to this symposium.

Section 307 of the Sarbanes-Oxley Act requires the SEC to issue rules setting minimum standards of professional conduct for attorneys appearing and practicing before the SEC in the representation of issuers. Section 307 was not part of the original bill reported out of the Senate Banking Committee. Rather, it was introduced on the Senate floor by Senator John Edwards of North Carolina, himself a lawyer, and co-sponsored by Senator John Corzine of New Jersey and Senator Michael Enzi of Wyoming. Edwards' amendment was prompted by an exchange of letters between a group of law professors and the SEC following the revelations of the Enron scandal.⁴² A letter had been

38. Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. §§ 78d-3, 78o-6, 7201, 7202, 7211-7219, 7231-7234, 7241-7246, 7261-7266, 18 U.S.C. §§ 1348-1350, 1514A, 1519, 1520 (2002)).

39. *Id.*, 116 Stat. 750 (codified at 15 U.S.C. § 7211).

40. *Id.*, 116 Stat. 785, 789, 790 (codified at 15 U.S.C. §§ 7261-7266).

41. White-Collar Crime Penalty Enhancement Act of 2002, Pub. L. No. 107-204, 116 Stat. 805 (codified as amended at 18 U.S.C. §§ 1341, 1343, 1349, 28 U.S.C. § 994, 29 U.S.C. § 1131 (2002)). See Carrie Johnson, *Panel Boosts Penalties for White-Collar Offenses*, WASH. POST, Jan. 9, 2003, at E1.

42. See Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670, 71,673 (proposed Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205), available at <http://www.sec.gov/rules/proposed/33-8150.htm>.

sent to the then-SEC chairman Harvey Pitt urging the SEC to impose an “up the ladder” reporting rule on attorneys for public corporations. This proposed rule would require attorneys who learned of misconduct at public companies to report such misconduct to the management of the company. The then-General Counsel of the SEC responded to this letter. His response was that although he did not disagree with the proposal, this “significant change in established practice” was more appropriate for Congressional action, as opposed to agency rulemaking.⁴³ When this correspondence came to the attention of Senator Edwards, he proposed the amendment to the pending legislation. This amendment was subsequently enacted as section 307. Although the legislative history on section 307 is sparse, comments by the co-sponsors indicate that their goal in section 307 was to prevent lawyers from “sitting idly by” while with their knowledge their clients committed fraud.⁴⁴ In the Senators’ view, inaction by lawyers made it possible for corporate managers to perpetrate the Enron and other corporate scandals.

Section 307 settled an old debate over the SEC’s authority to regulate the professional conduct of attorneys. In 1935, the SEC adopted Rule 2(e) of the SEC’s Rules of Practice (later renumbered Rule 102(e)) in which the SEC gave itself the authority to initiate disciplinary proceedings against attorneys who lacked integrity or competence, engaged in improper professional conduct or who violated federal securities law.⁴⁵ Sanctions for violating Rule 102(e) included censure, suspension and permanent bar to practicing before the SEC. This SEC rule was controversial, in part, because it had been adopted without express statutory authority.⁴⁶ For example, in 1981, the SEC in *In re Carter*⁴⁷ reversed an administrative law judge’s (ALJ) decision that two attorneys who failed to correct misstatements in a client’s press release and SEC filings concerning its earnings had aided and abetted their client’s securities law violation. The SEC’s decision to reverse the ALJ’s decision was based on its conclusion that the attorneys’ conduct was not “unambiguously” prohibited.⁴⁸ The SEC, however, then announced that in future cases, it would interpret Rule 102(e) to require an attorney who learned of his client’s violation of

43. *Id.*

44. See David M. Becker & Melissa Johns, *New Ethical Duties for Lawyers Under the Sarbanes-Oxley Act*, INSIGHTS, Nov. 2002, at 2.

45. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71,671. Rule 102(e) does not establish any standards of professional care. It only enables the SEC to discipline professionals who have engaged in improper professional conduct as defined by a state ethical rule. *Id.*

46. *Id.*

47. 47 S.E.C. 471 (1981).

48. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71,671-72.

SEC disclosure rules to take prompt steps to end the client's noncompliance. Such prompt steps included a "direct approach to the board of directors" or management.⁴⁹ In its *Carter* decision, the SEC also stated that it would seek comments from the public regarding whether this interpretation of Rule 102(e) should be expanded or modified. The SEC's announcement of its interpretation of an attorney's obligation in this securities setting was heavily criticized by the private bar.⁵⁰ Although the SEC never backed off its *Carter* interpretation of Rule 102(e), the SEC's general counsel at a subsequent time expressed concern that the SEC lacked the time or expertise to fashion a code of professional conduct for attorneys practicing before it.⁵¹ The SEC's general counsel further stated that Rule 102(e) proceedings should only be initiated where the attorney's conduct was a violation of established state law or established state professional misconduct rules.⁵² In the years that followed, although the SEC in individual cases stated that lawyers appearing before it had an obligation to report corporate misconduct to the board of directors and/or officers, the SEC never adopted formal standards requiring such action.⁵³ This lack of action was in part based on the uncertainty of whether the SEC had the power to adopt such standards. Section 307 of the Sarbanes-Oxley Act eliminated any such uncertainty. For the first time the SEC was expressly authorized — in fact, mandated — to promulgate rules regulating attorney professional conduct.

Section 307's specific mandate to the SEC was that it

issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule:

- (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and
- (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of

49. *Carter*, 47 S.E.C. at 512.

50. *Id.*

51. See Edward F. Greene, Lawyer Disciplinary Proceedings Before the Securities and Exchange Commission, Remarks to the New York County Lawyers' Association (Jan. 18, 1982), in Fed. Sec. L. Rep. (CCH) ¶ 83,089 (1982); see also Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71,672.

52. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71,672.

53. *Id.*

directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.⁵⁴

In response to this statutory mandate, the SEC on November 21, 2002 published proposed rules in the Federal Register. Comments in response to the Notice of Proposed Rulemaking were required to be received on or before December 18, 2002. Importantly, the proposed rules included not only the mandated “up-the-ladder” reporting requirement but also other rules which the SEC admitted “are not explicitly required by Section 307.”⁵⁵ Among the proposals not explicitly required was a “noisy withdrawal” proposal. This proposal requires attorneys under certain circumstances to notify the SEC that they had withdrawn from their representation of a securities issuer and permits the attorney to report evidence of client misconduct to the SEC, even if such disclosure is in violation of the Rules of Professional Conduct in the attorney’s state.⁵⁶

In other respects, the SEC also took an expansive view of its power to regulate the professional conduct of attorneys. For example, the SEC’s definition of “appearing and practicing” before the SEC as used in section 307 of the Sarbanes-Oxley Act covered attorneys who not only transact business with the SEC⁵⁷ or represent an issuer in an SEC administrative proceeding or in connection with any SEC investigation, inquiry, information request or subpoena,⁵⁸ but also any attorney who provides advice with respect to the United States securities laws or SEC’s rules or regulations regarding any document that the attorney has notice will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to the SEC.⁵⁹ This last group of attorneys could include attorneys who are not securities lawyers but who provide information to securities lawyers about a matter within their area of work, e.g., a litigator who responds to a request about the status of litigation involving the issuer. The broad reach of the SEC’s regulation of the legal profession is also evidenced in the fact that the SEC rules cover attorney conduct not only related to a client’s violation of federal securities laws, but also to any “breach of fiduciary duty” including those based solely on state common law.⁶⁰ The SEC has also admitted that its definition of the phrase “in the

54. Pub. L. No. 107-204, 116 Stat. 784 (codified at 15 U.S.C. § 7245).

55. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71,671.

56. *Id.* at 71,673; *see also* Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 33-8186, 68 Fed. Reg. 6324 (proposed Jan. 29, 2003) (to be codified at 17 C.F.R. pts. 205, 240, 249), available at www.sec.gov/rules/proposed/33-8186.htm.

57. Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. § 205.2(a)(i) (2003).

58. 17 C.F.R. § 205.2(a)(ii).

59. *Id.* § 205.2(a)(iii).

60. *Id.* § 205.2(d).

representation of an issuer”⁶¹ is a “broad definition.”⁶² Moreover, the phrase “evidence of a material violation” as used in the Sarbanes-Oxley Act was defined by the SEC to mean “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,”⁶³ as compared to a requirement of actual knowledge by an attorney. The SEC also adopted a regulation that governs the professional relationship between subordinate attorneys⁶⁴ and their supervising attorney.⁶⁵

The details of the federal government’s approach to the professional obligations of attorneys are discussed by others in this symposium and will not be repeated here. More important to this article than any particular proposal or adopted rule is the role the federal government has adopted for itself in the regulation of the legal profession. Through the Sarbanes-Oxley Act and the SEC’s actions pursuant to it, the federal government has thrust itself into the leadership position on attorney professional responsibility issues. These issues have long been the province of the states and the legal profession itself. Of utmost significance is that the federal government has now sought to resolve the complex issue of the proper role of an attorney for an organization when the attorney learns of misconduct by the corporate client — an issue which has been the subject of an ongoing debate for decades within the legal profession.⁶⁶ Although the SEC has written that it does “not intend to supplant state ethics laws unnecessarily,”⁶⁷ the SEC has also stated that its rules would preempt any state law that is not as rigorous as its own.⁶⁸ Thus, the federal government’s position is the position for the legal profession.

The federal government has justified its “robust” approach⁶⁹ to the regulation of the legal profession on various grounds. The federal government believes that “existing state ethical rules have not proven to be an effective deterrent to attorney misconduct.”⁷⁰ The federal

61. *Id.* § 205.2(a).

62. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670, 71,678 (proposed Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205), *available at* <http://www.sec.gov/rules/proposed/33-8150.htm>.

63. 17 C.F.R. § 205.2(e).

64. *Id.* § 205.5.

65. *Id.* § 205.4.

66. *See* Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71,673.

67. *Id.*

68. 17 C.F.R. § 205, *available at* www.sec.gov/rules/final/33-8185.htm.

69. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71,673.

70. *Id.* at 71,671; Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 33-8186, 68 Fed. Reg. 6324 (proposed Jan. 29, 2003) (to be codified at 17 C.F.R. pts. 205, 240, 249), *available at* www.sec.gov/rules/proposed/33-8186.htm.

government's approach will "deter instances of attorney and issuer misconduct and where misconduct has occurred, minimize its impact upon issuers and their shareholders."⁷¹ Further, the federally-imposed attorney conduct rules "should protect investors by helping to prevent instances of significant corporation misconduct and fraud,"⁷² because the SEC "believes that [the rules] will make it more likely that companies will address instances of misconduct internally, and act to remedy violations at earlier stages."⁷³ The SEC's position is that its approach "should serve to deter corporate misconduct and fraud. Corporate wrongdoers at the lower or middle levels of the corporate hierarchy will be aware that an attorney who becomes aware of their misconduct is obligated under the rule to report it up-the-ladder to the highest levels of the corporation."⁷⁴ The SEC also believes that its approach "should boost investor confidence in the financial markets . . . [because it] will enhance the proper functioning of the capital markets and promote efficiency by reducing the likelihood that illegal behavior would remain undetected and unremedied for long periods of time."⁷⁵

It is thus seen that the response of the federal government to the Enron scandal and other recent financial scandals is much different than its response to the Watergate scandal. In response to Enron, the federal government sought to directly regulate and redefine the attorney-client relationship. It is clear from the Sarbanes-Oxley Act and the SEC's actions pursuant to it that, unlike after Watergate, the federal government is not going to permit the debate and proposals for reform to take place exclusively within the legal profession and the state courts. As discussed earlier, after the Watergate scandal, it was the ABA, the state bar associations and the state courts that responded to the criticism of lawyers. Today, however, the organized bar and state courts are not being relied upon to respond to the Enron scandal. During the debate over section 307 of the Sarbanes-Oxley Act, Senator Edwards stated that "[w]ith Enron and Worldcom, and all the other corporate misconduct we have seen, it is again clear that corporate lawyers should not be left to regulate themselves"⁷⁶ Senator Enzi added that "the State bars as a whole have failed. . . . Even if they do have a general rule that applies, it often goes unen-

71. *Id.*

72. 17 C.F.R. § 205, available at www.sec.gov/rules/final/33-8185.htm.

73. *Id.*

74. *Id.*

75. *Id.*

76. 148 CONG. REC. S6552 (daily ed. July 10, 2002) (statement of Sen. Edwards); *Senate Passes Amendment to Accounting Bill Requiring Corporate Lawyers to Report Fraud*, 18 *Laws. Man. on Prof. Conduct (ABA/BNA)* No. 15, at 433 (July 17, 2002); see also Becker & Johns, *supra* note 44, at 2-10.

forced.”⁷⁷ SEC Chairman Harvey Pitt remarked that “Sarbanes-Oxley reflects some skepticism about the degree to which the legal profession can police itself.”⁷⁸ Pitt also complained that state disciplinary authorities had “done nothing” in response to referrals by the SEC about particular lawyers. He warned that if the state bars will not discipline securities lawyers, the SEC “will assume the task.”⁷⁹

The Enron scandal has led to the biggest step toward the federalization of the regulation of the legal profession in the history of the legal profession. The federal government now believes that it should decide the controversial issues of confidentiality and attorney loyalty to an organizational client that previously have been debated and decided by the profession itself and by the state courts.⁸⁰ Although some of the conclusions of the federal government are in accord with those arrived at by the profession itself and by the states,⁸¹ the federal government has decided some of the issues differently. For example, the prevailing rule among the states concerning an attorney’s obligation to an organizational client is based on ABA Model Rule 1.13. The ABA Model Rule suggests various remedial approaches — for example, a lawyer *may* ask for reconsideration; a lawyer *may* advise getting a separate legal opinion; a lawyer *may* refer the matter to higher authority in the organization — but requires none. The federal government approach, on the other hand, is to mandate certain action — “the attorney shall report” material violations to certain persons or committees set forth in the statute.⁸² Furthermore, the ABA Model Rules and the rules adopted by the states do not set different standards for lawyers who work within the organization and for lawyers who are outside counsel. The federal government’s approach seeks to create different obligations for inside and outside counsel.⁸³ Addi-

77. 148 CONG. REC. S6555 (daily ed. July 10, 2002) (statement of Sen. Enzi).

78. See James Podgers, *Seeking the Best Route*, 88 A.B.A. J. 68 (2002) (quoting Harvey Pitt, Speech to the Business Law Section of the American Bar Association (Sept. 20, 2002)); see also Letter from Judith S. Kaye, President, Conference of Chief Justices, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Dec. 13, 2002), available at <http://www.sec.gov/rules/proposed/s74502/jskaye1.htm>.

79. Rachel McTague, *Pitt Says SEC Will Take On Assignment of Disciplining Lawyers if State Bars Do Not*, 18 Laws. Man. on Prof. Conduct (ABA/BNA) No. 20, at 591 (Sept. 25, 2002); see also Rachel McTague, *Pitt Sees Benefits in New Federal Mandate for Lawyers to Report Securities Violations*, 18 Laws. Man. on Prof. Conduct (ABA/BNA) No. 17, at 480 (Aug. 14, 2002).

80. See Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670, 71,673 (proposed Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205) (stating that SEC proposals “embody ethical principles that legal commentators and the ABA have been considering for years”), available at <http://www.sec.gov/rules/proposed/33-8150.htm>.

81. See, e.g., 17 C.F.R. § 205.4. This regulation, “Responsibilities of Supervisory Attorneys,” is based on ABA Model Rule 5.1, and 17 C.F.R. § 205.5, “Responsibilities of a Subordinate Attorney” is based in part on ABA Model Rule 5.2.

82. 17 C.F.R. § 205.3(b).

83. See Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 33-8186, 68 Fed. Reg. 6324 (proposed Jan. 29, 2003) (to be codified at 17 C.F.R. pts. 205, 240, 249), available at www.sec.gov/rules/proposed/33-8186.htm. Compare proposed 17 C.F.R. § 205.3(d)(iii)(A) (“An attorney retained by the issuer shall withdraw from representing

tionally, the prevailing rule among the states based on the ABA Model Rules focuses on whether an attorney for an organization “knows” of corporate misconduct.⁸⁴ The SEC rejected an “actual knowledge” standard as inconsistent with section 307’s emphasis on the public interest and protecting investors.⁸⁵ The adoption of an objective standard by the SEC rather than an actual knowledge standard is very significant. Establishing that a lawyer “knows” of his client’s misconduct is usually difficult to prove. An actual knowledge standard provides more discretion to the attorney on how to respond to information indicating misconduct by the client. This issue was critical in the Watergate case when Mardian argued that because he did not “know” the true facts of the Watergate break-in, his conduct as an attorney for CRP was proper. In the corporate setting, lawyers for issuers will not have as much flexibility as lawyers have traditionally been granted in deciding how to respond to information of client misconduct.

The federal government’s response to the Enron scandal also reflects its position that every attorney owes an obligation to the public separate from an attorney’s obligation to his client. This position was the subject of many critical comments filed with the SEC. For example, the law firm Jones Day commented that the “touchstone of the attorney’s professional and ethical obligation is the attorney’s duty to the client, not some undefined duty to the market or public investors, and especially not the government agency that can among other roles bring an enforcement proceeding against the client.”⁸⁶ A former member of the SEC commented that the SEC has “enlisted lawyers as law enforcement officers, changing their allegiance from their clients to the SEC.”⁸⁷ The ABA Journal published an article about corporate lawyers and corporate accountability titled “Junior G-Men.”⁸⁸ Other comments emphasized that attorneys are advocates, not independent

the issuer, and shall notify the issuer, in writing, that the withdrawal is based on professional consideration.”) with proposed 17 C.F.R. § 205.3(d)(iii)(B) (“An attorney employed by the issuer shall cease forthwith any participation or assistance in any matter,” but withdrawal from representation in all matters is not required.).

See Letter from Richard W. Painter, Visiting Professor of Law, University of Michigan Law School, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Dec. 12, 2002), available at <http://www.sec.gov/rules/proposed/s74502/painter1.htm>.

84. The SEC used an actual knowledge standard to trigger a duty to report in *In re Carter*, 47 S.E.C. 471 (1981). See E-mail from Roberta S. Karmel, Professor, Brooklyn Law School, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Dec. 12, 2002), available at <http://www.sec.gov/rules/proposed/s74502/karmel1.htm>.

85. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71,682.

86. See Letter from Jones Day, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Apr. 7, 2003), available at <http://www.sec.gov/rules/proposed/s74502/jones-day040703.htm>.

87. See Karmel, *supra* note 84.

88. John Gibeaut, *Junior G-Men: Corporate Lawyers Worry That They’re Doing the Government’s Bidding While Doing Internal Investigations*, 89 A.B.A. J. 46 (2003).

auditors,⁸⁹ and that the SEC position was a significant change in how attorneys always have understood their role in society.⁹⁰

Although the same issue of an attorney's duty to the public when the attorney learns of client misconduct which will cause harm to the public was also critical to the Watergate scandal, Watergate did not lead to any serious attempt to require attorneys to go to the prosecution and confess their clients' misdeeds. The current view of the federal government therefore represents an important shift in the view of an attorney's role in society. As another commenter remarked in criticism of the SEC's proposals, "lawyers are not supposed to exercise leverage or power over clients by threatening to disclose client secrets."⁹¹

There are other indications that the Sarbanes-Oxley Act has started a movement towards the federalization of the regulation of the legal profession. During the rulemaking process, the SEC stated that whether an attorney-client relationship exists for purposes of the rules "will be a federal question."⁹² State law "will not be controlling."⁹³ The SEC also has stated that in the event that an attorney's conduct violates its rules as well as a state rule of professional conduct, the SEC may bring a proceeding against the attorney regardless of whether a state disciplinary proceeding was initiated.⁹⁴ Moreover, the SEC's position is that "even if a state ethics board or a court were to determine in an action not brought by the [SEC] that an attorney complied with [the SEC Rules] . . . that determination would not preclude the [SEC] from bringing either an enforcement action or a disciplinary proceeding against that attorney for a violation of [the SEC Rules] based on the same conduct."⁹⁵ It seems that the Sarbanes-

89. See Letter from Seventy-Nine Law Firms, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Apr. 7, 2003), available at <http://www.sec.gov/rules/proposed/s74502/79lawfirms1.htm>.

90. See Rachel McTague, *Lawyers' Confidentiality Isn't Absolute, According to SEC Commissioner Goldschmid*, 18 *Laws. Man. on Prof. Conduct* (ABA/BNA) No. 25, at 723 (Dec. 4, 2002) ("[I]t is the first time that a lawyer might be compelled to report information outside the organizational structure of his client."); Letter from Barry Nagler, Chairman of the Advocacy Committee, ACCA's Board of Directors, and M. Elizabeth Wall, Chair, ACCA's Board of Directors, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Apr. 7, 2003), available at <http://www.sec.gov/rules/proposed/s74502/acca040703.htm>; Susan Hackett, *SEC Takes Aim, Misfires*, *LEGAL TIMES*, Dec. 16, 2002, at 20 (stating that SEC rules "change the design of our ethics rules . . . from a focus on prohibiting lawyers from getting involved in or facilitating client misconduct to a focus on making lawyers responsible for rooting out client misconduct"); Otis Bilodeau, *SEC Rules on Lawyers Draw Flak*, *LEGAL TIMES*, Nov. 11, 2002; see also E-mail from Sullivan & Cromwell LLP, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Apr. 7, 2003), available at <http://www.sec.gov/rules/proposed/s74502/sullivan040703.htm>.

91. See Nagler & Wall, *supra* note 90.

92. 17 C.F.R. § 205 (2003), available at www.sec.gov/rules/final/33-8185.htm.

93. *Id.*

94. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670, 71,697 (proposed Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205), available at <http://www.sec.gov/rules/proposed/33-8150.htm>.

95. 17 C.F.R. § 205, available at www.sec.gov/rules/final/33-8185.htm.

Oxley Act has started the federalization of the attorney disciplinary process.

The federal government's response to the Enron scandal is also a triumph of the legislative and executive branches of government over the judicial branch of government. In most states, the power to regulate attorneys is vested in the highest state court. The power to adopt rules of professional conduct and the power to enforce them through the disciplinary system is vested in the judicial branch. The Sarbanes-Oxley Act and the SEC's role pursuant to it signify the rejection of the exclusive power of the judicial branch to regulate the legal profession.

V. THE LEGAL PROFESSION'S RESPONSE TO ENRON

As discussed earlier in this article, in response to the Watergate scandal, the ABA and the state bar associations after considering various reforms eventually adopted new model rules of professional conduct. In response to the Enron scandal, the ABA created a special committee, the Task Force on Corporate Responsibility, to examine the ethical principles governing the roles of lawyers and corporate officials.⁹⁶ In its Preliminary Report to the ABA, the Task Force criticized corporate lawyers for "turning a blind eye to the natural consequences of what they observe."⁹⁷ The Task Force then made various recommendations. One recommendation was that the ABA adopt the Ethics 2000 recommendation that Model Rule 1.6 be amended to permit disclosure of information to rectify the consequences of a client's fraudulent act that the lawyer's services were used to further. The Task Force also recommended that disclosure be required to prevent a serious crime from being committed.⁹⁸ The Task Force further recommended that Model Rule 1.13 be amended to require an attorney to take certain remedial actions rather than only to permit such actions. The Task Force criticized the current version of Rule 1.13 because it "unduly emphasized avoidance of disruption to

96. Robert Hirshon, President of the American Bar Association, charged the Task Force as follows:

The Task Force on Corporate Responsibility shall examine systemic issues relating to corporate responsibility arising out of the unexpected and traumatic bankruptcy of Enron and other Enron-like situations The Task Force will examine the framework of laws and regulations and ethical principles governing the roles of lawyers, executive officers, directors, and other key participants.

Preliminary Report of the American Bar Association Task Force on Corporate Responsibility [hereinafter *Task Force Report*], at http://www.abanet.org/buslaw/corporateresponsibility/preliminary_report.pdf (July 16, 2002); see also Martha Neil, *Task Forces Forge Ahead*, 88 A.B.A. J. 68 (2002); Bart Schwartz & Jonathan Freedman, *The SEC Wants Noisier Lawyers*, N.Y. L.J., Dec. 12, 2002, at 5.

97. *Task Force Report*, *supra* note 96, at 35.

98. See *Task Force Proposes Model Rule Changes for Lawyer Response to Corporate Wrongs*, 18 Laws. Man. on Prof. Conduct (ABA/BNA) No. 16, at 458 (July 31, 2002).

the corporation while playing down the more important goal of minimizing harm.”⁹⁹

In light of the ABA Task Force’s report and recommendations, various commenters, including the ABA and the Association of State Supreme Court Judges, asked the SEC to not adopt rules of professional conduct until after the ABA and the states had the opportunity to revisit its rules in response to the Enron scandal. In their comments to the SEC, the state supreme court judges emphasized that the state courts have been the traditional ultimate authority for the promulgation and enforcement of rules of attorney conduct. They urged the SEC to wait and allow the state courts to deal with these issues.¹⁰⁰ The ABA also argued to the SEC that changes to the rules of professional conduct should occur through “historically established mechanisms.”¹⁰¹ Another commenter pointed out that the ABA rules had been drafted by “presumably ethical people” and had been thought by “generations of serious, thoughtful attorneys to provide sufficient standards of professional conduct.”¹⁰² Just because the ABA had chosen to “strike the balance between conflicting interests in a way different from the balance” favored by the SEC, this did not justify the SEC’s actions.¹⁰³ The SEC’s response was that it was “not appropriate for it to wait for further developments” because there is “no evidence when, if ever, state supreme courts (or legislative bodies) will revisit these issues.”¹⁰⁴ Unlike after Watergate, the federal government was unwilling to allow the states and the ABA to lead the reform effort.

In August 2003, one year after the Sarbanes-Oxley Act became law and seven months after the SEC adopted the “up-the-ladder” rule and republished for further comment the “noisy withdrawal” rule, but before the SEC had taken final action on the “noisy withdrawal” proposal, the ABA House of Delegates adopted changes to Model Rule 1.6 and Model Rule 1.13. Interestingly, two years earlier, the House of Delegates had refused to adopt almost identical changes. By a vote

99. *Task Force Report*, *supra* note 96, at 28; see E-mail from William H. Simon, Saunders Professor of Law, Stanford Law School, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Dec. 13, 2002), available at <http://www.sec.gov/rules/proposed/s74502/simon121302.htm>. Model Rule 1.13 is “notoriously ambiguous.” *Id.*

100. Kaye, *supra* note 78.

101. See Joan C. Rogers & Rachel McTague, *SEC Must Issue Attorney Conduct Rules Under New Federal Accounting Reform Law*, 18 *Laws. Man. on Prof. Conduct (ABA/BNA)* No. 16, at 457 (July 31, 2002).

102. E-mail from Russell B. Stevenson, Jr., Senior Vice President & General Counsel, CIENA Corporation, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Apr. 6, 2003), available at <http://www.sec.gov/rules/proposed/s74502/rbstevenson1.htm>.

103. *Id.*

104. 17 C.F.R. § 205 (2003), available at www.sec.gov/rules/final/33-8185.htm.

of 218 to 201,¹⁰⁵ the House of Delegates amended Model Rule 1.6 to permit (but not require) a lawyer to reveal confidential information if the client was using the lawyer's services to commit a crime or fraud that would cause substantial injury to the financial interests of others. By a vote of 239 to 147,¹⁰⁶ the House of Delegates amended Model Rule 1.13 to require lawyers for organizations to report unlawful conduct by employees of the organization to the top officials of the organization. Model Rule 1.13 was also amended to permit a lawyer to disclose confidential information to persons outside the organization if the highest officials in the organization failed to address a clear violation of the law, and the lawyer reasonably believed that the violation was reasonably certain to result in substantial injury to the organization.¹⁰⁷ Opposition to these changes was based not only on traditional arguments in favor of a broad confidentiality rule, but also because of the view that the ABA had succumbed to pressure from the federal government.¹⁰⁸ Even some who voted in favor of the amendments did so not based on their view of the proper parameters of the attorney-client relationship, but based on their fear that to ignore the federal government's recent pronouncements would lead to the end of the ability of the legal profession to regulate itself.¹⁰⁹

VI. POSSIBLE CONCERNS FOR THE FUTURE

With any attempt at reform there is the possibility that unintended consequences will lead to results contrary to the public interest. With the hindsight of thirty years, several unintended consequences of the Watergate reform movement can now be identi-

105. A voice vote was first held, but it was so close that a manual vote count was required. See Jason Hoppin, *Crime and Punishment at ABA Meeting*, LEGAL TIMES, Aug. 18, 2003, at 12.

106. *Id.*

107. A proposal to require disclosure in such circumstances was not adopted. See Patricia Manson, *Lawyer-Ethics Code Undergoes Sea Change*, CHI. DAILY L. BULL., Aug. 12, 2003, at 1.

108. Lawrence J. Fox, a lawyer from Philadelphia, commented, "I think this is a sad day for confidentiality and a sad day for the ABA. We've succumbed to outside pressures from people in government, and it is not the role of the ABA to succumb to outside opinion." Asher Hawkins, *ABA Amends Two Rules to Fight Corporate Fraud*, LEGAL INTELLIGENCER, Aug. 13, 2002, at 3.

109. See Jonathan D. Glater, *Lawyers Pressed to Give Up Ground on Client Secrets*, N.Y. TIMES, Aug. 11, 2003, at A16 ("[T]he real issue is less about the administration of justice and more about lawyers' desire to avoid regulation."); see also Hawkins, *supra* note 108 ("[A] lot of it is reaction to the WorldComs and Enrons and fear that if we don't do something, someone else will We want to maintain as a self-regulatory profession, and this was the result."); Abraham Reich, *Confidentiality Principle Not Inviolable*, LEGAL INTELLIGENCER, Aug. 6, 2003, at 7.

One of the unique hallmarks of our profession has been self-regulation. . . . In fact, it is no coincidence that after the ABA House of Delegates, in 2001, rejected the proposals of the Ethics 2000 Commission [containing similar permissive disclosures now advanced by the task force], the Sarbanes-Oxley Act was enacted. There is little doubt that Section 307 of that act may be the most pernicious attempt to regulate, at the federal level, the conduct of lawyers. Further, federal regulation may be just around the corner.

Id.

fied. For example, the creation of the Office of Special Prosecutor led to numerous very expensive investigations, few of which resulted in meaningful prosecutions.¹¹⁰ Displeasure with this reform measure led both political parties to support its termination.¹¹¹ Additionally, limitations on individual campaign contributions enacted as a Watergate reform led to the influence of “soft money” contributions which may be more corrupting of the election process than large individual contributions.¹¹² This “unintended consequence” of individual campaign limits was also the subject of subsequent legislation,¹¹³ albeit decades later. It has also been argued that another Watergate reform, the Presidential Records Act of 1978, has had a chilling effect on the President’s ability to solicit candid advice.¹¹⁴ Post-Watergate amendments to the Freedom of Information Act have seemingly proven more helpful to unintended beneficiaries such as corporations and prisoners than journalists and the general public.¹¹⁵ The cost to the taxpayers of the Freedom of Information Act has also greatly exceeded predictions.¹¹⁶

There are several possible unintended consequences of the Sarbanes-Oxley Act and the SEC rules. One major concern is less compliance with the securities laws which will lead to more corporate scandals and less investor confidence in the capital markets.¹¹⁷ There are several reasons for this concern. The SEC rules seek to regulate not only attorneys directly involved in securities matters but also non-

110. See *Turning Back; Undoing Watergate Reforms*, TIME, June 1, 1981, at 28 (stating that the Office of Special Prosecutor led to “long, sensationalized and fruitless investigations”).

111. The special prosecutor office died on June 30, 1999 when Congress refused to extend the 1978 independent counsel statute. See Richard E. Cohen, *Watergate-Era Laws, R.I.P.*, NAT’L J., Aug. 21, 1999, at 2431 (stating that over the years, Watergate reforms have become relics); see also Francine Kiefer, *Watergate Reforms Fade, 30 Years Later*, CHRISTIAN SCI. MONITOR, June 17, 2002, at 1.

112. See Gail Russell Chaddock, *Can Campaign Finance Really Be Reformed?*, CHRISTIAN SCI. MONITOR, Mar. 23, 2001, at 2 (quoting former Senator William Brock as saying, “When we passed new laws in the days of Watergate, we were trying to get rid of the excesses of the early 1970s But we created a whole new set of monsters – the most pernicious was the explosion of soft money”).

113. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (to be codified at 2 U.S.C. §§ 438a, 441a-1, 441i, 441k, 36 U.S.C. § 510).

114. See Cannon, *supra* note 36.

115. See *Turning Back; Undoing Watergate Reforms*, *supra* note 110, at 28. FOIA intended to open Government records to citizens’ groups, journalists and scholars. Instead, many more requests come from prisoners. *Id.*

116. In 1974, Congress estimated that it would cost \$100,000 annually to enforce FOIA; in 1979, a survey indicated the law costs about \$45 million. *Id.*

117. See Nagler & Wall, *supra* note 90; *supra* note 102 and accompanying text; see also Roberta S. Karmel, *Securities Regulation: A Bid to Regulate the Entire Bar*, N.Y. L.J., Dec. 19, 2002, at 3; Letter from American Corporate Counsel Association, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Apr. 7, 2003), available at <http://www.sec.gov/rules/proposed/s74502/acca040703.htm>; Letter from Anthony Horan, Secretary, J.P. Morgan Chase & Co., to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Apr. 9, 2003), available at <http://www.sec.gov/rules/proposed/s74502/jpmorganchase040903.htm>; E-mail from Seward & Kissel LLP, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Apr. 8, 2003), available at <http://www.sec.gov/rules/proposed/s74502/seward1.htm>.

securities lawyers whose practice is only incidental to securities matters.¹¹⁸ These lawyers include tax lawyers, intellectual property lawyers and litigators who are often called upon to provide information to assist securities lawyers in preparing the SEC filings on behalf of their corporate clients.¹¹⁹ It has been suggested that the interest of investors will be harmed by the breadth of the SEC rules because non-securities lawyers will avoid working with securities lawyers in order to avoid the impact of the rules which includes the mandatory withdrawal from all representation of the client.¹²⁰ This will lead to less disclosure of matters relevant to investors than if these lawyers were excluded from the SEC's rules of professional conduct. Similarly, it has been suggested that the proposed SEC rules may act as a disincentive for issuers to use outside counsel in securities matters because of the possibility that the outside law firm will be required to withdraw from representing the issuer in non-securities matters.¹²¹ For example, if an outside law firm is representing an issuer in a securities matter and in an unrelated litigation matter, and withdrawal is required because of the securities issue, the firm must also withdraw from its representation of the issuer in the litigation matter. This will act as a disincentive to use outside counsel, who are generally viewed as being more independent and better in ferreting out corporate misconduct than in-house counsel.

Another concern is that if the SEC's plans are fully implemented, there will be an adverse impact on the relationship between the attorney and the corporate client.¹²² This will lead to more corporate misconduct than under current rules of professional conduct. Candid discussions with counsel will be endangered out of the fear that the attorney will disclose these discussions to the government. If clients

118. See 17 C.F.R. § 205.2(a)(iii) (2003).

119. See Karmel, *supra* note 84; Seventy-Nine Law Firms, *supra* note 89.

120. See generally Letter from David M. Becker and Edward F. Greene, Cleary, Gottlieb, Steen & Hamilton, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Dec. 16, 2002), available at <http://www.sec.gov/rules/proposed/s74502/clearybec040703.htm>; E-mail from Gerald S. Gackman, Chairman, Committee on Securities Regulation, Business Law Section, New York State Bar Association, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Dec. 16, 2002), available at www.sec.gov/rules/proposed/s74502/srcblsnysba040703.htm; Letter from Skadden, Arps, Slate, Meagher & Flom LLP, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Dec. 16, 2002), available at <http://www.sec.gov/rules/proposed/s74502/skaddenarps1.htm>; Sullivan & Cromwell LLP, *supra* note 90.

121. E-mail from Carter Ledyard & Milburn LLP, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Apr. 7, 2003), available at www.sec.gov/rules/proposed/s74502/carter040703.htm.

122. See Leslie Wharton, *Hazards for Attorney-Client Relationship: Sarbanes-Oxley Act's Reporting Requirements Pose Problems for Privileged Communications*, N.Y. L.J., Nov. 18, 2002, at 228; Letter from Jeff Bleich, President, The Bar Association of San Francisco, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Apr. 3, 2003), available at www.sec.gov/rules/proposed/s74502/jbleich1.htm; E-mail from Henry A. McKinnell, Ph.D., The Business Roundtable, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Apr. 8, 2003), available at www.sec.gov/rules/proposed/s74502/brt040803.htm; Seventy-Nine Law Firms, *supra* note 89.

are unwilling to confide in their attorneys, compliance with the securities laws will be weakened. This will further damage public confidence in the securities market. The American Corporate Counsel Association (ACCA) submitted comments arguing that fraud is less likely to be discovered and remedied by corporate counsel “shut out of the client’s inner circle because the client perceives [the attorney] to be a reporter or policeman for the government.”¹²³ The SEC’s regulatory regime also has been described as contrary to the principles of preventive law.¹²⁴ If communication between client and lawyer will be less candid, the lawyer will lack the information needed to advise the client about how to comply with the law.¹²⁵

Another concern is that even though section 307 of the Sarbanes-Oxley Act does not create any private right of action, and the final rules as adopted by the SEC expressly provide that no private right of action is created,¹²⁶ the SEC rules will be relevant in determining the standard of care in legal malpractice cases involving lawyers representing corporations. Expert testimony may be expected that the reasonably prudent lawyer would have acted in accordance with section 307 and the SEC rules. This may lead to increased liability for lawyers and increased cost of legal services.

VII. CONCLUSION

Both the Watergate scandal and the Enron scandal drew attention to the role of attorneys who represent organizations which are involved in wrongdoing. In both situations, attorneys were criticized for not doing enough to prevent the wrongdoing or for acting in a manner that inhibited the public and the government from learning of the wrongdoing. Both scandals resulted in reforms that attempted to restore the public’s confidence in the institutions that were involved in the scandals. Post-Watergate reforms sought to restore citizen confidence in the political arena. Post-Enron reforms seek to restore investor confidence in the financial arena. New rules of professional conduct for attorneys were part of both reform movements.

Reaction to the Enron scandal differed significantly from the reaction to the Watergate scandal, however, in that the federal government decided to directly regulate the legal profession and not to rely upon the traditional regulators of the legal profession, the legal profession itself and the state courts. Contrary to past practice, post-En-

123. Nagler & Wall, *supra* note 90.

124. Hackett, *supra* note 90, at 20.

125. Rachel McTague, *Thirty Prominent Securities Lawyers Tell SEC Reporting Rules Threaten Public Companies*, 18 *Laws. Man. on Prof. Conduct (ABA/BNA) No. 25*, at 724-25 (Dec. 4, 2002).

126. 17 C.F.R. § 205.7 (2003).

ron, the federal government has decided to regulate the legal profession itself. The full consequences of this decision are difficult to predict at this early stage. It is unclear how far the federal government will attempt to extend its reach in its regulation of the legal profession. It is also unclear how the legal profession will react to the possibility of a new regulatory regime. The different approaches taken by the federal government to the Watergate scandal and the Enron scandal cannot be explained by any differences in the two scandals. Both involved the identical issue of an attorney's role when representing an organizational client that has engaged in misconduct. The different responses in the aftermath of the Enron scandal, therefore, clearly demonstrate a new approach to the regulation of the legal profession. It may be that along with the investors and employees of Enron, self-regulation of the legal profession will be a victim of the Enron scandal.