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LAWYER EXCEPTIONALISM IN THE GATEKEEPING WARS

*Sung Hui Kim**

ABSTRACT

Although there is much debate about whether lawyers should have gatekeeping duties to avert client illegality and prevent harm to the capital markets, few have examined the fiery rhetoric that fuels this ongoing controversy. This Article explores the rhetoric deployed by the legal profession to ward off the federal regulation of lawyers who appear and practice before the Securities and Exchange Commission (SEC). After describing three canonical battles between the SEC and the bar, it identifies and examines the powerful rhetoric of "lawyer exceptionalism"—the notion that lawyers' societal function is unique and qualitatively different from that of other professionals who have legal obligations to avert fraud—and that this unique function is so valiant and virtuous that lawyers should be exempt from these gatekeeping obligations. The claim of lawyer exceptionalism hinges on the implicit invocation of particular images—the most important being the image of the lawyer as a litigator engaged in zealous advocacy. This Article demonstrates how these images—or, more accurately, "prototypes"—are used to persuade audiences that gatekeeping is fundamentally inconsistent with the practice of law. Moreover, it argues that the image of the litigator engaged in zealous advocacy is both exaggerated and misleading in the domain of the federal securities regulation of lawyers. This Article then offers suggestions on how to undermine the rhetoric of lawyer exceptionalism.

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INTRODUCTION

YOU'RE the corporate lawyer. Your largest client is a publicly-traded company in the equipment leasing business. The company has always had cash flow problems. Recently, however, the situation has turned dire due to the credit crunch. In fact, the company's cash flow position is now so bad that a critical loan covenant in the company's debt arrangements may soon be triggered. If triggered, the company will have to terminate sales and wind up its operations.

The chief executive officer (CEO) of this company solicits your help in doing what you've always done for the company: draft and review press releases and documents for public filing. But the CEO wants to release only upbeat news about the firm's finances and wants to continue to conceal the existence of this loan covenant.

You say, "The rules require you to tell the truth."

He responds, "You're my lawyer; I'm the client; that's *my* call. It's all on me. Anyways, everything will turn out just fine. It always does."

What do you do? Do you resign? Do you tell the Board? Do you flag the Securities and Exchange Commission (SEC)? Do you rock the boat? Or do you assist him, perhaps grudgingly, in preparing those documents?

Unfortunately, this situation is not fictitious, but based on an actual

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case, *In re Carter*,[1] discussed below. Although the two lawyers involved in the case were troubled by the CEO's misbehavior and urged compliance on several occasions, they did not stand their ground. Rather, at least one of the lawyers assisted the CEO in preparing the deceptive disclosures, and both lawyers continued to advise the CEO while he persisted in committing securities fraud.[2] Eventually, the company went bankrupt and the fraud was revealed.[3]

For decades, the SEC has sought to deter precisely this type of lawyer misconduct: the acquiescence in (and, in some cases, facilitation of) corporate frauds perpetrated by senior managers.[4] Besides suing lawyers for professional misconduct, the SEC has tried to clarify and prescribe affirmative duties to avert client illegality, backed by the threat of administrative or civil sanction. In doing so, the SEC was acting on the premise that lawyers were indeed "gatekeepers," defined as "private intermediaries who can prevent harm to the securities markets by disrupting the misconduct of their client representatives,"[5] and that it was

1. *See In re* Carter, Exchange Act Release No. 17597, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,847, at 84,149 & n.13 (Feb. 28, 1981); *infra* Part I.B.

2. *See id.* ¶¶ 84,154 & 84,157-58; *infra* note 65. Importantly, the lawyers never resigned and never notified the Board, the SEC, or the investors.

3. *Id.* ¶ 84,165.

4. *See* Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 727, 730 (concluding that fraud on securities markets are typically committed by senior managers—rather than lower-level employees—without the approval of either the board or a majority of shareholders); Elizabeth MacDonald & Joann S. Lublin, *SEC May Put Small Firms in Audit Plan: Proposals for Strengthening Corporate Audit Panels Influenced by New Data*, WALL ST. J., Mar. 25, 1999, at A2 (reporting a study of more than 200 corporate fraud cases brought by the SEC, which found that in 83% of the cases, the CEO, CFO, or both, were involved in the fraud).

5. This definition of gatekeepers first appeared in Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 413 (2008), but is modified and adapted from that set forth in Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 53 (1986) (describing "gatekeeper liability" as "liability imposed on private parties who are able to disrupt misconduct by withholding their cooperation from wrongdoers"). Although gatekeeping is not confined to the capital markets context, this Article focuses only on the role of lawyers as gatekeepers in the capital markets context. As classically defined, the gatekeeper is a *third party* who "supplements efforts to deter primary wrongdoers directly by enlisting their associates and market contacts as de facto 'cops on the beat.'" *See id.*; *see also* Stephen Choi, *Market Lessons for Gatekeepers*, 92 NW. U. L. REV. 916, 917 (1998) (noting that gatekeepers are *third-party* reputational intermediaries that perform certification services).

For alternative definitions of "gatekeeper," see, for example, JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 2-3 (2006) (advancing an alternative definition of "gatekeeper" as an "agent who acts as a reputational intermediary to assure investors as to the quality of the 'signal' sent by the corporate issuer"); Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 883 (1990) (defining a gatekeeper as "someone in a position to decline to provide . . . service to those who would misuse it"); Assaf Hamdani, *Gatekeeper Liability*, 77 S. CAL. L. REV. 53, 58 (2003) (defining "gatekeepers" as "parties who sell a product or provide a service that is necessary for clients wishing to enter a particular market or engage in certain activities"); Frank Partnoy, *Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime*, 79 WASH. U. L. Q. 491, 491 n.2 (2001) (not committing to a definition of "gatekeeper" but presuming that the definition would include "investment banking, accounting firms, and law firms in their activities related to securities issues");

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reasonable to impose gatekeeping duties on lawyers.

But the SEC's efforts to impose gatekeeping obligations on lawyers have been fiercely (and almost uniformly) opposed by the bar in highly contentious debates that I call the "gatekeeping wars." These battles rose to a fevered pitch when, in the wake of Enron,[6] Congress passed the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley), which authorized the SEC to regulate "attorneys appearing and practicing before" the SEC "in any way in the representation of issuers."[7]

In those historic battles with the SEC, the bar has repeatedly invoked the powerful rhetoric of "lawyer exceptionalism"[8]—the notion that lawyers' societal function differs from that of all other professionals (such as accountants) who have legal obligations to avert fraud, and that this unique function is so valiant and virtuous that lawyers should be exempt from gatekeeping obligations. The persuasive power of lawyer exceptionalism lies not so much in explicitly reasoned argument but in its implicit invocation of particular images, such as the *litigator engaged in zealous advocacy*. As natural as that image is, it is exaggerated and deeply misleading in this regulatory context.

Part I sets the stage by describing the central battles of the gatekeeping wars.[9] These battles have not only incubated the rhetoric of lawyer exceptionalism but have also shaped the American Bar Association's position on lawyers' duties when encountering managerial illegality. While I am not the first to describe these battles,[10] prior accounts have not concentrated on the discursive terms upon which they have been waged.

Part II dissects the bar's rhetoric of lawyer exceptionalism to explore why the rhetoric rings so true to so many. By mining this rhetoric, I show

Peter B. Oh, *Gatekeeping*, 29 J. CORP. L. 735, 746-66 (2004) (relaxing the third-party element of the definition by positing the SEC as gatekeeper).

6. *See* COFFEE, *supra* note 5, at 16 (noting that "gatekeepers failed en masse").

7. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 784 (codified as amended in scattered sections of 11, 18, 28, and 29 U.S.C.).

8. While this Article is the first to address lawyer exceptionalism in the area of professional regulation and professional responsibility, other scholars have addressed lawyer exceptionalism in other political contexts. *See, e.g.*, HEINZ EULAU & JOHN D. SPRAGUE, LAWYERS IN POLITICS (1964); MARK C. MILLER, *Are Lawyers Really Different from Nonlawyers? in* THE HIGH PRIESTS OF AMERICAN POLITICS: THE ROLE OF LAWYERS IN AMERICAN POLITICAL INSTITUTIONS 76-94 (1995); David R. Derge, *The Lawyer as Decision-Maker in the American State Legislature*, 21 J. POLITICS 408, 408-09 (1959); David R. Derge, *The Lawyer in the Indiana General Assembly*, 6 MIDWEST J. POL. SCI. 19, 19-20 (1962); John P. Heinz et al., *Lawyers for Conservative Causes: Clients, Ideology, and Social Distance*, 37 LAW & SOC'Y REV. 5, 34 (2003); Robert L. Nelson et al., *Lawyers and the Structure of Influence in Washington*, 22 LAW & SOC'Y REV. 237, 293 (1988).

9. Although the concept of "gatekeepers" can be broadly applied, this Article deals only with gatekeeping in the capital markets context, the only context over which the SEC maintains jurisdiction.

10. For superb analyses of the bar's canonical battles with the SEC, see Susan P. Koniak, *When Courts Refuse to Frame the Law and Others Frame It to Their Will*, 66 S. CAL. L. REV. 1075, 1079-84 (1993) [hereinafter Koniak, *When Courts Refuse*]; Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1248-60 (2003) [hereinafter Koniak, *The Bar's Struggle*]; Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J. L. & PUB. POL'Y 195 (2003) [hereinafter Koniak, *Corporate Fraud*].

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that the claim of lawyer exceptionalism is predicated on three images: (i) the litigator to represent lawyers, (ii) the auditor to represent gatekeepers, and (iii) the human manager to represent clients. The first two images—or more accurately "prototypes"—generate a *contrast effect*. Primed by the bar's rhetoric and our culture, when we think about lawyers, we envision the litigator; when we think about gatekeepers, we envision the auditor. Comparing litigators with auditors leads us to see lawyers and gatekeepers as separate and distinct categories, widely divergent in their key functions and attributes. Thus, the practice of lawyering appears fundamentally inconsistent with the practice of gatekeeping. This contrast effect bolsters the descriptive claim that lawyers are unique.

The third image—the human manager as client—fuels a *client confusion*, in which the human manager, and not the corporation, is mistaken for the true client. This confusion makes us think that gatekeeping obligations force the lawyer to betray her noble role as faithful and zealous advocate of her client. Accordingly, this client confusion bolsters the normative claim that lawyers' function is so valiant and virtuous that lawyers should be exempt from gatekeeping obligations.

Part III offers suggestions on how to counter the rhetoric of lawyer exceptionalism. To reduce the contrast effect, we can highlight overlapping functions and attributes of lawyers and other gatekeepers to undermine the descriptive claim that lawyers are unique. To counter the client confusion, we can emphasize that, for representations governed by Sarbanes-Oxley, the true client is the public corporation and not the human manager. Accordingly, gatekeeping obligations that require lawyers to withstand errant managers do not force the lawyer to betray her true client. Instead, gatekeeping duties publicly reaffirm the lawyer's duties to the actual client, the corporation. Taking these countermeasures will enable all those interested, whether it be the SEC, politicians, or other stakeholders, to better parry the bar's sometimes blustery backlash.

A few final points of clarification. This Article's primary purpose is to analyze the appeal of the bar's rhetoric of anti-regulation—in short, *how* the technologies of persuasion work the way that they do (and how they might be countered). It is not to interrogate *why* the bar resists gatekeeping, which is a matter discussed in a companion piece.[11] It is also not to make any systematic affirmative case that lawyers should be gatekeepers (although I believe that a strong case can be made).[12] The focus here is sharply on understanding how the rhetoric functions—something that should interest all sides of the gatekeeping wars.

I. THREE CANONICAL BATTLES

The disaster that was Enron took place in 2001 and 2002. Congress's response through Sarbanes-Oxley happened soon thereafter, although

11. Sung Hui Kim, Naked Self-Interest? Why the Legal Profession Resists Gatekeeping (draft manuscript, on file with author).

12. *See infra* notes 372-74 and accompanying text.

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the bickering over final SEC regulations languished for months. Now, in 2010, one might assume that the once tangled triangle of fraud, lawyer complicity, and SEC enforcement has worked itself out. But any such assumption would ignore a complex history going back to at least the 1970s. For decades, the organized bar and the SEC have been sparring over the duty of lawyers to stop fraud and the reach of SEC authority over their (mis)behavior. Each battle within that war, no matter how seemingly final, reveals itself through the long lens of history to be just the next iteration. This Part provides some sense of that history by highlighting three canonical battles that have incubated the rhetoric of lawyer exceptionalism: *SEC v. National Student Marketing*, *In re Carter*, and Sarbanes-Oxley.[13]

A. *SEC v. National Student Marketing Corp.*

Although the SEC has had longstanding civil and administrative authority to prosecute lawyers for assisting a securities fraud,[14] it was not until the 1970s that it began to do so.[15] In 1972, the SEC sued two prominent law firms and three specific partners for their role in the merger of Interstate National Corporation (Interstate) into National Student Marketing Corporation (NSMC).[16] Before closing the merger,[17] the parties learned that NSMC's interim financial statements were wildly inaccurate. Instead of a profit of $700,000, NSMC had suffered a net loss of approxi-

13. A few other cases are also significant but, due to space constraints, are not discussed here. *See, e.g.*, *In re* Gutfreund, Exchange Act Release No. 31554, 52 SEC Docket 2849 (Dec. 3, 1992); *In re* Kern, Exchange Act Release No. 29,356, 49 SEC Docket 422 (June 21, 1991), *aff'g in part and vacating in part* [1988-1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,342 (Nov. 14, 1988); *see also supra* note 10.

14. For authority to bring civil injunction actions in federal district courts to enjoin violations of securities laws, see Securities Act of 1933 § 20(b), 15 U.S.C. § 77t(b) (2006); Securities Exchange Act of 1934 § 21(d)(1), 15 U.S.C. § 78u(d)(1) (2006); THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 16.2[2] (5th ed. 2006). For authority to bring disciplinary actions in administrative proceedings against securities professionals for "improper professional conduct" or having "caused a violation of securities laws," see HAZEN, *supra*, § 16.2[18].

15. *See* RICHARD L. ABEL, AMERICAN LAWYERS 154 (1989) (noting that "half the proceedings against lawyers initiated by the SEC between 1935 and 1980 were begun after 1975").

16. The final court opinion (from which most of the factual description comes) can be found in *SEC v. National Student Marketing Corp.*, 457 F. Supp. 682 (D.D.C. 1978). The defendant law firms were Lord, Bissell & Brook (LBB) and White & Case. Other defendants included NSMC, directors of both companies, and the accounting firm and two of its partners. *Id.* at 686-87. Interstate was an insurance holding company, and NSMC was a provider of goods and services to college and high school students. *Id.* at 688.

17. Before the closing date, the boards of both companies had approved the merger and secured shareholder approval. *Id.* at 691.

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mately $80,000.[18] Failing to disclose these material[19] adjustments to shareholders (who had already approved the merger) would violate the anti-fraud provisions of the federal securities laws.[20] Nevertheless, the parties plodded ahead.[21] Lawyers on both sides opined that the transaction was "in full compliance with applicable law," and the merger closed.[22] Afterwards, no one disclosed the truth to the former Interstate shareholders, who had sold their shares based on a colossal misunderstanding.[23]

When the SEC discovered the fraud, it filed a civil enforcement action against the lawyers and their firms for aiding and abetting a securities fraud.[24] The SEC argued that lawyers have affirmative gatekeeping responsibilities: once a lawyer knows that a client is committing securities fraud, she has an obligation to insist that the client stop or rectify the fraud and, if unsuccessful, resign and disclose the unrectified fraud in a notice to the SEC.[25] This was not meant to be a radical reformulation of the lawyer's duties. Indeed, the model professional conduct codes—including the then-current Model Code of Professional Responsibility (Model Code)—issued by the American Bar Association (ABA) and

18. Specifically, the accountants determined that "a $500,000 adjustment to deferred costs, a $300,000 write-off of unbilled receivables, and an $84,000 adjustment to paid-in capital be made retroactive to May 31 and be reflected in the comfort letter to be delivered to Interstate." *Id.* at 691. The accountants' "comfort letter" (which was ultimately signed and delivered post-closing) stated that NSMC "would have shown a net loss of approximately $80,000." *Id.* at 695.

19. *See id.* at 696 n.25 (noting a statement by Interstate's chief financial officer reacted that "the deferred cost adjustment of $500,000 was 'a hell of a big adjustment.'"); *id.* at 709 (noting that "[t]here is no doubt that the adjustments were material, and therefore [the parties] should have refused to proceed with the merger absent disclosure to and resolicitation of the shareholders"); *id*. at 713 (noting the "obvious materiality" of the information).

20. *See id.* at 701-12.

21. *Id.* at 694 (describing how the closing took place, including the CEO of Interstate's deferral to its counsel on the issue of whether the closing could proceed on the basis of the accounting firm's unsigned draft comfort letter).

22. *Id.* at 690. The lawyers for both parties issued an opinion letter stating that its client had taken all actions required by law and that "transactions in connection with the merger had been duly and validly taken, to the best knowledge of counsel, in full compliance with applicable law." *Id.* (stating the merger agreement condition). The parties closed the merger on the basis of the accounting firm's unsigned draft comfort letter, which did not conform to the requirements of the merger agreement. *See id*. at 693-94.

23. *Id.* at 696-97. Nothing was done in spite of the fact that, after the merger closed, NSMC's accounting firm delivered its not-so-comforting comfort letter, which specifically urged both companies to resolicit shareholder approval based upon corrected financial statements. *See id.* at 695-96.

24. Specifically, the lawyers were charged with (i) failing to intervene by making an effort to halt the merger, (ii) inappropriately issuing an opinion letter that effectively "blessed" the transaction, and (iii) failing to withdraw that opinion and notify either the Interstate shareholders or the SEC, and (iv) issuing an opinion confirming the validity of post-merger stock sales under Rule 133. *See id.* at 712.

25. *See* SEC v. Nat'l Student Mktg. Corp., [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,360 (D.D.C. complaint filed Feb. 3, 1972) ("The law firms should have refused to issue the opinion letters and should have insisted that the financial statements be revised and the shareholders be resolicited, claimed the Commission. If that advice was ignored, the Commission contended, the attorneys should have ceased representing their respective clients and informed the Commission of the misleading nature of the financial statements.").

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adopted by virtually every state, had already taken a similar position.[26] Nevertheless, the bar vigorously insisted that the duty of confidentiality trumped any duty to disclose fraud.[27]

Indeed, the SEC's complaint stunned the legal community. This was, after all, the first time in almost forty years of federal securities regulation that "reputable outside lawyers" had been sued by the SEC.[28] Commentators declared that "a new epoch had commenced"[29] and that there was a "revolution" in the securities regulation of lawyers.[30] Lawyers "scrambl[ed] for copies" of the complaint and were "deeply shaken" by the fact that the SEC had charged "prestigious law firms."[31] The *Wall Street Journal* reported that almost every firm with a sizable securities law practice had met to discuss the case's implications.[32] Some insurance companies reportedly refused to insure liabilities arising out of securities transactions.[33]

The ABA went straight to work. It basically repealed the Model Code's rule requiring lawyers to reveal an unrectified fraud against a third party or tribunal.[34] Reversing course, it now insisted that disclosing

26. *See* Koniak, *When Courts Refuse*, *supra* note 10, at 1080. For mandatory disclosure, see MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(B)(1) (1969) ("A lawyer who receives information clearly establishing that . . . [h]is client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal."); CANONS OF PROF'L ETHICS Canon 41 (1968) ("When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon . . . a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps."); Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271, 292-93 (1984) (interpreting Canon 41 as a mandatory direction to act). For permissive disclosure, see CANONS OF PROF'L ETHICS Canon 37 (1968) ("The announced intention of a client to commit a crime is not included within the confidences which [a lawyer] is bound to respect."); MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(3) (1969) ("A lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime."). With respect to withdrawal, see *id*. DR 2-110(B)(2), (C)(1)(b), C(2) (mandating that a lawyer withdraw from representation if "[h]e knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule" and permitting him to withdraw if his client "[p]ersonally seeks to pursue an illegal course of conduct" or "[h]is continued employment is likely to result in a violation of a Disciplinary Rule").

27. Koniak, *When Courts Refuse*, *supra* note 10, at 1080; *see infra* notes 34-36.

28. J. Gordon Cooney, *The Implications of the Revolution in Securities Regulation for Lawyers*, 29 BUS. LAW. 130, 129 (1974).

29. Junius Hoffman, *On Learning of a Corporate Client's Crime or Fraud—the Lawyer's Dilemma*, 33 BUS. LAW. 1389, 1390 (1978).

30. *See* Cooney, *supra* note 28, at 129.

31. Hoffman, *supra* note 29, at 1390 n.4 (quoting Wayne E. Green, *Irate Attorneys: A Bid to Hold Lawyers Accountable to Public Stuns, Angers Firms*, WALL ST. J., Feb. 15, 1972, at 1). One prominent Washington attorney said, "I'd state conservatively that securities lawyers are shaking in their boots." *Id.*

32. *Id.*

33. Cooney, *supra* note 28, at 130, 134-35.

34. The repeal of the Model Code rule requiring disclosure was effectuated in two stages. First, in February 1974, the ABA House of Delegates amended the Code to provide that the lawyer's duty to withhold "privileged communication[s]" trumped any mandate to disclose fraud. *See* ABA, *Proceedings of the 1974 Midyear Meeting of the House of Dele-*

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information gained "in the professional relationship," which "would be likely to be detrimental to the client," was flatly prohibited.[35] As noted by Ronald Rotunda, this change effectively "engulf[ed] the entire disclosure requirement," making a "mirage" out of the pre-existing duty to reveal fraud.[36]

In addition, the ABA adopted a policy statement challenging the SEC's authority to impose disclosure duties on lawyers.[37] The ABA clarified its position that its model ethics codes allowed disclosure "only in the clearest cases" of illegality or fraud.[38] Further, it asserted that, aside from the ABA's model codes, only carefully considered federal legislation could impose upon lawyers the duty to disclose client fraud to the SEC.[39] Thus, according to the ABA's own logic, even courts could not interpret existing federal securities laws as requiring such obligations of lawyers.[40]

In a bench trial,[41] the federal district court found that the lawyers had indeed aided and abetted the securities fraud by acquiescing in the merger.[42] The court stated that these lawyers were "at the very least . . .

gates, 99 ANNUAL REPORT 151, 166 (1974) (reporting on the approval of an amendment to DR 7-102(B)). Second, on September 30, 1975, the ABA published an official opinion, which expanded on the 1974 amendment by prohibiting disclosure not only of *privileged* communications but also of any other information gained "in the professional relationship," disclosure of which "would be likely to be detrimental to the client." *See* Ronald D. Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 OR. L. REV. 455, 469 n.67 (1984)

35. *Id.* at 469 n.69; *see* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975).

36. Rotunda, *supra* note 34, at 469 (noting the effect of the ABA opinion on Model Code DR 7-102(B)). One measure of the radicalness of this revision is that, despite years of lobbying, only fourteen states adopted the ABA's drastic new change. Hazard, *supra* note 26, at 29-54.

37. ABA Comm. on Counsel Responsibility & Liability of the Section of Corp., Banking & Bus. Law, *Statement of Policy Adopted by American Bar Association Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to the Compliance by Clients with Laws Administered by the Securities and Exchange Commission*, 31 BUS. LAW. 543, 547 (1975) [hereinafter ABA, *Policy Statement*] ("The statutes administered by the SEC give it no power to require disclosure by lawyers concerning their clients beyond what is provided in the [Model Code].").

38. *Id.* at 547; *see also id*. at 545 ("[T]he lawyer has neither the obligation nor the right to make disclosure when any reasonable doubt exists concerning the client's obligation of disclosure . . . .").

39. *Id.* at 544-45 ("[A]ny principle of law which, except as permitted or required by the [Model Code], permits or obliges a lawyer to disclose to the SEC otherwise confidential information, should be established only by statute after full and careful consideration of the public interests involved, and should be resisted unless clearly mandated by law.").

40. *See id*. The ABA also warned of the possibility that a client's actions might be "improperly narrowed through the insistence of an attorney" relying on a "known, but perhaps erroneous, position of the SEC or a questionable lower court decision." *Id.* at 545.

41. Although both law firms and their respective partners participating in the merger's closing were originally charged, by the time of the bench trial, everyone else, except for LBB (counsel for Interstate), its two partners, and the former president and director of Interstate, had either consented to the entry of final judgments of permanent injunction, settled the case, or were otherwise dismissed. *See* SEC v. Nat'l Student Mktg. Corp., 457 F. Supp. 682, 687 (D.D.C. 1978). Thus, the court was left with the unenviable task of ruling solely on the conduct of the lawyers for Interstate (LBB), who were—as between the two law firms—less actively involved in the fraud.

42. *Id.* at 687.

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required to speak out" to their clients in an attempt to stop them from proceeding with the deal, noting that the lawyers' "silence . . . lent the appearance of legitimacy to the closing."[43] However, the court disagreed with the SEC's other allegations that issuing the opinion letter or failing to take any remedial action after the merger constituted securities laws violations.[44] In the court's view, the opinion "did not play a large part in the consummation of the merger" but was "simply one of many conditions to the obligation of NSMC to complete the merger."[45] This is notwithstanding the court's own holding that mere silence constituted "substantial" assistance of a securities violation.[46]

Having found the lawyers culpable, the court surprisingly declined to sanction them[47] and concluded instead that "the violations proved by the SEC appear to be part of an isolated incident, unlikely to recur and insufficient to warrant an injunction."[48] Thus, the SEC won only a formal victory; the court granted no relief and never mandated any explicit duty to notify the SEC or defrauded shareholders.[49]

When we examine the bar's hostile reactions to the SEC's lawsuit, we see the incipient notion of lawyer exceptionalism taking root. To support the implicit claim that lawyers' function is unique and qualitatively different from that of other gatekeeping professionals, lawyers (i) framed their

43. *Id.* at 713.

44. *See id.* at 714-15.

45. *Id.* at 714.

46. *Id.* at 713; Koniak, *The Bar's Struggle*, *supra* note 10, at 1252. Surely, if the lawyers' "silence . . . lent the appearance of legitimacy to the closing," *Nat'l Student Mktg. Corp.*, 457 F. Supp. at 713, then, *a fortiori*, the delivery of an opinion letter would do so as well. The court seems to have understated the lawyers' role in this fraudulent transaction. As noted by Morgan Shipman, the lawyer's opinion is the "passkey" to securities transactions. Morgan Shipman, *The Need for SEC Rules to Govern the Duties and Civil Liabilities of Attorneys Under the Federal Securities Statutes*, 34 OHIO ST. L.J. 231, 267 (1973). "If [the lawyer] judges that certain information must be included in a registration statement, it gets included . . . ; if he concludes it need not be included, it doesn't get included." A. A. Sommer, Jr., Comm'r, SEC, Address at the Banking, Corporation and Business Law Section of the New York State Bar Association: The Emerging Responsibilities of the Securities Lawyer (Jan. 24, 1974), *available at* http://www.sec.gov/news/speech/1974/012474 sommer.pdf.

Indeed, few managers and few investment bankers would be so foolish as to proceed with a transaction without their lawyers' green light. *See* Jonathan M. Barnett, *Certification Drag: The Opinion Puzzle and Other Transactional Curiosities*, 33 J. CORP. L. 95, 127-29 (2007) (explaining the widespread use of opinions for significant transactions by noting the opinion receiver's asymmetrical reputational incentives, whereby the receiver enjoys potentially little reputational gains by closing a good transaction without incurring the costs of obtaining a legal opinion but potentially suffers significant reputational harm by closing what might turn out to be a bad transaction without a legal opinion).

47. *Nat'l Student Mktg. Corp.*, 457 F. Supp. at 716 (refusing the SEC's request for injunctive relief).

48. *Id.*

49. Indeed, the court refrained from specifying any clear steps (such as resignation, remedial action, or disclosure) that lawyers must take if their pleas are ignored. *Id.* at 713 ("However, it is unnecessary to determine the precise extent of [lawyers'] obligations here, since it is undisputed that they took no steps whatsoever to delay the closing pending disclosure to and resolicitation of the Interstate shareholders.").

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role as "advocates" for their clients[50] and (ii) distinguished their role from that of auditors'.[51] They argued that "public accounting firms represent themselves as independent entities on which the public can rely for an objective evaluation of their clients' financial statements."[52] Thus, by implication, lawyers are seen as not performing any disinterested evaluation on which the public can (or should) rely. In fact, lawyers ridiculed the notion that "law firms have the same public responsibilities as auditing firms."[53]

To support the implicit claim that lawyers should be exempt from gatekeeping obligations, lawyers noted that the lawyer–client relationship, far from ordinary, is "of fundamental importance to our legal system."[54] Thus, the ABA insisted that lawyers should be free to advise "in the client's best interest without conflicting loyalties or obligations."[55] Accordingly, the ABA maintained that lawyers "cannot . . . be regarded as a source of information concerning possible wrong-doing by clients."[56] In other words, imposing gatekeeping obligations would contravene the special normative function that lawyers serve in our society.[57]

B. *In re Carter*

While the *National Student Marketing* case was winding down, the SEC's next big battle with the ABA was heating up. In 1979, the SEC Enforcement Division switched from a civil enforcement strategy to initiating a disciplinary proceeding under its longstanding power under Rule 2(e), now Rule 102(e),[58] of its Rules of Practice[59] against two partners

50. *See, e.g.*, Green, *supra* note 31 (reporting the general complaint by lawyers that the SEC's action "threatens to make the lawyer a policeman instead of an advocate" and that lawyers view themselves "first and foremost . . . advocates for their clients' cause, not . . . representatives of the public."); ABA, *Policy Statement*, *supra* note 37, at 544 ("Any such compelled disclosure would seriously and adversely affect . . . the ability of lawyers as advocates to represent and defend their clients' interests."); Monroe H. Freedman, *A Civil Libertarian Looks at Securities Regulation*, 35 Ohio St. L.J. 280, 288 (1974) (decrying the SEC's actions and stating that "every lawyer is an advocate, irrespective of whether he or she ever enters as courtroom"). To be fair, the ABA did concede that lawyers also function as counselors. *See* ABA, *Policy Statement*, *supra* note 37, at 546 ("It is a basic principle that the lawyer's role is essentially that of counselor to his client."). Over time, however, the bar's rhetoric de-emphasized the counseling function.

51. Green, *supra* note 31.

52. *Id.*

53. *Id.*; *see also* William T. Coleman, Jr., *The Different Duties of Lawyers and Accountants*, 30 Bus Law. 91, 91 (1975) (criticizing the SEC's "attempt to try to equate the lawyer to the public accountant").

54. ABA, *Policy Statement*, *supra* note 37, at 547.

55. *Id.* at 544.

56. *Id.*

57. *Id.* at 546 ("[A] role for the lawyer as investigator or informant would be a seriously inconsistent one, and the Bar should critically scrutinize any proposal, however limited, that the lawyer can be so regarded.").

58. *See* 17 C.F.R. § 201.102(e) (2009).

59. For the statutory authority of the SEC's Rules of Practice (including Rule 2) since 1935, see *In re* Carter, Exchange Act Release No. 17,597, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,847, at 84,149 & n.13 (Feb. 28, 1981). The SEC's authority to promulgate Rule 2(e) has been affirmed by courts. *See* Implementation of Standards of Profes-

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from a major New York law firm, William R. Carter and Charles J. Johnson.[60]

During the course of representing their client, the National Telephone Company, Inc., Carter and Johnson learned that the CEO[61] was publicly releasing glowing financial reports that withheld material information,[62] including the fact that the company was on the brink of insolvency.[63] Although the lawyers repeatedly advised the CEO to rectify the fraud, they were rebuffed each time.[64] Nevertheless, the lawyers continued to assist the CEO in preparing and filing deceptive public documents.[65] They never notified the board of directors[66] and never withdrew their representation.[67] As a result, the company's public investors remained in the dark until the company filed for bankruptcy.

The SEC charged the two lawyers with unethical or improper professional conduct and willfully aiding and abetting violations of the federal securities laws within the meaning of Rule 102(e).[68] The Administrative Law Judge (ALJ) sustained the charges and suspended them from practicing before the SEC for one year and nine months, respectively.[69]

On appeal, the Commissioners of the SEC reversed the ALJ's decision and dismissed the suit.[70] While acknowledging that "[a]ssociation of a law

sional Conduct for Attorneys, Securities Act Release No. 8150, Exchange Act Release No. 46,868, Investment Company Act Release No. 25,829, 67 Fed. Reg. 71,670 & 71,671 & n.14 (proposed Dec. 2, 2002) [hereinafter SEC Initial Rule] (noting that "[e]very court that has ever considered the issue has concluded that the Commission possessed the authority to promulgate Rule 102(e) . . . to protect the integrity of its processes and to encourage professionals to adhere to minimum standards of competence" and citing precedent).

60. Carter and Johnson were partners at the law firm of Brown, Wood, Ivey, Mitchell & Perry. *See In re Carter*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶¶ 84,146 & 84,152.

61. Sheldon L. Hart was National's founder, CEO, Chairman of the Board, controlling shareholder, president, and treasurer. *Id.* ¶ 84,151.

62. Specifically, Hart refused to disclose a critical loan covenant that, if triggered, would require National to wind up its operations. *Id.* ¶¶ 84,158-59. The agreement specifically provided that if (i) National attempted to borrow in excess of $19 million from the existing creditor group, or (ii) National failed to meet a specified liquidity test, National was required to implement the wind-down plan. *Id.* ¶ 84,158. Failure to implement the wind-down plan would be an event of default under National's existing credit facility. *Id.*

63. Like many equipment leasing companies, National had a persistent cash-flow problem that only worsened with the tightening credit markets. *Id.* ¶ 84,151. Most of National's costs were installation expenses for new equipment leases, which were incurred well before rental payments on those leases commenced. *Id.* Since rental payments were National's only significant source of revenue, National's cash flow position continued to worsen as the company entered into more leases and expanded its operations. *Id.*

64. *See id.* ¶¶ 84,154 & 84,157.

65. *Id.* ¶ 84,158. The final opinion of the Commissioners concluded that National's disclosures clearly violated the federal securities laws. *Id.* ¶ 84,165. Carter had revised a December 1974 press release and prepared a contemporaneous Form 8-K, which were materially false and misleading. *Id.* Also, Carter and Johnson remained in "close and continuing contact with the company," routinely advising Hart and receiving copies of National's deceptive disclosures. *Id.* ¶ 84,153.

66. *Id.* ¶ 84,165.

67. Koniak, *The Bar's Struggle*, *supra* note 10, at 1257.

68. *In re Carter*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,146.

69. *Id.* ¶ 84,146.

70. *Id.* ¶ 84,146 & 84,173.

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firm with a client lends an air of legitimacy and authority to the actions of a client,"[71] they concluded that the lawyers "did not intend to assist the violation by their inaction."[72] In rejecting the ALJ's determination, they found that the ALJ had improperly held the lawyers to a standard that went beyond heretofore clearly established professional mandates.[73]

The Commissioners also announced their intention to solicit public comment for a new standard for attorney professional conduct, which they articulated as follows:[74]

> When a lawyer with significant responsibilities in the effectuation of a company's compliance with the disclosure requirements of the federal securities laws becomes aware that his client is engaged in a substantial and continuing failure to satisfy those disclosure requirements, his continued participation violates professional standards unless he takes prompt steps to end the client's noncompliance.[75]

This new standard was intended to be a compromise. It was narrower than the *National Student Marketing* standard because it excused those lawyers lacking "significant responsibilities" for securities law matters and triggered obligations only if the noncompliance amounted to a continuing pattern.[76] Under this weaker standard, even Interstate's lawyers in the *National Student Marketing* case may not have aided and abetted a securities violation.[77] In addition, the Commissioners declined to prescribe what those "prompt steps to end the client's noncompliance" should be,[78] merely offering options to be considered and suggesting deference to the lawyer (in the actual situation) who "is in the best position to choose his next step."[79] Most important, no longer was the SEC—speaking through its Commissioners—insisting that lawyers had to report out an unrectified violation to the SEC.[80] And while the Commissioners warned that continued involvement with a recalcitrant client may violate professional standards, they clarified that there would be no blanket rule requiring lawyers to resign.[81]

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71. *Id.* ¶ 84,169.
72. *Id.*
73. *Id.* ¶ 84,170 (noting that the professional responsibilities of lawyers had "not been so firmly and unambiguously established" that it was proper to hold these lawyers accountable).
74. *Id.* ¶ 84,170 & 84,172.
75. *Id.* ¶ 84,172.
76. Koniak, *The Bar's Struggle*, *supra* note 10, at 1259.
77. COFFEE, *supra* note 5, at 211.
78. *In re Carter*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,172 ("What is required, in short, is some prompt action that leads to the conclusion that the lawyer is engaged in efforts to correct the underlying problem, rather than having capitulated to the desires of a strong-willed, but misguided client.").
79. *Id.*; Koniak, *The Bar's Struggle*, *supra* note 10, at 1259.
80. COFFEE, *supra* note 5, at 211.
81. *In re Carter*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,172 (stating that "[r]esignation is one option, although we recognize that other considerations, including the protection of the client against foreseeable prejudice, must be taken into account in the case of withdrawal," and disagreeing with the proposition that "resignation is the only

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Despite the new standard's relative toothlessness, the bar was again outraged. In its 1981 official comment, the ABA noted that the SEC's proposal had "generated widespread apprehension."[82] Notwithstanding the SEC's citation of legal precedent affirming its authority to discipline securities lawyers,[83] the ABA insisted that there was no case law to support the SEC's power to promulgate practice standards for lawyers.[84] It also pleaded that self-regulation sufficed to control professional misconduct,[85] notwithstanding the fact that state bar discipline, particularly against securities lawyers, is extraordinarily rare.[86]

Now more explicitly invoking lawyer exceptionalism, the ABA characterized lawyers' role as unique.[87] It stressed the "importance to society of lawyers' *unique* professional obligations"[88] as the basis for the legal profession's exemption from federal regulation.[89] It sharply contrasted the lawyer's role with that of an auditor's and emphasized that lawyers have an obligation of loyalty to clients, rather than independence from clients.[90] The ABA argued that the adoption of the SEC's new standard threatened to involve the SEC in "a hopeless morass" and warned that going after lawyers would unwisely divert the SEC's "historically limited resources."[91] Barely veiling its contempt, the ABA derided the "notion that the Commission has the power or responsibility to become a putative bar association"[92] and invoked one of its central tenets—that state bar authorities are the only bodies competent to regulate professional

permissible course when a client chooses not to comply with disclosure advice"). Under classical gatekeeping theory, requiring gatekeepers to withdraw their cooperation is viewed as the least burdensome of response duties that the law might prescribe. *See* Kraakman, *supra* note 5, at 54 n.3.

82. ABA Section of Corp., Banking & Bus. Law, *SEC Standard of Conduct for Lawyers: Comments on the SEC Rule Proposal* (*Release No. 33-6344*), 37 BUS. LAW. 915, 916 (1982) (reprinting the official comment).

83. *In re Carter*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,147 (stating that "[n]o court, having considered the question, has found the Commission not to have the authority to adopt Rule 2(e)" and citing precedent).

84. ABA Section of Corp., Banking & Bus. Law, *supra* note 82, at 917.

85. *See id*. at 919-22.

86. State bar disciplinary systems lack both the funding and the expertise to go after securities lawyers. *See, e.g.*, ABEL, *supra* note 15, at 143-50; Roger C. Cramton et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV 725, 730, 795-97 (2004); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 641 (1985); Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 6-8 (1991); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 822-30 (1992); Harvey L. Pitt, Chairman, SEC, Remarks Before the Annual Meeting of the American Bar Association's Business Law Section (Aug. 12, 2002) (transcript available at http://www.sec.gov/news/speech/spch579.htm) (expressing the SEC's frustration about the "generally low level of effective responses we receive from state bar committees when we refer possible disciplinary proceedings to them").

87. *See* ABA Section of Corp., Banking & Bus. Law, *supra* note 82, at 923.

88. *Id.* (emphasis added).

89. *Id.* (arguing against "[c]onscription of the legal profession" by the SEC and that the lawyer–client relationship is not "well suited" for regulation by the SEC).

90. *Id.*

91. *Id.* at 923-24.

92. *Id.* at 924.

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conduct.[93]

Not stopping there, in 1983, a reinvigorated ABA House of Delegates adopted a new model ethics code, the Model Rules of Professional Conduct (Model Rules), which recodified the 1974 "never disclose client fraud" amendment to the Model Code.[94] It did, however, add a caveat in the official Comments—an "escape hatch" permitting withdrawing lawyers to give third parties notice of withdrawal or to disaffirm tainted opinions.[95] This escape hatch was adopted to enable lawyers to dissociate themselves from ongoing client frauds, where there is an inherent risk of lawyers being drawn into litigation for accessorial liability.[96] In essence, the ABA forbade lawyers from blowing the whistle but quietly gave them permission to wave the red flag.[97] Further, these same ABA delegates "who waxed eloquent about the need to protect client confidences, accepted, without any debate," a provision "allowing the lawyer to breach the confidence to collect his fee" even if no formal charges are filed.[98]

In the wake of this backlash, the SEC backed down again and let the proposed rule "die a quiet death."[99] It apologized that it had neither the "time [n]or expertise" to fashion guidelines for securities lawyers.[100]

93. *See id.* (noting that the SEC's interest in the conduct of corporate and securities lawyers is "adjectival" and that "its expertise is lacking"); *see* David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145, 1200 (1993) (identifying the tenet that state disciplinary agencies are the only competent agencies to regulate professional conduct and arguing that this tenet is premised on faulty, universalist "assumptions about the separation of 'ethics' from" all other "substantive" areas of law).

94. *See* Koniak, *The Bar's Struggle*, *supra* note 10, at 1263, 1255-56.

95. *Id.* at 1263-64; *see* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. (1983) ("Neither this rule [1.6] nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like."); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 366 (1992) (reaffirming noisy withdrawal where the lawyer's "services or work product are being used or are intended to be used by a client to perpetrate a fraud").

96. *See* Hazard, *supra* note 26, at 301-04; Rotunda, *supra* note 34, at 480-81. The risk that lawyers would be drawn into litigation for aiding and abetting an offense is especially acute where, for example, the lawyer's work product is used to perpetrate continuing frauds. *See* Rotunda, *supra* note 34, at 480-81.

97. *Id.* at 484.

98. *Id.* at 471-72. For criticism of this exception to the duty of confidentiality, see Hazard, *supra* note 26, at 288 (objecting not on grounds that the exception "illegitimately protects lawyers, but that it protects only lawyers" who, as a result, are given "preferred treatment among victims of the client's fraud" even though lawyers will typically "be in a superior position to prevent the wrong"); Michael Seigel, *Use of Privileged Information for Attorney Self-Interest: A Moral Dilemma*, 3 BUS. & PROF. ETHICS J. 1, 8-10 (1983) (noting that making exceptions for attorneys and not for others who are similarly situated violates Kant's categorical imperative). The ABA also permitted the lawyer to reveal client confidences to a court for the purpose of undoing a perjury. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (1983).

99. Koniak, *The Bar's Struggle*, *supra* note 10, at 1260.

100. *See* Edward F. Greene, Gen. Counsel, SEC, Lawyer Disciplinary Proceedings Before the Securities and Exchange Commission: Remarks to the New York County Lawyers' Association (Jan. 18, 1982), *in* [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,089, at 84,803.

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Chastened, the SEC basically stopped pursuing lawyers.[101]

To add insult to injury to the SEC's mission, in 1994 the U.S. Supreme Court issued a decision that surprised even securities law experts.[102] By a five-to-four vote, the Court held in *Central Bank of Denver v. First Interstate Bank of Denver* that a private plaintiff could no longer maintain an aiding and abetting lawsuit under Section 10(b) and Rule 10b-5, the principal antifraud provisions of the Securities Exchange Act of 1934.[103] In so ruling, the Court departed from decades of judicial and administrative precedent as well as the position of eleven courts of appeal.[104]

And while the SEC's authority to pursue aiders and abettors (including lawyers and accountants) was legislatively reaffirmed the following year,[105] Congress made it tougher for the SEC by raising the evidentiary standard. For forty years, *recklessness* had been sufficient to establish civil aiding-and-abetting liability.[106] But Congress changed that standard to the much more stringent requirement of *knowingly* providing substantial assistance.[107] As a result, the SEC would not even touch the issue of lawyer misconduct until the massive debacle known as Enron.[108]

C. Sarbanes-Oxley Act of 2002

From the 1970s and 1980s, we now move to the more recent past. In reaction to Enron, WorldCom, Tyco, and other major scandals that ushered in the new millennium, Congress enacted Sarbanes-Oxley. In addition to ending the self-regulation of the accounting profession and

101. *See* Disciplinary Proceedings Involving Professionals Appearing or Practicing Before the Commission, Exchange Act Release No. 25,893, 53 Fed. Reg. 26,427, at 26,431 n.31 (July 13, 1988) (noting that Rule 2(e) proceedings have been confined to disciplining attorneys who already have been the subject of other judicial or administrative proceedings involving violations of the securities laws); Robert W. Emerson, *Rule 2(e) Revisited: SEC Disciplining of Attorneys Since* In re Carter, 29 Am. Bus. L.J. 156, 213 (1991) (noting that almost all Rule 102(e) proceedings instituted against lawyers since *In re Carter* were brought against defendants already found by federal courts to have violated securities laws); Norman Johnson, Commissioner, SEC, Suits Against Lawyers, Speech Before the ABA Federal Securities Law Committee (Nov. 8, 1996) (transcript available at http:// www.sec.gov/news/speech/speecharchive/1996/spch137.txt.) (stating that "improper professional conduct" by an attorney was a matter for state professional bodies to regulate and not the SEC).

102. *See, e.g.*, Joel Seligman, *The Implications of Central Bank*, 49 Bus. Law. 1429, 1430 (1994) (noting that the outcome of the case was an "unexpected result").

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

104. *Id.* at 192, 201 (Stevens, J., dissenting).

105. Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78t(e) (2006).

106. Cramton et al., *supra* note 86, at 829 n.408.

107. *See* 15 U.S.C. 78 t(e) (2006) ("[A]ny person that knowingly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision . . . .").

108. *See, e.g.*, SEC, Study and Report on Violations by Securities Professionals (2003), *available at* http://www.sec.gov/news/studies/sox703report.pdf (reporting that between 1998 and 2001, only 49 lawyers out of 1,735 securities professionals were prosecuted by the SEC for both primary and secondary violations of the securities laws).

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authorizing rules to enhance the independence of securities analysts,[109] Sarbanes-Oxley finally targeted lawyers and their complicity in corporate frauds,[110] notwithstanding heated opposition from the ABA.[111]

Section 307 of Sarbanes-Oxley delegated sweeping authority to the SEC to promulgate "minimum standards of professional conduct" that would enable it to discipline lawyers "appearing and practicing before the Commission in any way in the representation of issuers."[112] Specifically, it ordered the SEC to implement a rule requiring lawyers who encounter "evidence of a material violation" of law to report such evidence up the corporate ladder to the full board or an appropriate committee thereof, if necessary, to ensure that "appropriate remedial measures or sanctions" are taken.[113]

Finally armed with explicit Congressional authorization, the SEC published proposed rules for public comment on November 21, 2002.[114] In addition to a fairly elaborate internal up-the-ladder reporting protocol designed to ensure that companies would appropriately address material violations, this proposal included the infamous mandatory "noisy with-

109. Sarbanes-Oxley empowered the Public Company Accounting Oversight Board "to oversee the audit of public companies . . . in order to protect the interests of investors." Sarbanes-Oxley Act of 2002 § 101(a), 15 U.S.C. § 7211(a) (2006). Sarbanes-Oxley also authorized the SEC to engage in rulemaking designed to "address conflicts of interest that can arise when securities analysts recommend equity securities . . . in order to improve the objectivity of research." *Id.* § 78o-6(a).

110. *See, e.g.*, Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 984-85 (2005) (describing inside lawyers' implication in corporate frauds); Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1320 (2006) ("Lawyers have been implicated in almost all of the major health, safety, and financial scandals of recent decades"). When Sarbanes-Oxley was being debated, law firms representing Enron were facing lawsuits from Enron shareholders, who alleged that the law firms were actively involved in transactions "designed to move debt off Enron's books, inflate its earnings, and falsify Enron's reported financial results." *See In re* Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549, 657 (S.D. Tex. 2002) (citing Consolidated Complaint for Violation of the Securities Law, Newby v. Enron Corp., No. H-01-3624, (S.D. Tex. Apr. 8, 2002), 2002 WL 32597632 (naming Vinson & Elkins and Kirkland & Ellis as defendants in the lawsuit)). Vinson & Elkins settled the case for $30 million. John C. Roper, *Vinson & Elkins Settles with Enron for $30 Million*, HOUSTON CHRON., June 2, 2006, at A1. For an assessment of lawyers' role in Enron's transactions, see generally Milton C. Regan, Jr., *Teaching Enron*, 74 FORDHAM L. REV. 1139 (2005).

111. *See* Koniak, *Corporate Fraud*, *supra* note 10, at 220-21 (describing the ABA's lobbying efforts to derail Sarbanes-Oxley section 307); Letter from Robert D. Evans, Dir., Governmental Affairs Office of the ABA, to Senator Paul S. Sarbanes (July 19, 2002), *available at* http://www.abanet.org/poladv/letters/107th/business071902.html (expressing opposition to the House bill that became Sarbanes-Oxley section 307).

112. 15 U.S.C. § 7245 (2006). As further defined by the regulations, lawyers deemed to be "appearing and practicing before the Commission" (and thus covered by Part 205) include all lawyers who communicate with the SEC, represent issuers in their dealings with the SEC, or advise on matters pertaining to securities laws. *See* 17 C.F.R. § 205.2(a)(1) (2009). Also, only attorneys for SEC-reporting companies are covered by the rule. *See id.* § 205.2(h).

113. 15 U.S.C. § 7245 (2006).

114. *See* SEC Initial Rule, *supra* note 59, at 71,670; *see* Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8185, Exchange Act Release No. 47,276, Investment Company Act Release No. 25,919, 68 Fed. Reg. 6296 (Feb. 6, 2003) [hereinafter SEC Final Rule].

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drawal" provisions as a backstop.[115] Noisy withdrawal would be triggered only if (a) the prescribed intra-corporate procedures proved futile[116] and (b) the lawyer "reasonably believe[d] that a material violation is ongoing or is about to occur and is likely to result in substantial injury to the financial interest or property of the issuer or of investors."[117] In those circumstances, the lawyer would be *required* to (i) promptly disaffirm to the SEC any submissions "tainted" by a possible violation, (ii) in the case of outside counsel, withdraw from representing the company, and (iii) notify the SEC of the fact of her withdrawal "based on professional considerations."[118]

Although this burden of reporting outside the corporation was mitigated by the rules in a number of significant ways,[119] the bar was nonetheless aghast. An overwhelming majority of comment letters strongly opposed the proposal.[120] The ABA warned that noisy withdrawal would "risk destroying the trust and confidence many issuers have up to now placed in their legal counsel, creating divided loyalties and driving a wedge into the attorney-client relationship."[121] Comments maintained that the SEC was forcing attorneys to function as "watchdog[s]"[122] and

115. *See* SEC Initial Rule, *supra* note 59, at 71,681-82 (internal reporting); *id.* at 71,673 (noisy withdrawal).

116. Specifically, noisy withdrawal obligations would only apply when the client's highest authority fails to respond appropriately or timely to the lawyer's up-the-ladder report of evidence of a material violation. *See id.* at 71,674.

117. *Id.* at 71,688. "Material violation" means a "material violation of the securities laws, a material breach of fiduciary duty, or a similar material violation." *Id.* at 71,679. The final rules made cosmetic modifications to this definition. *See* 17 C.F.R. § 205.2(i) (2009).

118. SEC Initial Rule, *supra* note 59, at 71,688.

119. First, noisy withdrawal would not be mandated if the material violation had already occurred and had no ongoing effect. *See id.* at 71,690; *id.* at 71,674 (clarifying that in the case of a past material violation that has no ongoing effect, the attorney is "*permitted*, *but not required*, to take these steps, so long as he or she *also* reasonably believes that the reported material violation is likely to have caused substantial injury to the financial interest of the issuer or of investors") (emphasis added)). Second, withdrawal would not be required for in-house counsel, who would still have to disaffirm the relevant documents. *Id.* at 71,688-89. Third, lawyers representing companies that had adopted a "qualified legal compliance committee" to handle these reports were exempted from mandatory noisy withdrawal, and these companies would be subject to an altogether different procedure. *Id.* at 71,687-88.

120. Indeed, I could not locate a comment letter from a major law firm that was supportive of mandatory noisy withdrawal. Comment letters supportive of the SEC's proposal were typically submitted by non-lawyers, including law professors, engineers, and—occasionally—solo practitioners. For description of my methodology, see *infra* note 146. *See also* Roberta S. Karmel, *Realizing the Dream of William O. Douglas—The Securities and Exchange Commission Takes Charge of Corporate Governance*, 30 DEL. J. CORP. L. 79, 120 (2005) (noting the "multitude of negative comments," which resulted in the SEC "cut[ting] back on its proposal and extend[ing] the comment period on the 'noisy withdrawal' provisions").

121. Letter from the ABA to Jonathan G. Katz, Sec'y, SEC (Dec. 18, 2002), *available at* http://www.sec.gov/rules/proposed/s74502/apcarlton1.htm [hereinafter Letter from the ABA].

122. Letter from the Ass'n of the Bar of the City of N.Y. to Jonathan G. Katz, Sec'y, SEC (Dec. 17, 2002), *available at* http://www.sec.gov/rules/proposed/s74502/elmilonas1.htm [hereinafter Letter from the Ass'n of the Bar of the City of N.Y. (2002)] ("[T]he proposed rules . . . assign a 'watchdog' function to attorneys . . . . [A]ttorneys are required to report

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that by "requiring attorneys to police and pass judgment on their clients,"[123] the SEC was transforming the lawyer from trusted counselor to policeman.[124] The bar claimed that the proposed rule was tantamount to compelling lawyers to reveal client confidences.[125] It had somehow forgotten that the ABA itself had created the very procedure of noisy withdrawal and—since at least 1983—strongly suggested that it would *not* constitute disclosure.[126] The SEC's original proposal was so broadly denounced by the bar that the SEC quickly backed down.

On January 29, 2003, the SEC published its final regulations under Part 205,[127] which omitted mandatory noisy withdrawal and replaced it with a less onerous, discretionary external reporting provision[128]—one that rep-

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the misconduct of others even where the attorney played no role in any of the actions that led to the violation.").

123. Letter from Sullivan & Cromwell to Jonathan G. Katz, Sec'y, SEC (Dec. 18, 2002), *available at* http://www.sec.gov/rules/proposed/s74502/sullivanc1.htm [hereinafter Letter from Sullivan & Cromwell].

124. Letter from the Am. Corp. Counsel Ass'n to Jonathan G. Katz, Sec'y, SEC (Dec. 18, 2002), *available at* http://www.sec.gov/rules/proposed/s74502/bnagler1.htm (noting that the proposed rules "take an unprecedented and unnecessary step toward changing the role of a corporate lawyer from one of a trusted legal counselor to one of a whistle-blowing policeman").

125. REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON CORPORATE RESPONSIBILITY 53 n.94 (2003), *reprinted in* 59 BUS. LAW. 145, 173 n.94 (2003) ("Providing notice to the SEC that the attorney has withdrawn 'for professional considerations' and disaffirming specific documents will have a similar effect as a violation of client confidences . . . ."); Letter from the Comm. on Prof'l Responsibility & Conduct, State Bar of Cal., to Jonathan G. Katz, Sec'y, SEC (Apr. 4, 2003), *available at* http://www.sec.gov/rules/proposed/s74502/copracsbc040403.htm ("The Commission rules requiring or permitting disclosure of corporate secrets outside the corporate structure, however, will necessarily subvert and turn on its head the relationship of trust between client and lawyer.").

126. The only plausible and internally consistent way of reading the text of Model Rule 1.6 and its comment (which allows for noisy withdrawal) is for noisy withdrawal to not constitute disclosure of confidential information. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 14 (2002) ("Neither this Rule [1.6] nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal . . . ."); *id*. R. 1.16 cmt. 3 ("The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient."); *id.* R. 1.16 cmt. 3; Hazard, *supra* note 26, at 301-04; Koniak, *The Bar's Struggle*, *supra* note 10, at 1270.

127. *See generally* 17 C.F.R. §§ 205.1-.7 (2009). These regulations became effective on August 5, 2003. Implementation of Standards of Professional Conduct, Securities Act Release No. 8185, Exchange Act Release No. 47, 276, Investment Company Act Release No. 25,919, 68 Fed. Reg. 6320 (Feb. 6, 2003).

128. Under the finally adopted permissive external reporting provision, the lawyer is now allowed to "reveal to the [SEC], without the issuer's consent, confidential information related to the representation" under certain circumstances. 17 C.F.R. § 205.3(d)(2) (2009). Those circumstances are:

> (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 [an SEC] investigation or administrative proceeding from committing perjury . . . or committing any act . . . that is likely to perpetrate a fraud upon the [SEC]; 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.

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licated the disciplinary rule already in effect in most state jurisdictions.[129] At the same time, the SEC issued an alternative second proposal covering only mandatory external reporting,[130] which fared no better than the original proposal.[131]

Since the conclusion of the notice-and-comment rulemaking, the SEC has exchanged fire with two state bar associations that had openly flouted the SEC's authority to adopt Part 205 (notwithstanding Sarbanes-Oxley section 307).[132] While all of this was happening, the ABA revised its Model Rules to expand the lawyer's discretion to disclose.[133] After the Part 205 regulations were enacted, the ABA published a carefully crafted statement asserting that "lawyers for the corporation . . . are not 'gatekeepers' of corporate responsibility in the same fashion as public ac-

Id. Alternative reporting procedures apply to companies which had adopted qualified legal compliance committees (QLCCs). *See id*. § 205.3(c); *see also id.* § 205.2(k) (defining QLCC).

129. Note, *Developments in the Law: Corporations and Society*, 117 HARV. L. REV. 2227, 2242 (2004). As of 2004, "[t]hirty-seven states [permitted] disclosure to prevent a crime, while an additional four require such disclosure." *Id.* That said, only a minority of jurisdictions "allow[ed] disclosure to mitigate the effects of a *past* crime or fraud committed using the lawyer's services." *Id.* at 2242-43 (emphasis added).

130. *See* Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8186, Exchange Act Release No. 48,282, Investment Company Act No. 25,920, 79 SEC Docket 1392 (Jan. 29, 2003). This alternative proposal, which was never adopted, basically shifted the onus of reporting the fact of the lawyer's mandatory withdrawal to the *company*, rather than the reporting lawyer. *See id.*

131. For much of the bar, the alternative proposal was just as bad as the original one because it had the same effect of eroding clients' willingness to confide in counsel. *See, e.g.*, Letter from 79 Law Firms to Jonathan G. Katz, Sec'y, SEC (Apr. 7, 2003), *available at* http://www.sec.gov/rules/proposed/s74502/79lawfirms1.htm [hereinafter Letter from 79 Law Firms] ("We believe that as a practical matter the chilling effect on the attorney–client relationship of a *required* notice of attorney withdrawal to the Commission will be equally adverse, *whether that notice is required to be given by the issuer or by the attorney*."); Letter from the N.Y. County Lawyers' Ass'n to Jonathan G. Katz, Sec'y, SEC (Apr. 1, 2003), *available at* http://www.sec.gov/rules/proposed/s74502/edrobertson1.htm [hereinafter Letter from the N.Y. County Lawyers' Ass'n] ("Whether the reporting obligation is placed on the lawyer or on the client is immaterial to the fact that it is *the reporting obligation itself* that threatens to erode the candor required for meaningful attorney–client communications to transpire."); Letter from Debevoise & Plimpton to Jonathan G. Katz, Sec'y, SEC (Mar. 31, 2003), *available at* http://www.sec.gov/rules/proposed/s74502/debevoise1.htm [hereinafter Letter from Debevoise & Plimpton] (noting that the proposed alternative approach creates the same fundamental problems as the original proposal by "causing issuers not to consult counsel").

132. *See* Cramton et. al, *supra* note 86, at 799-808 (describing the SEC's stand-off with the Washington and California state bar associations, which challenged portions of Part 205). For an analysis of the preemption issues, see, for example, *id.* at 788-98; Sara Levy, *The SEC, The States and Attorney Conduct Rules: An Analysis of Preemption Issues*, 32 HOFSTRA L. REV. 1681, 1702-15 (2004).

133. After vociferous debate in its House of Delegates, the ABA adopted revisions to two of its rules expanding the lawyer's discretion to report internally to higher authorities and externally under certain circumstances. Cramton et. al, *supra* note 86, at 731-33; Kim, *supra* note 110, at 1039-53; Note, *supra* note 129, at 2234-36. The amendment to Rule 1.6(b) (Confidentiality of Information) passed by a vote of 218 to 201, and the amendment to Rule 1.13 (organizational client) passed by a vote of 239 to 147. *2003 Annual Meeting*, DAILY J. (ABA House of Delegates, San Francisco, CA), Aug. 11-12, 2003, at 13, *available at* http://www.abanet.org/leardership/2003/2003journal.pdf.; *see* Cramton et al., *supra* note 86, at 732 n.33.

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counting firms."[134]

Since 2003, the SEC has ramped up its enforcement efforts against lawyers, although most (if not all) of its actions have been based not on Part 205, but on legal principles that pre-dated Sarbanes-Oxley.[135] In the meantime, the securities bar continues to denounce the SEC for pursuing lawyers who are merely "engaged in what lawyers do," as if to suggest that lawyers should be immune from liability so long as their complicity is via "legal services."[136] On the legislative front, on July 30, 2009, Senator Arlen Specter of Pennsylvania, spurred by the lingering anger over Wall Street, introduced a bill that would effectively reverse the U.S. Supreme Court's *Central Bank of Denver*[137] decision.[138] And in a brief filed on August 6, 2009, the SEC argued that law firms should be held primarily liable for knowingly providing false and misleading statements in company's public disclosures.[139] As of this writing, the SEC has not revisited the third rail that is mandatory noisy withdrawal.[140]

II. LAWYER EXCEPTIONALISM

Even this condensed history of the gatekeeping wars reveals the appeal to "lawyer exceptionalism." As noted by David Wilkins, "one of the legal profession's most important constitutive beliefs [is] that it is a single profession bound together by unique and specialized norms and practices

134. REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON CORPORATE RESPONSIBILITY, *supra* note 125, at 22.

135. Keith L. Kearney et al., *Lawyers as Gatekeepers in the Underwriting Process*, *in* HOW TO COMPLETE YOUR SECURITIES OFFERINGS ON A TIMELY BASIS 2008, at 337, 341, 350 (PLI Corp. Law & Practice, Course Handbook Ser. No. 13,988, 2008).

136. *See, e.g.*, David B. Bayless, *Recent SEC Enforcement Actions Against In-House Lawyers: Its Impact on Legal and Compliance*, *in* INTERNAL INVESTIGATIONS 2008: LEGAL, ETHICAL & STRATEGIC ISSUES 665, 670, 676 (PLI Corp. Law & Practice, Course Handbook Ser. No. 14541, 2008) ("[L]awyers, when engaged in what lawyers do, should not normally be the subject of enforcement actions . . . . Even assuming the SEC's allegations are true . . . , the type of conduct that those in-house lawyers engaged in is the type of conduct that lawyers typically undertake. . . . It is unusual, to say the least, for these types of actions to be the subject of an SEC enforcement action for securities fraud."). The implication that lawyers should be exempt from liability for providing legal assistance flies in the face of principles of tort, agency and criminal law, which do not excuse lawyers whose assistance furthers illegality. *See* Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669, 680 (1981).

137. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 191 (1994). *See supra* note 103 and accompanying text.

138. *See* Liability for Aiding & Abetting Securities Violations Act of 2009, S. 1551, 111th Congress (2009); Ameet Sachdev, *Senator, SEC Hope to Pierce Shield Protecting Lawyers*, CHICAGO TRIB., Aug. 11, 2009, at 17.

139. The SEC stated that a third party also may be primarily liable if the entity provides the false or misleading information that another person puts into a false statement. Brief for the SEC, *Amicus Curiae*, in Support of the Position of Plaintiffs-Appellants on the Issue Addressed and in Support of Neither Affirmance nor Reversal at 6, *Pac. Mgmt. Co. v. Mayer Brown LLP*, No. 09-1619-cv (2d Cir. Aug. 6, 2009).

140. An important outcome in this battle is that the SEC even declined to mandate that lawyers and their law firms *withdraw* from representation. Under classical gatekeeping theory, requiring gatekeepers to withdraw their cooperation from wrongdoers is considered the *least* burdensome of response duties that the law may prescribe. *See* Kraakman, *supra* note 5, at 54 n.3.

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distinct from the norms and practices of lay people."[141] More specifically, in my view, lawyer exceptionalism contains both descriptive and normative components. As a descriptive matter, lawyer exceptionalism claims that lawyers have a societal function that is unique and qualitatively different from that of other professionals, such as accountants, who have legal obligations to avert fraud.[142] As a normative matter, lawyers' function is so valiant, virtuous, and beneficial that lawyers should be free to perform it without constraints imposed by the state.[143] In sum, lawyer exceptionalism maintains that the special nature of lawyers' role merits special treatment—namely, that lawyers should be exempt from obligations imposed by authorities outside of the legal profession, including the SEC.[144]

Again, my goal here is not to appraise the merits of regulating securities lawyers. Instead, my project is more sharply delimited to analyzing the rhetoric of lawyer exceptionalism, how it functions, and why it seems

141. Wilkins, *supra* note 93, at 1148.

142. Assuming the role of the modern priesthood, the legal profession has long claimed its uniqueness. For recent examples, see, for example, Letter from the Ass'n of the Bar of the City of N.Y. to Jonathan G. Katz, Sec'y, SEC (Apr. 7, 2003), *available at* http://www.sec.gov/rules/proposed/s74502/abcny040703.htm [hereinafter Letter from the Ass'n of the Bar of the City of N.Y. (2003)] ("[I]t would be difficult for issuers to have confidence that their communications with their attorneys would remain *sacrosanct*." (emphasis added)); Letter from the Corps. Comm., Bus. Law Section, State Bar of Cal., to Giovanni P. Prezioso, Gen. Counsel, SEC (Aug. 13, 2003) (copy on file with author) [hereinafter Letter from the Corps. Comm., Bus. Law Section, State Bar of Cal.] ("[L]awyers . . . play a unique and often pivotal role under the Federal securities laws."); Letter from Erik N. Frias to Jonathan G. Katz, Sec'y, SEC (Apr. 7, 2003), *available at* http://www.sec.gov/rules/proposed/s74502/enfrias040703.htm (noting the "sacrosanct . . . confidences between an attorney and his client" in arguing against the SEC's proposed rules); Letter from the L.A. County Bar Ass'n to Jonathan G. Katz, Sec'y, SEC (Dec. 18, 2002), *available at* http://www.sec.gov/rules/proposed/s74502/maroni1.htm [hereinafter L.A. County Bar Ass'n] ("Lawyers have a special and unique role in our society . . . ."). These assertions of uniqueness are consistent with the rhetoric of the Model Rules of Professional Conduct. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT pmbl. (2002) ("The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is *unique* in this respect because of the close relationship between the profession and the processes of government and law enforcement." (emphasis added)).

143. Voices from the bar insist that lawyers should not be regulated or subject to discipline by the SEC. *See, e.g.*, Letter from the Ass'n of the Bar of the City of N.Y. (2003), *supra* note 142 ("The SEC, as a prosecutorial body, should not regulate the attorneys who are defending cases brought by the [SEC]."); Letter from the ABA, *supra* note 121 (arguing for "avoidance of the chilling effect on zealous representation that can arise from lawyers being subject to threat of enforcement by the very regulatory agency before which they must advocate on behalf of their clients"); Letter from 77 Law Firms to Jonathan G. Katz, Sec'y, SEC (Dec. 18, 2002), *available at* http://www.sec.gov/rules/proposed/s74502/77lawfirms1.htm [hereinafter Letter from 77 Law Firms] ("We are also concerned the explicit or implicit threat of enforcement of 'ethics' rules by the [SEC] staff could chill a lawyer's energetic representation of his or her client . . . ."). Against the background of lax enforcement from state bar disciplinary authorities, this effectively translates into an argument that securities lawyers should be left unregulated. *See supra* note 86 and accompanying text.

144. The assertion of lawyer exceptionalism to stave off external regulation should not be surprising in light of Rick Abel's observation that "all professions proclaim their distinctiveness and justify their privileges by insisting on their unique qualifications to regulate themselves." ABEL, *supra* note 15, at 8.

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persuasive enough to invariably resurface in the gatekeeping wars. To do so, in terms of method, I go beyond the classical rhetorical analysis found in argumentation textbooks. Since at least the 1980s, cognitive scientists have deepened rhetorical analysis by providing a rich framework for parsing persuasion.[145] Accordingly, I rely on insights from cognitive science that sharpen lay intuitions about how rhetoric works.

Further, in terms of object of study, I focus most closely on the official comments filed during the SEC's notice-and-comment rulemaking process in connection with the Part 205 regulations implemented under section 307 of Sarbanes-Oxley.[146] These filings represent the most recent and significant clash in the gatekeeping wars between the bar[147] and the SEC. Moreover, the rhetoric of these comments is consistent with (and thus representative of) the rhetoric of prior battles.[148] Until now, no legal scholar has systematically reviewed these comments.

A. Contrast Effect

As noted above, the descriptive prong of lawyer exceptionalism claims that lawyers have a societal function that is unique and qualitatively different from that of other professionals, such as accountants, who have legal obligations to avert fraud. The persuasiveness of this claim does not hinge so much on carefully reasoned and defended argument; instead, it taps into default, culturally supplied categorical thinking about lawyers. Let me motivate this approach with a vignette:

> A father and his son are out driving. They are involved in an accident. The father is killed, and the son is in critical condition. The

145. *See generally* George Lakoff, *The Contemporary Theory of Metaphor*, *in* Metaphor and Thought 202 (Andrew Ortony ed., 2d ed. 1993); George Lakoff, Women, Fire and Dangerous Things: What Categories Reveal about the Mind (1987); George Lakoff & Mark Johnson, Metaphors We Live By (1980).

146. On its website, the SEC listed 252 official comments to the Part 205 proposals. Due to errors on the website, only 243 of the comments were actually available for download. First, I personally reviewed all the major comment letters—those submitted by large clusters of law firms, bar associations, and individual law firms who are reputable in the field of securities practice in an effort to understand the types of arguments commonly asserted by the bar. Second, two student research assistants coded the comment letters for the specific types of arguments made (e.g., lawyer as "zealous advocate," SEC as "prosecutor," or contrasting lawyers with auditors). Finally, I downloaded the comments into a database, which allowed me to conduct targeted text search queries.

147. For simplicity, I will often refer to the view from "the bar" or "the legal profession" to represent what I have found to be the dominant voice that has emerged within the legal profession to fend off external regulation by the SEC. At the same time, I acknowledge that there is, of course, no monolithic view from the bar and that our legal profession is composed of heterogeneous communities of lawyers with competing normative visions. *See, e.g.*, Theodore Schneyer, *Professionalism as Politics: The Making of a Modern Legal Ethics Code*, *in* Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession 140 (Robert L. Nelson et al. eds., 1992) (noting the "heterogeneity of ethical views" within the legal profession); Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 Yale J. on Reg. 77, 96-109 (2006) (identifying the anti-tax shelter faction of the tax bar).

148. In addition, the exemplars of rhetoric are well-defined and finite. Also, the filing procedures, which demand both formality and consensus, weed out most idiosyncratic views and outliers.

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son is rushed to the hospital and prepared for the operation. The doctor comes in, sees the patient, and exclaims, "I can't operate, it's my son!"[149]

Who's the doctor?

When this question was posed in a 1972 study by Larry Gorkin, only eighteen percent of the subjects could answer it, even though virtually all of them self-identified with feminist values.[150] Most subjects were flummoxed and could not see that the doctor was the son's *mother*. Why did an overwhelming majority fail to provide the simplest explanation to this problem? The answer lies in the cognitive science of categorical thinking.

Since the 1970s, advances in the fields of cognitive psychology, cognitive linguistics, artificial intelligence, and anthropology have provided a compelling account of the internal structure of categories.[151] Whenever we think about categories, we actually tend to home in on a representative instance of the category. For most important categories, our minds have constructed a "prototype," or mental model of a category member with its attendant attributes, to stand in for the category.[152] These stable

149. Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1113-14 (2004); Steven J. Sherman & Larry Gorkin, *Attitude Bolstering When Behavior Is Inconsistent with Central Attitudes*, 16 J. EXPERIMENTAL SOC. PSYCHOL. 388, 391 (1980).

150. Sherman & Gorkin, *supra* note 149, at 391 (citing Larry Gorkin, The Sensuous Doctor: The Response to Sex-Role Logic Problems (1972) (unpublished manuscript, on file with the State University of New York at Stony Brook)).

151. *See infra* notes 152-55 and accompanying text.

152. In short, a prototype is the cognitively "best example" of a category. For many categories, the category's prototype will contain a set of attributes, abstracted from experience, that reflect the "central tendency" (e.g., the average, median, or modal values on various dimensions) of the category members. *See* Lawrence W. Barsalou, *Ideals, Central Tendency, and Frequency of Instantiation as Determinants of Graded Structures in Categories*, 11 J. EXPERIMENTAL PSYCHOL. 629, 630 (1985) (noting two possible interpretations of the "family resemblance" model and arguing that determining family resemblance through comparisons to central tendencies may be more plausible, given limited cognitive resources).

To be sure, prototype theory is not the only theory of categorical processing. As research in cognitive psychology progresses, new findings invariably foster the evolution of our models of categorization. For example, in some contexts we rely on exemplars—specific concrete instances of category members as distinguished from a unitary prototype abstracted from experience, as well as implicit or explicit theories about the causal relationship of an attribute to a category and the purpose of a category, to assist our everyday classification. ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE 37 (1999). The emerging consensus in cognitive psychology favors a mixed model of prototypes and exemplars—guided by theories—which are either activated, applied, or even suppressed depending on the context. *See* SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION: FROM BRAINS TO CULTURE 101 (2008) ("People rely on a mixture of representations . . . ."); KUNDA, *supra*, at 31-32 ("Most recent reviewers of the relevant research have come out in favor of a mixed model . . . ."); Gregory L. Murphy & Douglas L. Medin, *The Role of Theories in Conceptual Coherence*, 92 PSYCHOL. REV. 289, 300 (1985); *see also* FISKE & TAYLOR, *supra*, at 98, 101-02 (describing various conditions affecting "category activation"). In my judgment, because the social category of "lawyer" is a culturally familiar one for most people, prototypes, rather than exemplars, are likely to be activated. That said, whether we envision abstracted prototypes or concrete exemplars doesn't matter much for purposes of this Article. In addition, I am not arguing that the cognitive phenomena described in this Article are the exclusive cognitive phenomena taking place in the gatekeep-

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mental models are adaptive: they simplify and streamline our perception process[153] and define our expectations, which then enables us to act in a purposive manner.[154]

But they also sometimes disserve us, as in the case of the *female doctor* problem. When thinking through the category of doctors, the prototype of a *male doctor* was activated for many of us. Put another way, we tend to perceive the male doctor as the "best example" or most cognitively accessible instance of the category of doctors. Although we all intellectually understand that women can be doctors, the prototype of the male doctor was too powerful to override for many of us.

In my view, categorical thinking is at the heart of the bar's rhetoric of lawyer exceptionalism. After all, the descriptive claim that lawyers are unique is nothing more than a claim that the *category* of lawyers does not overlap with the *category* of gatekeepers. As I demonstrate below, the bar's rhetoric primes the litigator as the prototype for lawyers; conversely, the rhetoric primes the auditor as the prototype for gatekeepers. Because the litigator seems so disparate from the auditor, a *contrast effect*[155] is created, which makes us think that lawyers are unlike gatekeepers. The consequence is to bolster the bar's descriptive claim that lawyers are one-of-a-kind.

1. Lawyer as "Litigator"

When we think about the category of lawyer, which instance—or prototype—comes to mind? Is it a trust and estates lawyer, a tax lawyer, a patent lawyer, or perhaps a trial lawyer? Which prototype comes to mind depends, of course, on various factors.[156] What I seek to demonstrate here is that when we think of the category of lawyer, the litigator most likely comes to mind. This happens by default because the litigator is chronically accessible[157] in our culture. Additionally, in this regulatory context, the bar's rhetoric specifically primes[158] this figure.

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ing wars; rather, I am merely asserting that these cognitive phenomena are meaningful in the gatekeeping wars.

153. C. Neil Macrae & Gail V. Bodenhausen, *Social Cognition: Thinking Categorically About Others*, 51 ANN. REV. PSYCHOL. 93, 95-96 (2000).

154. *Id.* at 94.

155. For a definition of "contrast effect", see *infra* note 227 and accompanying text in Part II.A.3.

156. More precisely, the prototype activation is conditionally automatic. *See* Macrae & Bodenhausen, *supra* note 153, at 98-102. The relevant conditions include: the perceiver's attentional resources, temporary processing goals, chronic accessibility, category salience, and, for social categories, general attitudes toward members of the category in question. *See id.*

157. A concept that is "chronically accessible" is one that easily comes to mind at all times. *See* KUNDA, *supra* note 152, at 24. For example, "honesty" and "friendliness" are trait dimensions that are chronically accessible by Americans because they are culturally favored. FISKE & TAYLOR, *supra* note 152, at 30.

158. "[*P*]*riming* refers to any experiences or procedures that bring a particular concept (or any other knowledge[ ] structure) to mind." KUNDA, *supra* note 152, at 22.

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Prototypes are often constructed out of the most *typical*[159] members of the category. Although litigation itself is steadily diminishing in its significance, there's some reason to think there are more lawyers who regard themselves as litigators than not.[160] If so, the central tendency (or the average, median, or modal values on various dimensions) of category members may be the litigator.

Regardless of the actual numbers, the prototype of litigator is so frequently primed by our environment that it's chronically accessible. This is a feature of American history,[161] which provides iconic lawyers in the form of "great courtroom warriors," such as Daniel Webster,[162] John Adams,[163] Clarence Darrow,[164] Abraham Lincoln,[165] and Thurgood Marshall.[166] Modern popular legal culture[167] is obsessed with television shows featuring litigators in plotlines, like *L.A. Law*, *Law and Order*, *Ally McBeal*, and *The Practice*, and critically acclaimed films such as *Kramer vs. Kramer*,[168] *The Verdict*,[169] *Philadelphia*,[170] and *Erin Brockovich.*[171]

159. *See* Eleanor Rosch & Carolyn B. Mervis, *Family Resemblances: Studies in the Internal Structure of Categories*, 7 COGNITIVE PSYCHOL. 573, 602 (1975) ("The more prototypical a category member, the more attributes it has in common with other members of the category . . . .").

160. *See* JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 42 (2005). This recently published study of the Chicago bar does not categorize lawyers into litigators versus non-litigators but does differentiate practitioners by fields to which they have devoted at least five percent of their work. *Id.* Just counting those practitioners who report practicing "business litigation" and "general litigation" already gives us a figure of fifty percent of lawyers in the Chicago bar who may identify themselves as "litigators." *Id.*

161. Until the development of the major industrial economy in the late 19th century, lawyers were almost exclusively litigators or, more precisely, trial lawyers. Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1601 (1989).

162. *See* LAWRENCE M. FRIEDMAN, HISTORY OF AMERICAN LAW 303-33 (Simon & Schuster 1985) (1973).

163. *See* Anthony Chase, *Lawyers and Popular Culture: A Review of Mass Media Portrayals of American Attorneys*, 11 AM. B. FOUND. RES. J. 281, 282 (1986) (noting John Adam's defense of the British soldier who gave the order to fire that precipitated the Boston Massacre of 1770).

164. Clarence Darrow was the main defense attorney in the historic 1925 "Scopes Monkey Trial" in Dayton, Tennessee. *See* Douglas D. Linder, State v. John Scopes ("The Monkey Trial"), http://www.lawumkc.edu/faculty/projects/ftrials/scopes/evolut/htm (last visited Feb. 17, 2010). The film *Inherit the Wind* (1960) is a fictionalized account of the trial. *See* PAUL BERGMAN & MICHAEL ASIMOW, REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES 74-79 (2006).

165. Mark E. Steiner, *A Docket That Reflects Then and Now*, A.B.A. J., Feb. 2009, at 39.

166. David B. Wilkins, *From "Separate is Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1548-51 (2003).

167. Friedman, *supra* note 161, at 1580 (positing two definitions of "popular legal culture," the second of which includes "books, songs, movies, plays and TV shows which are about law or lawyers, and which are aimed at a general audience").

168. KRAMER VS. KRAMER (Columbia Pictures 1979).

169. THE VERDICT (20th Century Fox 1982).

170. PHILADELPHIA (TriStar Pictures 1993).

171. ERIN BROCKOVICH (Universal Studios, Columbia Pictures 2000).

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For these reasons, the litigator prototype is by default what's in the air.[172]

This default prototype should not be different for experts. From the first day of law school, the expert-in-training is encouraged to adopt the litigator's partisan perspective.[173] Professional conduct codes—written by experts for experts—give prominence to the role of the litigator.[174] Legal ethics scholars, such as Daniel Markovits, Monroe Freeman, and

172. *See also* Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 7 (noting that, after consuming popular culture, which depicts the trial as a "central pivot of the American legal process," visitors from Mars might be "incredulous" if told that "the trial is rapidly disappearing from the American legal scene"); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1255 (2005) (observing that the "image of law in public consciousness is centered on the trial," even though there is abundant evidence that the number of trials is shrinking).

173. As Gary Blasi notes, our legal education system is predicated on "unstated and generally unexamined assumptions" about lawyering, including the notion that "a lawyer is a litigator, very likely a trial lawyer, knowledgeable about both legal doctrine and procedure, and able to put that knowledge to use on behalf of an individual client, generally in a fairly simple dispute with another party." Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 324-25 (1995). The dominant law school pedagogy is the case method and not the deal or even problem method. A plethora of courses are devoted to procedural law or skills more relevant to litigators (civil procedure, evidence, federal courts, conflicts of laws, legal writing, trial advocacy) rather than transactional lawyers. *See* Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 93-94 (1994) (noting law schools' focus on the adversary system and the justiciable "case," a "controversy marked by zealous arguments"). Law students generally tote around *case*books filled with judicial opinions—not *deal*books filled with term-sheets, contracts, or prospectuses. At most law schools, first year law students are required to participate in mock appellate argumentation. Later on, students spar in national moot court competitions. Even beyond law school, litigation remains highly salient. All law school graduates take the multi-state bar examination, which tests six subjects, only two of which would be associated with the typical knowledge base of non-litigating lawyers. *See* National Conference of Bar Examiners: The Multi-State Bar Examination, http://www.ncbex.org/multistate-tests/mbe/ (last visited Feb. 17, 2010) (2006) (stating that the Multi-State Bar Examination tests contracts, real property, torts, constitutional law, criminal law, and evidence). Once admitted to the state's bar, a certificate issued by the state's highest *court* is promptly delivered to the newly minted lawyer, even though—during that lawyer's entire career—she may never have any contact with any court (except for jury duty).

174. *See, e.g.*, Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1454 n.527 (2004) ("All nine rules in Section 3 [Model Rules 3.1 through 3.9] of the Model Rules ('Advocate') are devoted to litigation issues."); Robert W. Gordon, *Corporate Law Practice As A Public Calling*, 49 MD. L. REV. 255, 278 (1990) ("[T]he ABA's [Model Rules] were drafted (largely upon the insistence of the trial bar) to give primacy to the advocate's role . . . ."); James W. Jones, *Future Structure and Regulation of Law Practice: An Iconoclast's Perspective*, 44 ARIZ. L. REV. 537, 541 (2002) ("[W]e have effectively adopted the English barrister as the paradigmatic model for the regulation of law practice in this country"); Re, *supra* note 173, at 115 ("Codes of professional ethics and responsibility have traditionally been designed primarily for litigators."); Milton Regan, Jr., *Professional Responsibility and the Corporate Lawyer*, 13 GEO. J. LEGAL ETHICS 197, 200 (2000) (noting that ethical rules "have been formulated primarily with the litigator in mind"); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 672 (1978) ("Although the [Model Code] recognizes to a larger extent than did the [Canons], which preceded it, that all lawyers are not constantly litigating, the advocate's role is still clearly the axis of the Code." (internal citations omitted)); Wilkins, *supra* note 93, at 1152 (noting that virtually all of the principles contained in the 1908 Canons of Ethics "convey[ed] the impression that most lawyers spent most of their time in court, or, alternatively, that the ethics of litigation were equally applicable to other areas of legal practice" and that the 1969 Model Code made "few distinctions between different legal tasks, such as litigation and counseling"). The emphasis on the litiga-

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Lawrence Fox, model lawyers' norms based on the ethic of adversary advocacy to the virtual exclusion of all other roles.[175] Even Supreme Court Justices privilege the litigator's advocacy function when referring to the role of lawyers generally.[176]

This default representation is further primed by the specific language used in the bar's official comments to the SEC's Part 205 proposals. The comments repeatedly use the terms "advocate" or "zealous advocate" to refer to lawyers generally and "advocacy" or "zealous advocacy" as representing the core function or attribute of lawyers.[177] For example, ac-

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tor's role is disproportionate to the significance of litigation in modern practice. *See supra* note 172.

175. *See* DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 3-4, 13-17 (2008) (noting that the ethic of adversary advocacy requires that "lawyers must lie" and "lawyers must cheat"). *See generally id.* at 25-99 (Part I: Adversary Advocacy). For a critique of Markovits's modeling, see Ted Schneyer, *The Promise and Problematics of Legal Ethics from the Lawyer's Point of View*, 16 YALE J. L. & HUMAN. 45, 58-60 (2004) (criticizing Markovits for both overstating the adversary obligations of litigators and treating litigators as representative of the legal profession generally). For a reply, see Daniel Markovits, *Further Thoughts About Legal Ethics From The Lawyer's Point of View*, 16 YALE J.L. & HUMAN. 85, 101-111 (2004); and see also MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 13-43 (3d ed. 2004); Freedman, *supra* note 50, at 288 (decrying the SEC's actions and stating that "every lawyer is an advocate, irrespective of whether he or she ever enters as courtroom"); and Lawrence J. Fox et. al, *Historical Preface*, 67 FORDHAM L. REV. 691, 693 (1998) (noting that lawyers "are zealous advocates first and foremost"). None of this is to deny that advocacy is a component of the lawyers' role.

176. In the 1984 case of *United States v. Arthur Young*, the U.S. Supreme Court rejected the argument asserted by the accounting firm, Arthur Young, that an auditor's workpapers should be protected from a summons by the Internal Revenue Service on the basis of an accountant's qualified work-product immunity. 465 U.S. 807, 817-18 (1984). The Supreme Court noted that:

> The *Hickman* work-product doctrine was founded upon the private attorney's role as the client's confidential advisor and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. An independent certified public accountant performs a different role. By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client . . . . This "public watchdog" function demands that the accountant maintain total independence from the client . . . .

Id.

By expressly referring to the lawyer as the "client's . . . advocate" and describing the lawyer's job as "present[ing] the client's case in the most favorable possible light," the Supreme Court clearly privileges the *advocacy* function of litigators. *See id.* at 817. Also, by describing the accountant's role in "certifying the public reports," the Court privileges the auditor's functions of disinterested evaluation and certification. *See id.* at 817-18. Thus, on the issue of whether concerns about client candor should trump disclosure obligations, the Court's disparate treatment of lawyers and accountants is ultimately grounded in the prototypes of the *litigator engaged in advocacy* and the *auditor engaged in disinterested evaluation and certification*.

177. Of the 243 comments made publicly available electronically, only 123 were submitted by lawyers writing in their capacity as lawyers. Since I relied on the comments to ascertain the view of the bar, I generally excluded comments filed by clients (corporations), even though they may have been authored by in-house counsel, because they also reflected the perspective of a purchaser of legal services (in addition to the perspective of a provider of legal services). Of these 123 comments, 43% featured the text string "advocate" or its variants (searched via using the root "advoc"), and 24% featured the term "zealous." *See* SEC, Comments on Proposed Rule: Implementation of Standards of Pro-

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cording to the law firm of Sullivan & Cromwell:

> An attorney's principal obligation, both to the client and to the public interest, is to be a *zealous advocate* for his or her client within the bounds of the law. Issuers are likely to have concerns about the ability of counsel to *advocate* their interests before the [Securities & Exchange] Commission *zealously* and within the bounds of the law when counsel himself or herself could become a target, or threatened target, of the Commission.[178]

The law firm Jones Day states unequivocally, "Attorneys are advocates."[179] The Association of the Bar of the City of New York, whose members practice in the largest securities law firms, writes that "[t]he attorney's role is to serve as the issuer's advocate"[180] and that they have a "mandate . . . [to] zealously represent their clients."[181] The comment letter from a group of 77 Law Firms, including such elite securities firms as Cravath, Swaine & Moore; Sullivan & Cromwell; and Wachtell, Lipton, Rosen & Katz, contains an entire section entitled "The Effect on Advocacy."[182] The American Bar Association worries that "exposure to third party liability could have a chilling effect on a lawyer's ability to act solely in the interest of and zealously advocate for a client."[183]

Once a concept, such as "advocate," is activated by semantic stimuli, the associated cognitive concepts residing in our long-term memory are rendered more accessible[184] through a process called "spreading activation."[185] For example, when I say "hospital," you should be able to more quickly recall "nurse," "drugs," and "illness."[186] Which conceptual nodes are connected to "advocate" and "advocacy"? Although no experiments are directly on point, everyday linguistic practices provide some clues.

Consider, first, a dictionary definition of an advocate: "1: one that *pleads* the cause of another; specif: one that pleads the cause of another before a *tribunal* or *judicial court* <the [advocate] for the *defense*>."[187]

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fessional Conduct for Attorneys, http://www.sec.gov/rules/proposed/s74502.shtml (last visited Feb. 17, 2010). To be sure, a few law firms displayed a more nuanced view of the role of lawyers. *See, e.g.*, Letter from Clifford Chance to Jonathan G. Katz, Sec'y, SEC (Dec. 18, 2002), *available at* http://www.sec.gov/rules/proposed/s74502/clifford2.htm ("A corporate or securities lawyer is primarily an *advisor to* a company. A lawyer who represents a company in connection with an investigation or litigation is an *advocate for* the company."). That said, virtually all law firms opposed anything resembling noisy withdrawal.

178. Letter from Sullivan & Cromwell, *supra* note 123 (emphasis added).

179. Letter from Jones Day to Jonathan G. Katz, Sec'y, SEC (Apr. 7, 2003), *available at* http://sec.gov/rules/proposed/s74502/jonesday040703b.htm [hereinafter Letter from Jones Day].

180. Letter from the Ass'n of the Bar of the City of N.Y. (2003), *supra* note 142.

181. Letter from the Ass'n of the Bar of the City of N.Y. (2002), *supra* note 122.

182. Letter from 77 Law Firms, *supra* note 143.

183. Letter from the ABA, *supra* note 121.

184. Macrae & Bodenhausen, *supra* note 153, at 96.

185. *See* Galen V. Bodenhausen & C. Neil Macrae, *Stereotype Activation and Inhibition*, 11 ADVANCES IN SOCIAL COGNITION 1, 14-17 (1998); Macrae & Bodenhausen, *supra* note 153, at 96, 115.

186. Macrae & Bodenhausen, *supra* note 153, at 96.

187. WEBSTER'S NEW COLLEGIATE DICTIONARY 18 (10th ed. 1996) (emphasis added).

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The concepts of "plead[ing]," "tribunal," "court," and "defense" are tightly connected with litigation and the litigator. In sharp contrast, non-litigating lawyers, such as business lawyers, do not generally handle justiciable controversies and have little contact with "judges" or "courts."[188] Indeed, business lawyers' disconnection from the paradigm of adjudicative proceedings may explain why lawyers, legal scholars, and lay folk alike have trouble articulating what it is that business lawyers actually do.[189]

188. *See, e.g.*, John Flood, *Doing Business: The Management of Uncertainty in Lawyers' Work*, 25 LAW & SOC'Y REV. 41, 67 (1991) (noting that advocacy consumes little of the business lawyer's time and that "corporate lawyers hardly ever enter a courtroom").

189. *See, e.g.*, Gary A. Munneke, *Lawyers, Accountants, and the Battle to Own Professional Services*, 20 PACE L. REV. 73, 75-76 (1999); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 45-46 (1981) (noting bar associations' difficulty in defining the "practice of law" outside of litigation practice in a way that distinguishes the work of lawyers from other professionals and noting that some jurisdictions simply note that the practice of law is "what lawyers do").

Legal scholars have proffered many complex and diverse explanations about what business lawyers actually do, almost none of which highlight the role of "advocacy." *See, e.g.*, LOUIS M. BROWN, PREVENTIVE LAW (1950); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.2.3, at 690-91 (practitioner's ed. 1986) (discussing preventive law); Louis M. Brown, *The Law Office—A Preventive Law Laboratory*, 104 U. PA. L. REV. 940, 940 (1956) (noting that business lawyers practice preventive law); Yves Dezalay, *The Big Bang and the Law: The Internationalization and Restructuration of the Legal Field*, 1 THEORY, CULTURE & SOC'Y 279, 279-93 (1990); Flood, *supra* note 188, at 42 (noting that business lawyers are engaged in "managing uncertainty for both their clients and themselves"); Ronald J. Gilson, *Value Creation By Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 255 (1984) (noting that business lawyers engineer transaction costs); Michael J. Powell, *Professional Innovation: Corporate Lawyers and Private Lawmaking*, 18 LAW & SOC. INQUIRY 423, 423 (1993) (describing business lawyers as "legal entrepreneurs"); Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 LAW & SOC. INQUIRY 679, 683 (1996) (describing business lawyers' role in suppressing business disputes as business facilitators).

To be clear, I am not as interested in this Part in what business lawyers actually do as much as our *understanding* of what business lawyers do. Stated another way, I am not contesting the proposition that business lawyers occasionally engage in conduct that bears some resemblance to the advocacy of litigators (although legal scholarship's overwhelming emphasis on the non-advocacy aspects of the business lawyer's role suggests that advocacy is not a prominent facet). I easily concede that when business lawyers negotiate opposite sides of a transaction, such as a buy–sell agreement, they often stake out adversarial positions on their clients' behalf. Nonetheless, there are good reasons why we linguistically refer to such conduct as "negotiations," rather than "advocacy." First, ordinary agents—such as real estate agents—also engage in negotiations, and yet we don't normally refer to realtors' work as "advocacy." Thus, "advocacy" is insufficiently descriptive. Second, there are fundamental differences between litigators' advocacy and the purported "advocacy" of business lawyers. For example, in pre-contractual deal negotiations, most of the conflicts negotiated by business lawyers are not justiciable. If buyer and seller cannot reach an agreement on price, which seller's representations or warranties are to be included in the agreement, the form of consideration, or which closing documents are to be delivered, that is usually the end of the matter: if they fail to agree, their non-agreement is usually non-litigable. In other words, the deal just "dies." *See* Schwartz, *supra* note 174, at 676. Third, even where the conduct of business lawyers and litigators most overlap (for example, business lawyers' deal negotiations and litigators' settlement negotiations), there are still fundamental differences. *See* Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 637 (1976) (distinguishing between negotiations to settle disputes that "have arisen out of past actions" and negotiations that establish "rules to govern future conduct"). Further, I am also not contesting the

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Consider, next, the linguistic practice of self-description. The ABA Section of Litigation unequivocally describes its mission as "dedicated to helping litigators become more effective *advocates* for their clients."[190] In sharp contrast, business lawyers typically refer to themselves as "advisors" or "counselors."[191] Indeed, the self-described mission of the ABA Section of Business Law is to "serve the public, the profession and the Section."[192] Notice that the terms "advocate" or "advocacy" appear nowhere in the Business Law Section's mission statement.

Finally, it's fascinating how the comments often activate a particular subset of litigator—the criminal defense lawyer. For instance, the Association of the Bar of the City of New York writes:

> [T]he proposed noisy withdrawal and related requirements place the SEC, which is a *prosecutorial agency*, in the extraordinary and anomalous position of regulating the counsel of its adversaries. . . . "The SEC is frequently and quite properly the *adversary* of *private citizens*. In those circumstances, *private citizens* turn to lawyers to represent them and advocate their case to the SEC, before the SEC and, if necessary, against the SEC in *court proceedings*."[193]

Although the SEC performs many functions, including rulemaking, market oversight, adjudication, and enforcement, and does refer criminal cases to the U.S. Department of Justice for prosecution, the above quota-

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proposition that business lawyers practice "in the shadow of law," or act with the purpose of minimizing adverse legal outcomes in potential litigation. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968-69 (1979). But, again, real estate agents also practice in the shadow of the law, and yet, we rarely refer to their work as "advocacy." (Indeed, every person potentially acts in the shadow of the law in the sense that he or she acts with the intention to avoid legal liability, some persons being more informed or adept than others.) My main point here is that, given preconceived notions about advocacy and our nebulous understandings about what business lawyers actually do, when the bar says "advocate" to denote "lawyer," it is the litigator, rather than the business lawyer, who comes to mind. Also, based on my ten years of practice experience as a business lawyer, I cannot recall a single moment when a transactional colleague or I described ourselves as advocates. For the most part, transactional lawyers tend to classify one another as either deal-makers or deal-breakers. *See infra* notes 213, 308.

190. *See* ABA, Section of Litigation, http://www.abanet.org/litigation/about/ (last visited on Jan. 30, 2010) (emphasis added).

191. COFFEE, *supra* note 5, at 193 (noting that corporate lawyers do not view themselves as "embattled advocates" but as "wise counselors"). More entrepreneurial business lawyers may eschew professional monikers in favor of characterizing their work as that of "business service providers who sell specialized legal–financial services to customers." Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1203 (2009).

192. The ABA Section of Business Law states:

> The Mission of the Section is to serve the public, the profession and the Section by furthering the development and improvement of business law, educating Section members in business law and related professional responsibilities, and helping Section members to serve their clients competently, efficiently and professionally.

ABA, Business Law Section, http://www.abanet.org/buslaw/home.shtml (last visited on Feb. 17, 2010).

193. Letter from the Ass'n of the Bar of the City of N.Y. (2003), *supra* note 142 (quoting Richard Hall, *Why the SEC is Unfit to Regulate Lawyers*, INT'L FIN. L. REV., Dec. 2002, at 16, 16 (emphasis added)).

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tion selectively emphasizes the SEC's role as a "prosecutorial agency"[194] and "adversary of private citizens." Accordingly, the lawyer's role is carefully framed as safeguarding private interests: "[P]rivate citizens turn to lawyers to represent them and advocate their case to the SEC . . . in court proceedings."[195] These framings activate the criminal defense context rhetorically, even though the SEC's Part 205 regulations specifically exempt criminal defense representation.[196]

If the litigator is chronically accessible (as I have argued), then the subtype of the criminal defense lawyer is particularly salient and accessible in our culture.[197] Television and film often invoke the "archetypal positive image" of the criminal defense lawyer: "a protector who stands with his or her client against all the world no matter what the odds."[198] Obvious examples come to mind: Perry Mason,[199] Atticus Finch in *To Kill A Mockingbird*,[200] Daniel Kaffee in *A Few Good Men*,[201] or Jake Brigance in *A Time to Kill.*[202]

While categories are often represented by typical instances, categories may also be represented by an *ideal* instance—especially if the category itself is perceived as being imbued with an intrinsic purpose.[203] In our society, a widely shared view of the purpose of lawyers is to defend their clients against adversaries and, in particular, the state. And what instance of lawyer most completely and vividly fulfills that purpose? The criminal defense lawyer. As such, the criminal defense lawyer, a subset of litigators, may in fact be the cognitively "best example" of lawyer.

194. Of the 123 comments submitted by lawyers, *see supra* note 177, 24% featured the text string "prosecute" or its variants (searched via using the root "prosecut.").

195. Letter from the Ass'n of the Bar of the City of N.Y.(2003), *supra* note 142.

196. *See infra* note 294 and accompanying text.

197. Friedman, *supra* note 161, at 1599 (noting that the criminal defense lawyer receives "good press" while others are "dismissed as mountebanks").

198. Chase, *supra* note 163, at 282.

199. As noted by Lawrence Friedman, in Perry Mason, "almost every episode featured a criminal trial." Friedman, *supra* note 161, at 1600 n.39. See Chase, *supra* note 163, at 282, for a survey of portrayals of American attorneys in mass media.

200. To Kill a Mockingbird (Universal International 1962); *see* Bergman & Asimow, *supra* note 164, at 17-20.

201. A Few Good Men (Columbia Pictures 1992); *see* Chase, *supra* note 163, at 286-90.

202. A Time to Kill (Warner Bros. 1996); *see* Bergman & Asimow, *supra* note 164, at 250-53. To be sure, since the 1970s, there has been a rising tide of negative media depictions which, no doubt, reflect growing popular animus against lawyers, including criminal defense lawyers. *See* Michael Asimow, *Bad Lawyers in the Movies*, 24 Nova L. Rev. 533, 536 (2000). But even in those accounts, many of the crooked lawyers happen to be litigators. For example, *Liar, Liar* (Universal Pictures 1997) and *The Devil's Advocate* (Kopelson Entertainment 1997) depict morally bankrupt litigators. Of course, *The Firm* (Paramount Pictures 1993) is one famous counter-example of morally bankrupt tax lawyers. *Id.* at 534-35.

203. *See, e.g.*, Lakoff, *supra* note 145, at 87-88 (noting the relevance of ideals in culturally significant categories and paragons); Barsalou, *supra* note 152; Russell C. Burnett et al., *Ideal Is Typical*, 59 Canadian J. Experimental Psychol. 3 (2005); William F. Chaplin et al., *Conceptions of States and Traits: Dimensional Attributes with Ideals As Prototypes*, 54 J. Personality & Soc. Psychol. 541, 553 (1988); Elizabeth B. Lynch et al., *Tall Is Typical: Central Tendency, Ideal Dimensions, and Graded Category Structure Among Tree Experts and Novices*, 28 Memory & Cognition 41 (2000).

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The activation of the criminal defense lawyer and its associated network of concepts is evidenced in the bar's frequent assertions of the right to "effective" or "independent" counsel.[204] Here, of course, "independence" means independence from the state. The ABA writes:

> A core principle of our democratic values is the right of everyone, including organizations, to *representation by independent counsel* of their choice to advise and protect *against adversarial* actions, especially those of *governmental agencies*. To ensure that *independence*, lawyers need to be able to act in the best interests of the client without self interest or concern over the lawyer's personal exposure to civil liability.[205]

In a similar vein, the State Bar of California makes more explicit references to the right to criminal defense representation under the Sixth Amendment:[206]

> The importance of the *assistance of counsel* is grounded on common law principles and reflected in the *Sixth Amendment* to the U.S. Constitution (as to *criminal trials*). . . . When an agency with *enforcement* authority, such as the SEC, promulgates rules that weaken the confidential and fiduciary relationship between counsel and client, the agency *necessarily interferes with the attorney–client relationship* and the client's *right to effective assistance of counsel*.[207]

Both implicit and explicit references to the Sixth Amendment right to counsel for criminal trials[208] are striking in light of the fact that the Sixth Amendment only attaches to criminal prosecutions,[209] which are ex-

204. *See, e.g.*, Letter from 77 Law Firms, *supra* note 143, at 6 ("[T]he explicit or implicit threat of enforcement of 'ethics' rules by the [SEC] staff could . . . endanger[ ] the right to effective counsel."); Letter from the N.C. Bar Ass'n to Jonathan G. Katz, Sec'y, SEC (Jan. 21, 2003), *available at* http://sec.gov/rules/proposed/s74502/jnpruden1.htm [hereinafter Letter from the N.C. Bar Ass'n] ("Every issuer is entitled to representation by counsel that will act in its best interests.").

205. Letter from the ABA, *supra* note 121 (emphasis added).

206. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

207. Letter from the Corps. Comm., Bus. Law Section, State Bar of Cal., *supra* note 142 (emphasis added). This quotation comes from a letter submitted by the State Bar of California after Part 205 was enacted. *See id.* The letter protested the permissive noisy withdrawal provision and questioned the SEC's very authority to enact Part 205. *See id.*

208. *See, e.g.*, Letter from the Corp., Fin., & Sec. Law Section of the D.C. Bar to Jonathan G. Katz, Sec'y, SEC (Apr. 7, 2003), *available at* http://sec.gov/rules/proposed/s74502/dcbar1.htm [hereinafter Letter from the Corp., Fin., & Sec. Law Section of the D.C. Bar] ("[T]he SEC rules would deny clients the right to counsel in criminal matters, a right recognized by the Sixth Amendment and repeatedly affirmed by the courts."); Letter from Foley & Lardner to Jonathan G. Katz, Sec'y, SEC (Mar. 20, 2003), *available at* http://sec.gov/rules/proposed/s74502/kbwiner1.htm (suggesting that the rule "den[ies] clients of their right to effective assistance of counsel . . . [and] would raise serious constitutional questions"); Letter from the N.C. Bar Ass'n, *supra* note 204 ("Criminal lawyers are not required to withdraw from representation of a client that has indicated it has committed an offense.").

209. *See* Rothgery v. Gillespie County, Tex., 128 S. Ct. 2578, 2594 (2008) (Roberts, J., concurring) (clarifying that the Sixth Amendment right to counsel exists to protect the accused in his defense at trial and "not defense in relation to other objectives that may be

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pressly exempted from the Part 205 reporting obligations.[210] But, more important to my argument, these Sixth Amendment references suggest that the type of lawyer the comments have in mind is the criminal defense attorney—a type of litigator.[211]

At this point, knowledgeable readers are likely to object, "Wait! Lawyers aren't only zealous advocates. They're also officers of the court. And they certainly do much more than litigate or defend. You're just painting a caricature!" I couldn't agree more. I know it's a caricature, but it's not one that I am making up: it's a caricature already in our heads. My point here is that the bar's rhetoric takes full advantage of that fact.

I am not here interested so much in what lawyers actually do as much as our conventional *understanding* of what lawyers do.[212] In this Part, my goal is merely to establish the operation of a specific cognitive phenomenon: the implicit, automatic activation of concepts that start from the trait of "zealous advocate" and end up at the prototype of the "litigator." The fact that this may be imprecise or overstated on the merits says nothing about whether our implicit cognitions nevertheless occur in this manner. It's no different from pointing out that people hold stereotypes even though they're not well founded.[213]

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important to the accused" and citing precedent); Strickland v. Washington, 466 U.S. 668, 689 (1984) (noting that the purpose of the Sixth Amendment's guarantee of effective assistance of counsel "is simply to ensure that criminal defendants receive a fair trial"). Moreover, the Sixth Amendment is temporally constrained. In an eight-to-one decision, the Supreme Court held that a "criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." *Rothgery*, 128 S. Ct. at 2592 (majority opinion).

210. *See infra* note 294 and accompanying text.

211. This is not the place to challenge the uncritical transposition of criminal defense representation (comprising an estimated three percent of legal practice) to all contexts in which lawyers practice, as others have supplied critiques. *See* HEINZ ET AL., *supra* note 160, at 42 tbl.2.1 (reporting that 3% of total legal effort is devoted to criminal defense and that 41 out of 675 lawyers surveyed (or 6% of those lawyers) devote at least 5% of their work to criminal defense). For critiques, see, for example, Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1204-07 (2003); Rhode, *supra* note 86, at 606 (criticizing the bar's individualist claims, which are "heavily parasitic on the criminal defense role"); Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 544 (arguing that the criminal trial cannot serve as the model of the adversary system or of the behavior of advocates in the civil trial).

212. *See supra* note 189.

213. To be clear, I am not arguing that only litigators who are involved in formal adjudicative proceedings are engaged in advocacy. After all, when lawyers publicly answer media charges or engage in political lobbying efforts on behalf of their clients, they appear to be engaged in a form of advocacy outside the traditional adjudicatory context. *See* Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys*, 22 GEO. J. LEGAL ETHICS 1259, 1310 (2009). I am also not arguing that only *lawyers* engage in advocacy. We all know that political lobbying is a form of advocacy that is often practiced by non-lawyers. *See* Michael L. Stern, *Ethical Obligations of Congressional Lawyers*, 63 N.Y.U. ANN. SURV. AM. L. 191, 205-06 (2007). Indeed, there are aspects of the business lawyer's practice that resemble the advocacy of litigators. *See supra* note 189. My only point here is that, for various reasons, we tend to cognitively associate the term "advocacy" or "zealous advocacy" with litigators (and not business lawyers), which in turn renders the bar's claims persuasive to many listeners. But it is also my view that when the bar stretches the definition of "zealous advocacy" to en-

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In sum, by hammering on the notion of "zealous advocate," the bar activates the prototype of "litigator" (even "criminal defense lawyer"). This in turn triggers a cascade of associated concepts. At the same time, alternative conceptual networks are actively suppressed through "spreading inhibition."[214] In the end, when we think of the category of lawyer, we privilege the instance of litigator and the attendant attribute of zealous advocacy. In tabular form, the cognition of lawyer as litigator can thus be summarized:

Category	Lawyer
Prototype	Litigator
Attribute	Zealous advocacy (especially against the state)

2. *Gatekeeper as "Auditor"*

Now consider the category of gatekeepers. It's safe to say that popular culture does not provide any strong default prototype since the category is unfamiliar to most people. But what about the bar's rhetoric? What prototype does it prime? Although various instances of "gatekeeper" are offered,[215] such as "policeman,"[216] "field agent,"[217] "reporter,"[218] "investigator,"[219] and "judge,"[220] the prototype most frequently activated is the

compass virtually all activities undertaken by all lawyers, the bar unwittingly undermines its own descriptive claim that lawyers are unique. After all, many of those functions performed by many lawyers are also performed by non-lawyers. Accordingly, "advocacy" insufficiently describes the work of lawyers. *See supra* note 189 and *infra* note 308.

214. *See* Macrae & Bodenhausen, *supra* note 153, at 102; Bodenhausen & Macrae, *supra* note 185, at 8-10.

215. The comments often do not explicitly talk of "gatekeeper" (only four percent of the comments submitted by lawyers explicitly mention "gatekeeper"). But they gesture to a superordinate category that is not explicitly articulated but includes the likes of policemen, judges, and auditors.

216. *See, e.g.*, Letter from the Comm. on Sec. of the Bus. Law Section of the Md. State Bar Ass'n to Jonathan G. Katz, Sec'y, SEC (March 31, 2003), *available at* http://sec.gov/rules/proposed/s74502/adpoliakoff1.htm [hereinafter Letter from the Comm. on Sec. of the Bus. Law. Section of the Md. State Bar Ass'n] ("The practical effect . . . is to put the attorney in the role of a policeman . . . ."); Letter from the Chi. Bar Ass'n to Jonathan G. Katz, Sec'y, SEC (Dec. 18, 2002), *available at* http://sec.gov/rules/proposed/s74502.htm [hereinafter Letter from the Chi. Bar Ass'n] (warning that the lawyer would be in the "position of auditor or policeman" and serve "as the [SEC]'s field agent").

217. Letter from the Chi. Bar Ass'n, *supra* note 216.

218. *See, e.g.*, Letter from the Am. Corp. Counsel Ass'n to Jonathan G. Katz, Sec'y, SEC (Apr. 7, 2003) (expressing concern that the proposed regulations would turn the lawyer into a "cop[ ] on the beat" or "reporter" or "policeman for the government").

219. *See, e.g.*, Letter from the Bar Ass'n of S.F. & the Beverly Hills Bar Ass'n to Jonathan G. Katz, Sec'y, SEC (Dec. 18, 2002), *available at* http://sec.gov/rules/proposed/s74502/ctbradford1.htm (pointing out that Part 205 goes beyond the mandate of Sarbanes-Oxley section 307, which "does not require the attorney to act as an investigator or policeman"); Letter from Jones Day, *supra* note 179 ("[B]y requiring mandatory [noisy] withdrawal . . . , Section 3(d) would effectively make attorneys watchdogs or investigators required to second guess a client's decisions . . . .").

220. Letter from the Chi. Bar Ass'n, *supra* note 216 (fearing that the lawyer would become a "judge of no recourse," "auditor or police officer").

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auditor.[221] No doubt, this is in part because the auditor is both plausible and context-relevant. After all, the SEC has no regulatory authority over cops, journalists, or judges; by contrast, it specifically regulates auditors, a subset of accountants.

Take, for instance, the following representative comment from the Association of the Bar of the City of New York:

> Attorneys act as *advocates* and advisors to their clients. Unlike accountants, their role is not to "attest" to information, "certify" information or vouch to the public. Nor are they employed to enforce the law or regulations governing their issuer clients. Unlike an *auditor* whose very role is to be *skeptical and utterly independent*, an attorney acting as an *advocate* must be able to make full use of the attorney–client privilege (consistent with the crime–fraud exception) to make effective and zealous *advocacy* possible. Despite this basic understanding of the attorney's role, the proposed rules attempt to transform attorneys into *investigators* of their clients, and put attorneys in the impossible position of simultaneously acting as *advocates* and *unilateral judges* of even past misconduct by the issuer and whistleblowers, rendering practically impossible the mandate that attorneys must zealously represent their clients.[222]

The above excerpt explicitly mentions "auditors." Notice the emphasis on attestation and certification,[223] both of which require the disinterested evaluation of the company. The concepts of attesting, certifying, as well as impartially evaluating (suggested by the terms "skeptical and utterly independent [from the client]," "investigators," and "judges") fall nicely within the same activated network centering on the prototype of the auditor. Notice also how attorneys (framed as "advocates") are viewed as *not* possessing those particular attributes.

The following comment from the Maryland State Bar Association highlights the role of the auditor and, more explicitly, the function of disinterested evaluation:

> [T]he role of the auditor is clearly that of an objective assessor who determines the accuracy and adequacy of the financial statements; the auditor, therefore, *must* be independent to be objective. On the other hand, the attorney is the advocate for the client (*i.e.*, to defend his or her client zealously), *not* the independent auditor.[224]

221. Of the 123 comments submitted by lawyers, 39% featured the text string "auditor" or "accountant." See *supra* notes 146 and 177 for a description of my methodology.

222. Letter from the Ass'n of the Bar of the City of N.Y. (2002), *supra* note 122 (emphasis added).

223. *See* Securities Act of 1933, 15 U.S.C. § 77aa(25) (2006); Securities Exchange Act of 1934, 15 U.S.C. § 78m(a)(2), (2)(a) (2006). Under current law, auditors are instructed to investigate their clients' financial statements for the purpose of certifying to the investing public that the audit was conducted in accordance with GAAS and that the financial statements fairly and accurately represent the company's condition in accordance with the standards of the Public Company Accounting Oversight Board. *See* 15 U.S.C. § 78j-1 (2006).

224. Letter from the Comm. on Sec. of the Bus. Law Section of the Md. State Bar Ass'n, *supra* note 216.

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Notice the activated concepts that all center on the prototype of the auditor: "objective assessor," "accuracy . . . of financial statements," and "independent." By contrast, the lawyer is framed as the "advocate for the client" with the lawyer's function of zealous defense highlighted.

Finally, consider the priming by 79 Law Firms in their comments. They note expressly that:

> [A] public accountant for an issuer (i) is *required to be independent* (as defined at great length and in considerable detail), (ii) *audits* an issuer's financial statements, (iii) *reports* on the results of the audit *to the issuer's shareholders* and (iv) is *relied on by the investing public*.[225]

Yet again, the prototype of the auditing accountant is activated. Yet again, the attribute emphasized is that the auditors "report" auditing results that must be trustworthy so as to be "relied" upon by the public. Here also, the "public" nature of auditing is emphasized to be sharply contrasted with the presumed "private" nature of lawyering.

In sum, then, categorical processing of the gatekeeper looks like this:

Category	Gatekeeper
Prototype	Auditor
Attribute	Disinterested evaluation Certification

3. *The Contrast*

Above I've made the case that the bar's rhetoric primes the prototypes of the litigator and auditor to represent the categories of lawyers and gatekeepers, respectively. And for the litigator, the crucial representative attribute is zealous advocacy. As for the auditor, the representative attributes are the disinterested evaluation and certification associated with the typical audit.

Category	Lawyer	Gatekeeper
Prototype	Litigator	Auditor
Attribute	Zealous advocacy (especially against the state)	Disinterested evaluation Certification

Comparing these prototypes side-by-side leads to what cognitive psychologists call the "contrast effect." The contrast effect is a bias that leads perceivers to exaggerate the differences between two instances presented

225. Letter from 79 Law Firms, *supra* note 131.

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together unless the instances "are very similar to each other."[226]

Much of the evidence for the contrast effect comes from studies examining the categorization of borderline instances, or target instances that lie near the border of two categories. The typical experimental paradigm takes two extremes, such as a male and female face, and morphs the images together to create a composite image, such as an androgynous face, that sits in the middle of the spectrum between the extremes.[227] Then scientists ask subjects to judge whether the borderline image belongs in either of the two extreme categories.[228] For example, scientists ask subjects to determine the gender of an androgynous face that is a 50:50 composite of the male and female face.[229] Strikingly, the same morphed face is more likely to be judged *female* after being exposed to the original *male* face; conversely, the exact same composite is more likely to be judged *male* after exposure to the original *female* face.[230] In other words, subjects are biased in favor of finding a contrast.[231] Numerous other experiments employing colors, audio tones, and morphed images of cat and dog have confirmed this basic cognitive tendency.[232]

With this rudimentary understanding of the contrast effect, consider the simultaneous activation of the litigator on the one hand and the auditor on the other. The contrast effect predicts that the juxtaposition of the litigator and auditor will lead perceivers to exaggerate their differences and think of them as belonging to separate categories; in short, the litigator now seems oppositional to the auditor. Since litigator and auditor psychologically represent their respective categories (lawyer and gatekeeper), there is a further consequence: the entire category of lawyers comes to seem nothing like the entire category of gatekeepers.

Schematically, the phenomenon looks like this:

226. James A. Hampton et al., *Comparison and Contrast in Perceptual Categorization*, 31 J. EXPERIMENTAL PSYCHOL. 1459, 1466 (2005) (making this point with respect to experiments on context and target hues).

227. *See* J. Friedenberg et al., Priming and Perception of Androgynous Faces: What You See Is Not What You Get, Poster Presentation at the Forty-Third Annual Meeting of the Psychonomic Society, Kansas City, Mo. (2002) (copy of research on file with author).

228. *Id.*

229. *Id.*

230. *Id.*; Hampton et al., *supra* note 226, at 1460-61.

231. There is also a weaker bias called the "assimilation effect," which occurs when a target instance "is more likely to be included in the category of the context" instance. Hampton et al., *supra* note 226, at 1460-61. The assimilation effect is likely to occur if the target instance is already very similar to the context instance. *Id.*

232. *Id.* at 1470-71.

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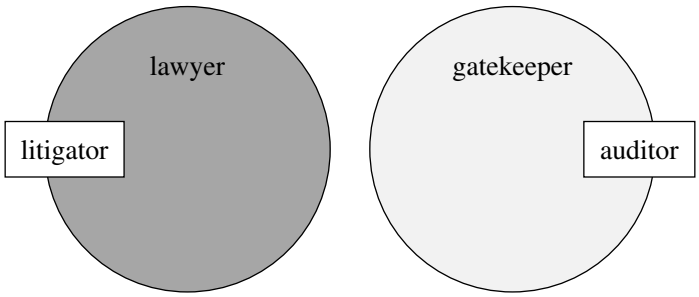

Rhetorically, we see lawyers taking advantage of this contrast effect in comments such as these:

• "[t]he attorney-client relationship is different than the *auditor*-client relationship . . . ."[233]

• "Accountants . . . are *in no way* analogous to lawyers who render securities advice to public companies."[234]

• "[T]he roles of independent public accountants and attorneys are very different."[235]

• "[L]awyers and accountants play fundamentally different roles under the federal securities laws."[236]

• "[T]here is no valid analogy that warrants regulating attorneys similarly to independent public accountants."[237]

• "[T]he analogy [with auditors] is fatally flawed."[238]

In sum, when we think about lawyers, we are primed to think of the prototype of litigator. When we think about gatekeepers—or some professional who should be averting fraud—we are primed to think of the prototype of auditor. These cognitions, both latent in our culture and primed by the bar's rhetoric, lead us effortlessly to think that lawyers and gatekeepers are separate and independent categories. The practice of lawyering thus appears fundamentally inconsistent with the practice of gatekeeping.

233. Letter from the Ass'n of the Bar of the City of N.Y. (2003), *supra* note 142 (emphasis added).

234. Letter from the N.Y. County Lawyers' Ass'n, *supra* note 131 (emphasis added); *accord* Letter from the L.A. County Bar Ass'n, *supra* note 142 ("Attorneys do not have duties to the public like those of accountants in certifying financial statements.").

235. Letter from 79 Law Firms, *supra* note 131.

236. Letter from the Fed. Regulation Comm. of the Sec. Indus. Ass'n to Jonathan G. Katz, Sec'y, SEC (April 7, 2003), *available at* http://www.sec.gov/rules/proposed/s74502/frcsia040703.htm [hereinafter Letter from the Fed. Regulation Comm. of the Sec. Indus. Ass'n].

237. Letter from 79 Law Firms, *supra* note 131.

238. Letter from Debevoise & Plimpton, *supra* note 131 ("It may be argued that auditors of issuers are required . . . to notify the [SEC] under some circumstances of auditors' withdrawal, and that attorneys should be treated the same way. We submit, however, that the analogy is fatally flawed.").

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B. Client Confusion

Consider finally, who is the client in a securities context? The legally correct answer for the vast majority of legal representations[239] (including all representations covered by Sarbanes-Oxley section 307)[240] is the corporation, and not the CEO or some senior corporate manager.[241] As a formal matter, the senior corporate manager and lawyer are co-agents who share allegiance to their common principal (the corporation) rather than to each other.[242]

But that's not the default prototype that comes to mind for the category of client. Instead, most people and most lawyers think of the client as a flesh-and-blood human being. Interestingly, the official comments filed with the SEC track that default understanding instead of the legally correct one. They consistently activate the prototype of the human manager, which in turn triggers a familiar cultural script—that of the lawyer safeguarding the dignity and autonomy of vulnerable individual defendants from government overreaching.[243]

The invitation to think of the client as the human manager suffuses the comments—albeit indirectly—through appeals to the hallowed duties of

239. *See* Heinz et al., *supra* note 160, at 43 (noting the study's findings that the "corporate sector consumed more than twice the amount of Chicago lawyers' time devoted to personal and small-business client work in 1995 (64 percent versus 29 percent)").

240. The Part 205 regulations enacted under Sarbanes-Oxley section 307 only apply to corporate representations. *See* 17 C.F.R. § 205.2(g) (2009).

241. The law also makes clear that other corporate constituents do not constitute "the client," although lawyers are entitled to defer to them to the extent that they are duly authorized. But vested power always has its limitations. As William Simon has noted, "[e]ven the highest authority, when it engages in an injurious and 'clearly' illegal course of conduct, is not 'duly authorized.'" William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 Cal. L. Rev. 57, 81 (2003). Interestingly, an old Chinese maxim conveys a similar idea: "Even the emperor needs the mandate of Heaven." To be clear, this is not intended to give lawyers carte blanche to ignore the business judgment of client representatives who are entitled to deference on business matters. But if the co-agent advocates an illegal course of conduct that threatens material harm to the corporate client, the normal rule of deference makes no sense in light of the limited nature of the co-agent's authority.

For authority on the identity of the client in the organizational context, see *Yablonski v. United Mine Workers of America*, 448 F.2d 1175, 1181 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); Model Rules of Prof'l Conduct R. 1.13(a) & cmt. 1 (2002) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents . . . . Officers, directors, employees and shareholders are the constituents of the corporate organizational client."); Model Code of Prof'l Responsibility EC 5-18 (1983) ("A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity."); Restatement (Third) of the Law Governing Lawyers § 96 cmt. b (2000) ("By representing the organization, a lawyer does not thereby form a client–lawyer relationship with all or any individuals employed by it or who direct its operations . . . .").

242. Geoffrey C. Hazard & William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct 233 (1990); *see also* Restatement (Third) of Agency § 1.04 (2006) (definition of co-agents).

243. *See* Rhode, *supra* note 86, at 594, 605.

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loyalty[244] and confidentiality.[245] For example, on loyalty, consider the comment letter of 77 law firms, signed by almost all the elite law firms that practice securities law:

> We are concerned that Part 205 would drive a wedge between client and the counsel who advised it on a matter by creating a conflict of interest between the client and its counsel and forcing the client to use other counsel to defend itself.[246]

Plainly, the SEC's original proposal (proposed Part 205, which included mandatory noisy withdrawal) is being blamed for creating a conflict of interest between lawyer and client.[247] The problem with this statement is that it is ludicrous in the relevant context of an organizational client. For situations serious enough to implicate Part 205, it isn't Part 205 that has created the conflict of interest; it is the manager for whom we have credible evidence of committing a material violation (by the regulations' own terms) who has created the conflict of interest. Accordingly, compliance with Part 205 doesn't make the lawyer disloyal to the true client (the corporation). Only the wrongdoing manager is being disloyal to the client by breaking the law and potentially exposing the client to liability. Further, it isn't the client (the corporation) who now must "use other counsel to defend itself";[248] rather, it is the wrongdoing manager who must hire his own lawyer.[249]

On confidentiality, consider the comment letter of 79 law firms:

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244. Although this duty is not formally recited in the model professional conduct codes, it applies to lawyers via the law of agency and the law of fiduciary relations. WOLFRAM, *supra* note 189, § 4.8, at 146; Gerald Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1255-56 & nn.108-09 and accompanying text.

245. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002); MODEL CODE OF PROF'L RESPONSIBILITY EC 4-1 (1983).

246. Letter from 77 Law Firms, *supra* note 143.

247. *See* Letter from the N.Y. County Lawyers' Ass'n, *supra* note 131 ("Whether the reporting obligation is placed on the lawyer or on the client is immaterial to the fact that it is *the reporting obligation itself* that threatens to erode the candor required for meaningful attorney–client communications to transpire.").

248. Letter from 77 Law Firms, *supra* note 143.

249. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 10 (2002) (noting that the lawyer for the organization cannot represent (or promise confidentiality to) an organizational constituent whose interest is adverse to that of the organization); STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 157-59 (2002) (detailing state versions of Rule 1.13). As a result, the general rule is that the lawyer for the corporation can continue to represent the corporation against a wrongdoing constituent. There are, however, a few exceptions. First, if the corporation's lawyer carelessly "leads a constituent to believe that she is acting as the constituent's individual lawyer," then she is disqualified from representing the entity against that constituent. *See* Simon, *supra* note 241, at 70. Second, when a shareholder derivative action is not in its early stages and does not appear patently frivolous, some courts "have permitted corporate counsel to represent the officers, while new counsel is retained for the corporation." *Id.* at 79. None of this is to say that the Model Rules did a good job of clearly delineating the authority structure of the corporation in cases where officers or directors are errant. For a critique of Model Rule 1.13, see, for example, Stephen M. Bainbridge & Christina J. Johnson, *Managerialism, Legal Ethics, and Sarbanes-Oxley Section 307*, 2004 MICH. ST. L. REV. 299, 309-10; Stephen Gillers, *Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure*, 1 GEO. J. LEGAL ETHICS 289 (1987); Kim, *supra* note 110, at 1044-46; Simon, *supra* note 241, at 80-83.

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> In the vast majority of cases counsel enjoy the confidence of their clients and, given access to the facts by their clients, succeed in persuading their clients to refrain from actions that harm the investing public. If clients are afraid to confide candidly and completely in their counsel and instead proceed without the advice of counsel, the public will inevitably be harmed in some cases when it need not have been.[250]

This passage repeats the traditional justification for the lawyer's duty of confidentiality (and the attorney–client privilege), which posits that confidentiality guarantees induce clients to "confide candidly and *completely* in their counsel,"[251] including revealing their illicit intentions, which in turn enables lawyers to talk clients out of their nefarious plans.

Comments call for the preservation of *full* or *complete* candor,[252] *complete* confidentiality,[253] and *full and frank* communications between lawyer and client.[254] Some go so far as declaring confidences "inviolate"[255] or "sacrosanct,"[256] implicitly equating the legal profession with the medieval priesthood. Likewise, the American College of Trial Lawyers maintains that, under pre-existing law, the client's "shared confidences" are "absolutely privileged."[257] Similarly, the following passage from the Los Angeles County Bar Association suggests that the "traditional balance" struck by current law supports strict confidentiality:

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250. Letter from 79 Law Firms, *supra* note 131.

251. *Id.* (emphasis added).

252. *See, e.g.*, Letter from Troutman Sanders LLP to Jonathan G. Katz, Sec'y, SEC (Apr. 7, 2003), *available at* http://www.sec.gov/rules/proposed/s74502/troutman040703.htm (noting that the SEC would "want to encourage [securities counsel] to give *full* candor in their advice to issuers" (emphasis added)); Letter from Fed. Regulation Comm. of the Sec. Indus. Ass'n, *supra* note 236 ("It is good for the integrity of the markets and for the investing public if a broker-dealer's officers can consult their attorneys in *complete* candor." (emphasis added)).

253. *See, e.g.*, Letter from 79 Law Firms, *supra* note 131.

254. *See, e.g.*, Letter from Emerson Elec. Co. to Jonathan G. Katz, Sec'y, SEC (Apr. 7, 2003), *available at* http://www.sec.gov/rules/proposed/s74502/wwwithers1.htm ("[T]he prerequisite to effective legal representation is *full and frank* disclosure by the client to his lawyer . . . ." (emphasis added)); Letter from Jones Day, *supra* note 179 ("[A]n attorney must be apprised of the *entire* universe of information that bears on a client's given situation. Our legal system has long recognized the need for *full and frank* discussions between clients and attorneys" (emphasis added)).

255. *See, e.g.*, Letter from the Ass'n of the Bar of the City of N.Y. (2002), *supra* note 122 ("A client must feel free to discuss anything with his or her lawyer . . . . The observance of the ethical obligation of a lawyer to hold *inviolate* the confidences and secrets of a client not only facilitates the full development of facts essential to proper representation of the client but also encourages non-lawyers to seek early legal assistance." (emphasis added)); Letter from the Corp., Fin. & Sec. Section of the D.C. Bar, *supra* note 208 ("A fundamental principle in the client–lawyer relationship is that the lawyer holds *inviolate* the client's secrets and confidences." (emphasis added)).

256. *See, e.g.*, Letter from the Ass'n of the Bar of the City of N.Y. (2003), *supra* note 142 ("[I]t would be difficult for issuers to have confidence that their communications with their attorneys would remain *sacrosanct*" (emphasis added)); Letter from Erik N. Frias, *supra* note 142 ("By making an end-run around the duty of confidentiality, this alternative seeks to give the [SEC] a peek into what has traditionally been considered *sacrosanct*, the confidences between an attorney and his client." (emphasis added)).

257. Letter from the Am. Coll. of Trial Lawyers to Jonathan G. Katz, Sec'y, SEC (Apr. 2, 2003), *available at* http://www.sec.gov/rules/proposed/s74502/macooper1.htm.

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> Under the traditional balance, an attorney may advise a client, "tell me everything that I should know about representing you—my lips are sealed, and no information will be made public except to represent your interests." Thus the client can have confidence when disclosing to a lawyer *all* relevant information without fear that the lawyer will disclose it to third parties.[258]

Although these positions are plausible for individual human clients,[259] they are farcical when applied to corporate clients. After all, the lawyer's duty to keep secrets shared by corporate managers has always been severely qualified.[260] As lawyers working in-house can attest, whenever a conflict of interest between a corporate employee and the corporation becomes apparent, lawyers must give the "corporate Miranda warning," which reminds the employee that the lawyer's duty runs to the firm alone, and thus no confidentiality to the employee can be promised.[261] In fact, the lawyer may have a duty to reveal the manager's confidences to authorized corporate constituents if necessary to prevent the manager from causing reasonably foreseeable harm to the corporate client.[262] Moreover, any revelations made by the manager to corporate counsel have al-

258. Letter from the L.A. County Bar Ass'n, *supra* note 142. Admittedly, California does have one of the strictest confidentiality rules in the nation. That said, this comment suggests a uniform "traditional balance" without acknowledging California's outlier status on the confidentiality rule. *Id.*

259. Although certainly not absolute, the strongest confidentiality protections nonetheless apply to *individual* clients who, by definition, would not be subject to the numerous de facto exceptions to the duty of confidentiality enumerated in the text accompanying notes 260-66, *infra*. But even then, regardless of whether the client is an individual or an entity, relevant exceptions to the duty of confidentiality have long existed such that the Los Angeles County Bar Association's claim that client constituents should be comfortable in disclosing *all* relevant information is an exaggeration, especially in the context at hand. As detailed below, over four-fifths of states allowed lawyers to reveal confidential client information to third parties for the purpose of averting a crime or fraud. *See infra* note 353. Moreover, if it turns out that the client sought legal advice for the purpose of obtaining assistance for a crime or fraud or the client ends up employing the lawyer's advice to perpetrate a crime or fraud (regardless of the client's intent at the time of the advice), the attorney–client privilege does not protect the client's revelations under the crime–fraud exception. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 (2000); Rotunda, *supra* note 34, at 475 & n.97.

260. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2002) ("If a lawyer . . . knows that an officer . . . is engaged in . . . a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization . . . including, if warranted by the circumstances to the highest authority that can act on behalf of the organization . . . ."). According to the official comment, the "highest authority" *ordinarily* would be the board of directors. *See id.* R. 1.13 cmt. 5. The Restatement states that "[i]n appropriate circumstances, the lawyer may request intervention" from the majority stock owner. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 cmt. f (2000).

261. *See* Kim, *supra* note 5, at 444 (quoting John K. Villa, *When and How to Issue Corporate Miranda Warnings*, ACC DOCKET, Sept. 2006, at 76).

262. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 cmt. e (2000) ("A lawyer is also required to act diligently . . . by taking steps to prevent reasonably foreseeable harm to a client. . . . The lawyer is not prevented by rules of confidentiality from acting to protect the interests of the organization by disclosing within the organization communications gained from constituents who are not themselves clients."); Cramton et. al, *supra* note 86, at 737.

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ways been subject to disclosure by higher authorities to anyone *outside* of the corporation—no matter how destructive or embarrassing this may be to the manager.[263] Both the duty of confidentiality and the attorney–client privilege are ultimately controlled by the sitting board, who may decide at any time to waive either and disclose managerial confidences to outsiders.[264] In fact, companies often cooperate in prosecutions against former misbehaving managers to win leniency for themselves.[265] In addition, shareholder plaintiffs suing derivatively may discover the contents of managerial confidences shared with corporate counsel under the *Garner* doctrine—even over the board's objection.[266]

In sum, the bar repeatedly makes legally incorrect arguments about loyalty and confidentiality. Whether these lawyers realize their errors is hard to know.[267] What's fascinating is that these arguments don't actually sound ridiculous, unless we continuously chant as a mantra "the client is the corporation"—which we don't. Indeed, when we hear the bar's appeals, we naturally make sense of them by implicitly accepting the bar's framing of the client as the human manager.[268]

To the extent that this client confusion takes place, the bar has activated a heroic view of the lawyer-as-litigator.[269] Reading the comments to the SEC, we forget the fact that the client is actually a public corporation with "access to economic and political resources" that make it "much better able . . . to protect [itself] against overzealous enforcement practices than the bar's standard David and Goliath morality play would lead one to believe."[270] Instead, the lawyer-as-litigator is seen as the only "independent bulwark" between citizens and official tyranny.[271] As

263. Corporate managers who are engaged in material violations (as defined in 17 C.F.R. § 205.2(i) (2009)) have no legitimate claim of protection from the corporate attorney–client privilege or the duty of confidentiality to the corporate client. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 10 (2002); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96(b) & cmt. b (2000); Cramton et. al, *supra* note 86, at 813.

264. *See* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 358 (1985) (holding that a corporation's bankruptcy trustee had power to waive the attorney–client privilege with respect to pre-bankruptcy communications); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. j (2000) (describing who has the authority to waive the organization's attorney–client privilege); Cramton et. al, *supra* note 86, at 738; Letter from William H. Simon to Jonathan G. Katz, Sec'y, SEC (Dec. 13, 2002), *available at* http://www.sec.gov/rules/proposed/s74502/simon121302.htm.

265. William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1467 (2006).

266. *See* Garner v. Wolfinbarger, 430 F.2d 1093, 1103-04 (5th Cir. 1970) (allowing shareholders in derivative action access to otherwise privileged communications between a CEO and its counsel so long as "good cause" is shown), *cert. denied*, 401 U.S. 974 (1971).

267. *See* Kim, *supra* note 11.

268. *See* Rhode, *supra* note 86, at 605-06.

269. *See id.* at 607-08.

270. David B. Wilkins, *Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics*, *in* EVERYDAY PRACTICE AND TROUBLE CASES 68, 85 (Austin Sarat et al. eds., 1998). *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

271. *See, e.g.*, Evan A. Davis, *Past Efforts and Future Possibilities: The Meaning of Professional Independence*, 103 COLUM. L. REV. 1281, 1281 (2003) (describing "the role of the legal profession as an independent bulwark between individuals or organizations and the

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Deborah Rhode has remarked, "It is far easier to defend a highly privatistic vision of the social good and the profession's responsibilities when the lawyer appears as a protector of the persecuted rather than friend of the finance company."[272] As a result, client confusion bolsters the bar's normative assertion that placing gatekeeping obligations on the lawyer infringes upon her noble role as faithful and zealous advocate.

III. NEUTRALIZING THE RHETORIC

The bar's rhetoric primes us to think that the best example of the lawyer is the litigator engaged in zealous advocacy; the best example of the gatekeeper is the auditor engaged in disinterested evaluation; the best example of the client is the human fending off the overreaching state.[273] These three moves generate a contrast effect and a client confusion that fortify the bar's anti-regulatory position.[274] If one were so inclined, how might one neutralize this rhetoric of lawyer exceptionalism, such that gatekeeping would seem consistent with lawyering?

A. Reducing the Contrast

Recall from Part II.A the table that summarizes the descriptive prong of lawyer exceptionalism—the claim that lawyers are qualitatively different from gatekeeping professionals and thus are functionally unique:

Category	Lawyer	Gatekeeper
Prototype	Litigator	Auditor
Attribute	Zealous advocacy (especially against the state)	Disinterested evaluation Certification

A systematic approach to reducing the contrast would work at both the level of attributes and the level of prototypes.

1. Attributes

a. Contesting zealous advocacy

Let's accept, for the moment, that the relevant prototypes for comparison should be litigators and auditors. Even then, it is possible to reduce the contrast between the attributes that are associated with these prototypes. First, let's focus on a litigator's zealous advocacy. To think that litigators only and always zealously advocate is reductionist—as noted earlier, a caricature or stereotype.[275] One way to dampen this stereotype

political branches of government," which "requires the lawyer to oppose the government in defense of the client's legal interests").

272. Rhode, *supra* note 86, at 607-08.

273. *See supra* Part II.A-B.

274. *Id.*

275. *See supra* Part II.A.1.

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is to point out systematically that, depending on the context, litigators often perform disinterested evaluations.[276]

For instance, litigators are often expressly retained for corporate internal investigations, which require them to ascertain whether (i) a material violation of the law has been committed in fact, and (ii) to advise the board as to what, if anything, needs to be done to mitigate corporate liability.[277] Even in the context of everyday lawsuits, litigators have to gauge objectively the strengths and weaknesses of their client's case in order to offer the best advice.[278] Under the constraints of Rule 11 of the Federal Rules of Civil Procedure, the litigator certifies to the court that she has undertaken a disinterested evaluation of her client's allegations when she signs a pleading or written motion.[279] And state ethics codes have placed onto litigators explicit duties to evaluate and root out vexatious cases since as early as 1887.[280]

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276. *See supra* Part II.A.2.

277. Prominent litigators, such as William McLucas and David Boies, are retained by corporate boards to lead internal investigations of alleged corporate malfeasance. McLucas was retained by the boards of Enron, WorldCom, and Qwest Communications. *See* John M. Holcomb, *Corporate Governance: Sarbanes-Oxley Act, Related Legal Issues, and Global Comparisons*, 32 DENV. J. INT'L L. & POL'Y 175, 213 (2004). McLucas was ranked as a "top litigation lawyer" in the 2003 edition of *Euromoney's Guide to the World's Leading Litigation Lawyers*. *See* William R. McLucas, http://www.wilmerhale.com/william_mclucas/ (last visited Feb. 17, 2010). Boies, who famously argued on behalf of former Vice President Al Gore before the U.S. Supreme Court in *Bush v. Gore*, was named "Commercial Litigator of the Year" by Who's Who. *See* David Boies, http://www.bsfllp.com/lawyers/data/0001 (last visited Feb. 17, 2010). Boies was retained by the board of Tyco International. *See* Holcomb, *supra*, at 213. In conducting internal corporate investigations, litigators interview throngs of corporate employees, review piles of documents, and confer with board members. *See* Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 888-92. In short, they invariably engage in fact-finding, counseling, and, indeed, disinterested evaluation.

278. *See* Gilson, *supra* note 5, at 882-86.

279. *See* FED. R. CIV. P. 11(a)-(b). By signing pleadings and written motions as the attorney of record, the litigator certifies to the court that she has undertaken a disinterested evaluation—"an inquiry reasonable under the circumstances"—to determine whether the legal and factual contentions in her papers are meritless. *Id.* By imposing on the litigator an affirmative duty to investigate and evaluate the veracity of her client's factual allegations and the plausibility of legal claims—backed by the threat of court sanction—Rule 11 requires her to function like a gatekeeper of the litigation process with an explicit duty to control and screen access to civil litigation. *See* Marc Galanter, *Reading the Landscape of Disputes*, 31 UCLA L. REV. 4, 19 (1983); Gilson, *supra* note 5, at 876-77. If the lawyer is unable to vouch for her client in the manner prescribed by Rule 11, she must decline to represent the client in a lawsuit. In other words, she must uphold the classic gatekeeping duty to withhold services from one's client. *See* Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 VAL. U. L. REV. 1, 6 n.19 (2003) (identifying ten sanctioning provisions, including Rule 26(g)).

To be clear, I am not making an empirical claim that in the real world, Rule 11 successfully forces litigators to weed out meritless lawsuits. But Rule 11 has caused litigators to undertake *some* disinterested evaluation and certification in their everyday practice. In short, litigators *actually* do what everyone knows auditors are supposed to do—but in the service of the fair and efficient allocation of judicial resources.

280. *See, e.g.*, ALABAMA LAWYERS CODE OF ETHICS § 14 (1887) ("An attorney must decline in a civil cause to conduct a prosecution, when satisfied that the purpose is merely to harass or injure the opposite party, or to work oppression and wrong"); MODEL RULES

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In addition, the litigator must engage in other behavior that doesn't fit neatly with the bar's depiction of "zealous advocacy."[281] For example, the litigator must disclose controlling legal authority directly adverse to her client's position; she must rectify a client's perjury to the tribunal, which may necessitate a noisy withdrawal or even disclosure; and, in response to a proper discovery request for a smoking gun document that could demolish her client's case, she must produce it.[282] Indeed, these behaviors seem more in line with disinterested evaluation than with zealous advocacy.

Given that litigators don't always single-mindedly advocate, we need to pay attention to context. And, quite simply, zealous advocacy is not warranted in this one. Part 205 addresses narrowly what steps a lawyer "appearing and practicing before the [SEC] in the representation of an issuer"[283] must take when she encounters "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."[284]

Thus, Part 205 directs the lawyer, who has just learned of a possible existing or imminent law violation, how to proceed in such a situation.[285] The relevant situation calls for lawyers' disinterested evaluation, which is integral to fact-finding (to determine what, if anything, happened) and to counseling (to communicate the results of any fact finding and to advise on what the law requires of clients).[286] Disinterested evaluation is necessary to ensure that lawyers reasonably determine legal risks when they counsel their clients to comply with the law.[287] The relevant context does not call for the broader license to characterize facts and law that one ordinarily associates with advocacy.[288]

Indeed, all of the structural elements that have historically legitimated

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OF PROF'L CONDUCT R. 3.1 (2002) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(1) (1969) ("[A] lawyer shall not . . . file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."); CANONS OF PROF'L ETHICS Canon 30 (1968) ("The lawyer must decline to conduct a civil cause or make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong.").

281. *See* Letter from Sullivan & Cromwell, *supra* note 123 (describing the bar's depiction of a zealous advocate).

282. *See* MODEL RULES OF PROF'L CONDUCT R 3.3(a)(1)-(2) (2002) (disclosing adverse legal authority); *id.* (rectifying client perjury); *id.* R. 3.3(b) & R. 3.4(d) (complying with discovery requests). For a more comprehensive list of duties that constrain zealous advocacy, see Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 262-63 (1985).

283. 17 C.F.R. § 205.1 (2009).

284. *Id.* § 205.2(e) (defining "evidence of a material violation").

285. *Id.* § 205.1.

286. *See supra* note 277 and accompanying text.

287. *Id.*

288. *See* Cramton et. al, *supra* note 86, at 769.

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the function of adversary advocacy are lacking.[289] As identified by Murray Schwartz, those missing structural elements are: (i) an "adversary to challenge the client's statement of facts, to sharpen the issues, to seek clarification of positions, or to point to countervailing considerations"; (ii) an "impartial arbiter . . . charged with the responsibility of reaching the correct decision under the law" and ensuring that both sides follow the "rules of the contest"; and (iii) procedural rules that constrain the conduct of both parties.[290] Critically, those procedural rules operate to produce an open factual record to be shared by the parties as the basis for their arguments and to serve as the factual foundation for the arbiter's decision.[291] All of the above elements collectively operate to legitimate the function of advocacy by restraining it and guarding against its predictable abuses.[292]

But none of those elements is present in the situation targeted by Part 205. In that situation, the client will not have been charged with the alleged law violation in which case defense advocacy would be warranted.[293] (In fact, defense advocacy for past violations is expressly exempted from Part 205 reporting duties.[294]) In the relevant situation, the lawyer and client are entirely on their own: there is no adversary to counterbalance the lawyer's rendition of the facts, no opponent to challenge the lawyer's interpretation of the law, no referee to police parties' self-interested behavior, and no impartial arbiter charged with ascertaining the truth.[295] In fact, the only constraint on the client's actions and the

289. Schwartz, *supra* note 174, at 677.

290. *Id.*

291. For example, the rules governing discovery, subpoena power to compel witnesses and documents, and—in criminal contexts—rights to confrontation and compulsory process all operate to produce an open factual record. *See* U.S. CONST. amend. VI; FED. R. CIV. P. 26(b)(1)-(2), 45.

292. *See* Schwartz, *supra* note 174, at 677 ("Putting one's best foot forward by stepping on the feet of the other side makes sense because of the presence of an impartial arbiter."); Wilkins, *supra* note 93, at 1188 ("[T]he permissions [underlying advocacy] are based on the presumption that adversary processes are more likely to work fairly and effectively if both parties are represented by advocates who have relatively few obligations to parties other than their own clients.").

293. *See* Michael L. Seigel, *Corporate America Fights Back: The Battle Over Waiver of the Attorney–Client Privilege*, 49 B.C. L. REV. 1, 21 (2008) ("In many cases, the internal investigation is substantially completed by the time government agents come knocking at the corporation's door.").

294. *Compare* 17 C.F.R. § 205.3(b)(2)-(3) (2009) (imposing a duty to report where a lawyer is representing issuer in non-litigation context), *with id.* § 205.3(b)(6)(ii) (imposing no duty to report where a lawyer is retained "[t]o assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer . . . in any investigation or judicial or administrative proceeding relating to such evidence of a material violation"); *see also id.* § 205.3(b)(7)(ii) (addressing qualified legal compliance committees). For a criticism that this exemption, as written, is overly broad and mistakenly conflates legitimate advocacy with certain forms of counseling, see Cramton et. al, *supra* note 86, at 769-79. Criminal defense advocacy for past violations is the context for which the strongest policy justifications for attorney–client confidentiality hold. *See, e.g.*, David Luban, *Lawyers As Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 830-38 (exploring justifications for the attorney–client privilege in representations of individual criminal defendants).

295. *Cf.* Schwartz, *supra* note 174, at 677.

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lawyer's assistance is provided by the law itself, as interpreted by the client's lawyer.[296] Also, no one—other than the lawyer and the client—has ready access to any facts that might establish wrongdoing.[297] To describe this situation as necessitating the lawyer's advocacy is to wholly disregard the structural justifications underlying adversary advocacy.[298]

Moreover, not only is advocacy in this context inapposite; it can also be dangerous and illegal.[299] Unlike the adjudicable facts of litigation proceedings, the facts in this context are the "hot, live, alterable and current facts of a client's immediate affairs."[300] As a result, the lawyer is critically situated to either facilitate or prevent legal wrongs.[301] To the extent that the lawyer's advocacy in this situation assists the illegal act or its concealment, the lawyer runs the risk of aiding the offense and being prosecuted for it.[302] Although lawyers often protest that they shouldn't be liable for doing what lawyers generally do,[303] principles of criminal, tort, and agency law make clear that legal services are not categorically exempt from accessorial liability and that lawyers are not free to knowingly facilitate crimes, frauds, or their cover-ups.[304]

296. W. Bradley Wendel, *Professionalism as Interpretation*, 99 Nw. U. L. Rev. 1167, 1173 (2004).

297. *See* Schwartz, *supra* note 174, at 677-78.

298. *See id.*

299. *See generally* Hazard, *supra* note 136.

300. Brown, *supra* note 189, at 941.

301. In preventing harm, the lawyer can frustrate the violation before it is committed (and thus foreclose any possibility of client liability) or, if the violation is ongoing, save the client from further sanction by stopping the harm flowing from the violation. *See* Gillers, *supra* note 249, at 301. If the material law violation is unrectified and undisclosed, it will often be classified as an ongoing securities violation. *See infra* notes 353-62 and accompanying text. Thus, assuming an informationally efficient market, the sooner a securities violation is detected and disclosed, the fewer investors will be harmed by the misleading disclosures or omissions. Therefore, it behooves the company to rectify and disclose violations as soon as possible in an effort to mitigate damages. Also, early detection and rectification may mitigate criminal liability. *See* Seigel, *supra* note 293, at 10 (noting that federal prosecutors, in deciding whether to indict a corporation, will consider, among other factors, "whether the corporation had taken steps voluntarily to disclose the wrongdoing" and "the extent to which the corporation took remedial action once the criminality was discovered"). Moreover, in corporate criminal sentencing, organizations can earn reductions in criminal fines by diligently detecting and redressing employee criminality. *See* U.S. Sentencing Guidelines Manual §§ 8B2.1(a), 8C2.5 (2004).

302. Hazard, *supra* note 136, at 682 (citing cases holding that "it is improper for a lawyer to give advice as to how to commit a crime or fraud or how to conceal criminal or fraudulent acts").

303. *See supra* notes 136 and accompanying text.

304. *See* Hazard, *supra* note 26, at 291. To be sure, the determination of liability for any particular case will hinge on factual details, such as the nature of the assistance and the lawyer's state of mind. As Hazard notes, "the farther we move away from simple, unsuggestive advice, and the closer we move toward active assistance, the farther we get from what the law encourages and permits and the closer we get to what the law abhors and proscribes." Hazard, *supra* note 136, at 671. For example, "courts have held that it is unlawful for a lawyer to negotiate for his client in pursuance of an illegal purpose or to prepare documents to effectuate it." *Id.* at 682 (citation omitted) ("[T]he cases say not only that liability results from actual knowledge of the client's illegal purpose, but also that it results from knowledge of facts that reasonably should excite suspicion.").

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This is not to say that advocacy should be confined to formal adjudicative proceedings or that it is always crystal clear in which contexts advocacy is legitimate.[305] Indeed, there may be situations far afield from adjudication that nonetheless warrant some form of adversary advocacy.[306] However, the farther one moves away from the paradigm of adjudication (and the attendant structural elements), the tougher it becomes to argue that the situation justifies advocacy.[307] My main point here is that the specific situation targeted by Part 205 does not justify advocacy.[308]

b. Contesting disinterested evaluation

Now that we've worked on the litigator side of the contrast effect, what about working the auditor side? If litigators are not always unbridled advocates, maybe auditors are not always disinterested umpires.[309]

The fact is, instead of watching out for shareholder interests, auditors have been blamed for aligning themselves with the overly aggressive accounting positions taken by their client's management.[310] The poster child for this problem was the late Arthur Andersen LLP (Andersen), which had countenanced serious GAAP violations so that Enron could cook its books.[311] But Andersen was not unique in its acquiescence to its client's management.[312] An empirical study covering 1,000 large public companies from 1997 to 2001 yielded no evidence that the quality of public company audits performed by Andersen was any worse than that of

305. Indeed, for any given set of facts, the line between advocacy and counseling may be uncertain. "[B]ut it is also true that every legal distinction of any import is subject to the blurry-line critique," and securities lawyers are paid to negotiate "the gray between advocacy and advice." Cramton et. al, *supra* note 86, at 777. For further analysis of the distinction between counseling and advocacy, *see* WOLFRAM, *supra* note 189, § 13.2.1, at 688-90. That said, even the ABA acknowledges that advocacy and counseling are different. Thomas D. Morgan, *Thinking About Lawyers as Counselors*, 42 FLA. L. REV. 439, 443-44 (1990); *see* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-3 (1980) ("A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different.").

306. *See supra* note 213.

307. Wilkins, *supra* note 93, at 1188 (making this point with respect to a hostile audit).

308. To be sure, some lawyers will insist on stretching the definition of advocacy to encompass just about anything that lawyers could conceivably do for their clients. But many of those broader definitions of advocacy (such as "acting in a manner that furthers the client's interests") are so over-inclusive that they fail to distinguish advocacy from the common functions of ordinary agents, including real estate agents and auditors. Stated another way, the broader the definition of "advocacy" advanced by the bar, the more likely it undermines the bar's descriptive claim that lawyers perform unique functions. *See supra* notes 189, 213.

309. *See generally* Robert A. Prentice, *The Case of the Irrational Auditor: A Behavioral Insight into Securities Fraud Litigation*, 95 NW. U. L. REV. 133 (2000).

310. *See* Theodore Eisenberg & Jonathan R. Macey, *Was Arthur Andersen Different? An Empirical Examination of Major Accounting Firm Audits of Large Clients*, 1 J. EMPIRICAL LEGAL STUD. 263, 288 (2004).

311. George J. Benston, *The Regulation of Accountants and Public Accounting Before and After Enron*, 52 EMORY L.J. 1325, 1336-38 (2003) (detailing both GAAP errors and aggressive interpretations of GAAP that nonetheless "conformed to the letter of the GAAP rules").

312. *See* Eisenberg & Macey, *supra* note 310, at 263.

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the other large accounting firms.[313] Further, laboratory and field studies of auditor behavior confirm auditors' general tendency toward alignment with management.[314]

None of this should surprise anyone familiar with either the history or the business model of accounting firms. For decades, the accounting profession has fought to resist a uniform and cohesive body of clear accounting principles and instead has embraced positions designed to minimize friction with corporate managers.[315] Accountants pushed for the right to make unqualified certifications of management's accounting even if management's choice of accounting principles was ill-advised.[316] They opposed restrictions on "pooling of interest" accounting for mergers and acquisitions, even though pooling was labeled a "tool of deception" by the Federal Trade Commission.[317] They sought to reduce the scope of audits and the level of testing, resisting a mandatory forensic component to the audit.[318] Moreover, those same accounting firms who audit clients' financial records have long provided tax advisory services,[319] including tax compliance, tax planning, and tax advocacy[320] services. And, during the last half century, these accounting firms have provided management advisory services[321] as part of the accounting industry's effort to redefine itself as providing full-service business consulting.[322] Given those myriad opportunities to expand revenues beyond audit fees, it is no wonder that

313. *See id.* at 264-65 (noting that the study's analysis "yields no evidence that accounting profession problems that lead to [financial] restatements were unique to Andersen" and suggesting that "accounting profession problems are industrywide and not linked to any particular firm").

314. *See* Robert A. Prentice, *The SEC and MDP: Implications of the Self-Serving Bias for Independent Auditing*, 61 OHIO ST. L.J. 1597, 1640-49 (2000). These studies show that auditors often came to advocate their clients' positions on accounting issues. *Id.* Accountants were "more willing to subordinate objectivity and independence in order to resolve accounting conflicts in favor of their clients, less willing to give qualified opinions, including going concern qualifications, and less willing to resign from accounts the more income they derive from that client." *Id.* at 1644.

315. *See* COFFEE, *supra* note 5, at 125.

316. *Id.* at 124-25, 130, 137; GARY JOHN PREVITS & BARBARA DUBIS MERINO, A HISTORY OF ACCOUNTANCY IN THE UNITED STATES: THE CULTURAL SIGNIFICANCE OF ACCOUNTING 275-77 (1998).

317. COFFEE, *supra* note 5, at 133 (describing the Big Eight's opposition to efforts to limit pooling); JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET 418-30 (3d ed. 2003).

318. COFFEE, *supra* note 5, at 141-42.

319. *See id.* at 120, 123; PREVITS & MERINO, *supra* note 316, at 181-82. Accounting firms began offering tax advisory services following the enactment of federal income tax law in 1913. COFFEE, *supra* note 5, at 120; PREVITS & MERINO, *supra* note 316, at 181-82.

320. Accountants represent their clients before the IRS in non-criminal tax proceedings. *See* 31 C.F.R. § 10.3(b) (2009).

321. Such services include business appraisal and valuation, bookkeeping, litigation support, and financial information systems design and implementation. Much of these non-audit services were restricted (although not completely banned) by section 201 of Sarbanes-Oxley. Sarbanes-Oxley Act of 2002 § 201(a), 15 U.S.C. § 78j-l(g)(h) (2006).

322. MARK STEVENS, THE BIG SIX: THE SELLING OUT OF AMERICA'S TOP ACCOUNTING FIRMS 105 (1991). To be sure, by 2000, this industry trend toward consulting had begun to reverse when accounting firms began disposing of their non-tax consulting divisions. Nonetheless, Deloitte & Touche, for example, continues to market consulting services, and accounting firms in general continue to derive significant revenues from consulting. *See*

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the accounting firms that we expect to act as public watchdogs have acted more like the precious lapdogs of the managers who feed them.[323]

In sum, litigators engage in some disinterested evaluation and auditors engage in conduct that resembles advocacy. Whether they're formally supposed to or not is beside the point. The goal here is merely to spell out descriptively the ways in which flesh-and-blood litigators and auditors share overlapping attributes in the real world. Flagging these similarities helps counter the bar's descriptive claim that lawyers are in fact functionally unique.

2. *Prototypes*

The strategy above—of contesting attributes—is obvious. Less obvious is the strategy for activating alternative prototypes, which is a technique suggested by a cognitive science approach to analyzing the bar's rhetoric. In other words, why not replace the litigator and the auditor?

a. Replacing the litigator

The bar's sharp emphasis on the litigator makes us forget the non-litigating lawyers who regularly perform disinterested evaluations and certifications as part of their core competencies. Take, for example, those lawyers practicing corporate and securities law (corporate lawyers).[324] Corporate lawyers typically serve as quarterbacks or "field marshals"[325]

Alvin A. Arens & Randal J. Elder, *Perspectives on Auditing Education After Sarbanes-Oxley*, 21 ISSUES IN ACCT. EDUC. 345, 348 (2006).

323. To be sure, general audit quality may have improved since Sarbanes-Oxley ended the self-regulation of the accounting profession and restricted the provision of certain non-audit services believed to have impaired auditor independence. For a discussion of Sarbanes-Oxley's restriction (in section 201) on certain non-audit consulting services and its likely effects, see Robert A. Prentice & David B. Spence, *Sarbanes-Oxley as Quack Corporate Governance: How Wise Is the Received Wisdom?*, 95 GEO. L.J. 1843, 1891 (2007). Nonetheless, there remains reason for caution in light of the fact that not all conflicts of interest were banned. *See* Arens & Elder, *supra* note 322, at 348 (summarizing what Sarbanes-Oxley failed to proscribe, including tax consulting services).

324. Although usage varies somewhat, for the purposes of this Article, I will adopt the most prevailing usage of the term "corporate lawyers" to describe those *transactional* lawyers who specialize in corporations and securities law and assist companies in business planning and structuring corporate finance transactions. Since more specialized types of lawyers are typically experts in the fields of broker–dealer compliance and regulation, investment management, and securities litigation and enforcement, I mean to exclude them from this definition of "corporate lawyers." A useful reference point is the law firm of Wilmer Cutler Pickering Hale and Dorr LLP, which boasts an extraordinarily wide range of capabilities on matters relating to securities laws. It has a "Corporate and Transactional" practice area, which handles private and public corporate financings, including venture financings and public offerings. *See* Wilmer Hale, Corporate and Transactional, http://www.wilmerhale.com/corporate/ (last visited Feb. 17, 2010). In contrast, the "securities" practice area handles broker–dealer compliance and regulation, investment management, and litigation and enforcement, which are also excluded from my definition of "corporate lawyers." *See* Wilmer Hale, Securities, http://www.wilmerhale.com/securities/ (last visited Feb. 17, 2010).

325. A. A. Sommer, Jr., Comm'r, SEC, The Emerging Responsibilities of the Securities Lawyer, *supra* note 46 ("[T]he registration statement has always been a lawyer's document and with very, very rare exceptions the attorney has been the field marshall [sic] who coordinated the activities of others engaged in the registration process . . . .").

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of the public offering process. For public offerings, corporate lawyers are regularly retained to conduct extensive factual investigations of the corporate issuer for the purpose of verifying the accuracy of the issuer's registration statement filed with the SEC. This "due diligence" has been operationalized into an elaborate set of standard verification procedures that law firms have developed over time.[326]

When performing due diligence, the corporate lawyer systematically corroborates facts asserted in the company's registration statement.[327] For example, she may verify that the corporate issuer holds valid, unexpired leases for every property that it purports to occupy. For statements requiring evaluative judgment, such as statements describing and assessing the particular risks associated with the issuer's business,[328] the process is more complex. The lawyer typically discusses such statements with management and assesses them from the perspective of a reasonable investor.[329] Any lawyer who has performed due diligence on behalf of her clients recognizes that she has engaged in disinterested evaluation, which draws on precisely the same truth-searching and fact-corroborating faculties that auditors employ for an audit.

Corporate lawyers also provide certifications to their clients or counterparties in connection with public offerings.[330] This certification, known as a Rule 10b-5 or "negative assurance" opinion, assures the opinion recipient (the client or counterparty) that the lawyers are not aware of any material misrepresentation or omission by the issuer in the registration statement.[331] Lawyers provide such a certification on the basis of the due diligence that they've performed. Indeed, the certification is useless unless the lawyer has undertaken a disinterested evaluation.

326. Kraakman, *supra* note 5, at 82-83. Although the scope of due diligence will vary from firm to firm and from client to client, lawyers may be involved in legal, business, financial, and, sometimes, accounting due diligence. *See* Valerie Ford Jacob, *The Due Diligence Process from the Underwriter's Perspective*, *in* CONDUCTING DUE DILIGENCE IN M&A AND SECURITIES OFFERINGS 2008, at 89, 96-104 (PLI Corp. Law & Practice, Course Handbook Ser. No. 14933, 2008). See *infra* note 348 and accompanying text for an explanation of why due diligence is performed.

327. COFFEE, *supra* note 5, at 349.

328. A description of the material risks of investing in the issuer's securities is located in the "Risk Factors" section of the registration statement. *See* Steven V. Bernard et al., *Risk Factors Disclosure and the Private Securities Litigation Reform Act*, *in* SECURITIES FILINGS 2007, at 53, 55-56 (PLI Corp. Law & Practice, Course Handbook Ser. No. 11099, 2007).

329. See *infra* note 349 for discussion of the "reasonable investor" standard.

330. Underwriters generally require both their own counsel as well as issuer's counsel to release a certification. *See* Jacob, *supra* note 326, at 103.

331. John C. Coffee, Jr., *Can Lawyers Wear Blinders? Gatekeepers and Third-Party Opinions*, 84 TEX. L. REV. 59, 64 (2005); ABA Task Force on Sec. Law Opinions, *Negative Assurance on Securities Offerings*, 59 BUS. LAW. 1513-16 (2004) (noting that this opinion practice has been adopted for registered offerings, including short form registrations on Form S-3 and take-downs from shelf registrations under Rule 415, and certain unregistered offerings, such as Rule 144A and Regulation S offerings).

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b. Replacing the auditor

Similarly, the bar's emphasis on the auditor prototype veils the existence of various other gatekeepers who in the real world may provide even less disinterested evaluation than auditors. Take, for example, investment bankers, who may be the capital markets' most important gatekeepers.[332] They are regularly retained to render fairness opinions about the valuation of target companies in connection with major acquisitions.[333] Although everyone agrees that they are supposed to be objective when performing this function,[334] investment bankers have been known to fall short. They have been criticized and held liable by courts for delivering unreliable opinions that were biased toward the valuation positions held by their clients' management.[335] In short, investment

332. Investment bankers are primarily regulated and sanctionable by the Financial Industry Regulatory Authority (FINRA, formerly the National Association of Securities Dealers), which is monitored by the SEC. *See* Order Approving a Proposed Rule Change Relating to a New Limited Representative Registration Category for Investment Banking Professionals, Exchange Act Release No. 59,757, 74 Fed. Reg. 18,268 (Apr. 21, 2009). Also, the SEC can apply a wide range of sanctions against investment bankers. It may initiate administrative proceedings to revoke a broker–dealer's registration. *See* Securities Exchange Act of 1934 § 15(b), 15 U.S.C. § 78o(b)(4) (2006). The SEC may also suspend or expel the investment banker from a national securities exchange or FINRA. *See id.* §§ 19(a)(3), 15A(1)(2), 15 U.S.C. §§ 78o-3(l), 78s(a)(3). Investment bankers are probably the capital markets' most important gatekeepers in terms of securities anti-fraud liability. Steven P. Marino & Renee D. Marino, *An Empirical Study of Recent Securities Class Action Settlements Involving Accountants, Attorneys or Underwriters*, 22 SEC. REG. L.J. 115, 174 (1994).

333. A "fairness opinion" is an opinion based on a careful valuation of the target company that the proposed deal consideration is "fair from a financial point of view" to the shareholders. *See* David M. Silk & David A. Katz, *Takeover Law and Practice 2001*, *in* DOING DEALS 2001: UNDERSTANDING THE NUTS AND BOLTS OF TRANSACTIONAL PRACTICE 9, 47 (PLI Corp. Law & Practice, Course Handbook Ser. No. B0-00VN, 2001); Steve J. Cleveland, *An Economic and Behavioral Analysis of Investment Bankers When Delivering Fairness Opinions*, 58 ALA. L. REV. 299, 301-02 (2006). Fairness opinions are usually issued to the target company, although they may also be issued to the acquirer corporation if, for example, the transaction is an exchange offer and not a cash-out merger. A "fair" price is generally understood to mean "a price within the range that a reasonable and prudent board would accept" in similar circumstances. *See* Lucian Bebchuk & Marcel Kahan, *Fairness Opinions: How Fair Are They and What Can Be Done About It?*, 1989 DUKE L. J. 27, 33 n.34; *see also id.* at 30-44 (discussing alternative definitions).

334. While everyone agrees that investment bankers should be disinterested in this role, not everyone agrees that they should be liable for faulty fairness opinions. For various views, see, for example, COFFEE, *supra* note 5, at 2 (identifying the investment banker as gatekeeper when giving a fairness opinion); William J. Carney, *Fairness Opinions: How Fair Are They and Why We Should Do Nothing About It*, 70 WASH. U. L. Q. 523, 525 (1992) (arguing against imposing gatekeeper liability on investment banks for fairness opinions and maintaining that fairness opinions "assur[e] the continued application of the business judgment rule during an era when it has been under severe attack"); Ted J. Fiflis, *Responsibility of Investment Bankers to Shareholders*, 70 WASH. U. L.Q. 497, 497 (1992) (advocating gatekeeper liability for investment banks rendering fairness opinions).

335. *See, e.g.*, Robert A. Prentice, *The SEC and MDP: Implications of the Self-Serving Bias for Independent Auditing*, 61 OHIO ST. L.J. 1597, 1623 (2000) (noting criticisms of fairness opinions as "made-to-order recommendations . . . that support managers' pre-established positions," "virtually worthless," and a "deceit upon the investing public and the marketplace generally"); John S. Rubenstein, *Merger & Acquisition Fairness Opinions: A Critical Look at Judicial Extensions of Liability to Investment Banks*, 93 GEO. L.J. 1723, 1726-27 (2005); *id.* at 1729-41 (summarizing case law imposing liability on investment

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bankers have sometimes acted more as managerial rubber stamps than as gatekeepers watching out for shareholders' interests.

As another possible prototype of a gatekeeper, consider securities analysts,[336] who have historically been regarded as public watchdogs[337] for evaluating and making recommendations to investors about companies' securities.[338] Although everyone agrees that they are supposed to be objective and truthful, securities analysts have been accused of publicly pumping stocks that they privately disparaged.[339] In a prominent example, securities analysts paid a whopping $1.4 billion in penalties to New York authorities and agreed to structural reforms to ensure the independence of securities analysts.[340] As noted by John Coffee, these securities analysts had acted "more like cheerleaders than objective umpires."[341]

As a concrete suggestion, instead of litigators and auditors, the prototypes of corporate lawyers and investment bankers (or securities analysts) could be activated. Both investment bankers and securities analysts bear

bankers). The unreliability of some fairness opinions may be due to conflicts of interest that compromise objectivity, such as the bundling of an opinion fee with the larger "success fee," payable only if the transaction closes. Ann Davis & Monica Langley, *Open Secrets—Good Reviews: Opinions Labeling Deals "Fair" Can Be Far From Independent*, WALL ST. J., Dec. 29, 2004, at A1; *see* Rubenstein, *supra*, at 1726-29 (summarizing conflicts of interest).

336. Securities analysts are regulated by the FINRA and the New York Stock Exchange, self-regulatory agencies that are monitored by the SEC, as well as the SEC itself. *See* COFFEE, *supra* note 5, at 245 (explaining the regulation of analysts employed by broker–dealers).

337. *See, e.g.*, Dirks v. SEC, 463 U.S. 646, 658 (1983) (describing securities analysts as "ferret[ing] out" information to help investors). Only recently has scholarly commentary focused on the securities analyst as a capital markets gatekeeper. Under the more narrow definition of "gatekeeper" adopted in this Article ("private intermediaries who can prevent harm to the securities markets by disrupting the misconduct of their client representatives"), only securiteis analysts employed by the issuer's investment bank would technically qualify as gatekeepers.

338. *See* Jill Fisch & Hillary Sale, *The Securities Analyst as Agent: Rethinking the Regulation of Analysts*, 88 IOWA L. REV. 1035, 1040-43 (2003) (describing the role of analysts).

339. In 2002, New York Attorney General Eliot Spitzer announced that high-profile securities analysts had publicly recommended that investors buy stocks that they had privately disparaged, even referring to touted stocks as "dogs" or "junk" in internal e-mails. Fisch & Sale, *supra* note 338, at 1037. As it turned out, the objectivity of securities analysts had been infected by (among other things) conflicts of interest, including the fact that analysts often reported on companies who happened to be the underwriting clients of their firms or whose stocks they personally owned. *See id.* at 1043-56; *see also* Robert A. Prentice, *The Inevitability of a Strong SEC*, 91 CORNELL L. REV. 775, 789-92 (2006). In addition, excessive optimism had clouded the objectivity of securities analysts. Fisch & Sale, *supra* note 338, at 1048.

340. *See* Press Release, SEC, NY Attorney General, NASD, NASAA, SEC NYSE and State Regulators Announce Historic Agreement to Reform Investment Practices: $1.4 Billion Global Settlement Includes Penalties and Funds for Investors (Dec. 20, 2002), *available at* http://www.sec.gov/news/press/2002-179.htm; *see also* Joint Press Release, SEC et al., Ten of Nation's Top Investment Firms Settle Enforcement Actions Involving Conflicts of Interest Between Research and Investment Banking (Apr. 28, 2003), *available at* http://www.sec.gov/news/press/2003-54.htm. Also, additional regulations have been enacted to enhance analyst objectivity. *See* Fisch & Sale, *supra* note 338, at 1037-38, 1061-71 (summarizing regulations).

341. John C. Coffee, Jr., *A Course of Inaction: Where Was the SEC When the Mutual Fund Scandal Happened?*, 2004 LEGIS. AFF. 46, 46.

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some gatekeeping responsibilities, so why shouldn't the similarly situated corporate lawyer? Even if we stick with auditor to represent the category of gatekeeper, by bringing the *corporate lawyer* to mind, we see striking similarities in the context of public offerings. First, as shown above, both auditors and corporate lawyers perform disinterested evaluations to ensure the accuracy of the registration statement in accordance with the respective regulations in the Securities Act of 1933.[342] Second, both auditors and corporate lawyers are required to be named in the issuer's registration statement, which effectively puts investors on notice that the corporate issuer has been examined by professionals.[343] Third, both auditors' and corporate lawyers' disinterested evaluations and certifications benefit public investors.[344]

To be sure, auditors are required by law to perform their disinterested evaluations and certifications and to do so explicitly for the benefit of public investors.[345] By contrast, no law affirmatively mandates that lawyers perform these functions or invites investors to rely on lawyers' Rule 10b-5 certifications.[346] But what the law has sought to encourage directly with respect to auditors, it has done so indirectly with respect to lawyers. By creating a private cause of action under section 11 of the Securities Act of 1933 (section 11) that enables investors to sue all key players in the public offering process (except for lawyers) for material errors found in the company's registration statement,[347] the law has furnished strong incentives for these players to use lawyers and to delegate to them the tasks of disinterested evaluation and certification.[348] In addition, by con-

342. Regulation S-X applies to the financial statements and Regulation S-K applies to all other portions of the registration statement. *See* 17 C.F.R. §§ 210.1-01, 229.10 (2009).

343. *See* Securities Act of 1933 Schedule A, 15 U.S.C. § 77aa, Item 23 (2006) (requiring disclosure of "the names and addresses of counsel who have passed on the legality of the issue"); *id.* Items 25, 26 (certification by accountants); *see also* Securities Exchange Act of 1934, 15 U.S.C. §§ 78m(a)(2), 78m(b), 78n (2006).

344. *See* John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1296-97 (2003).

345. *See id.* at 1310 (noting that no SEC rule expressly requires lawyers to perform due diligence in connection with the preparation of disclosure documents).

346. *Id*. at 1310; *see also* JAMES D. COX ET. AL, SECURITIES REGULATION: CASES AND MATERIALS 505 (2008) (noting the omission of lawyers as section 11 defendants); Coffee, *supra* note 344, at 1312 ("Alone, the attorney escapes and need not certify in any way as to the accuracy of the client's disclosures."); Richard R. Howe, *The Duties and Liabilities of Attorneys in Rendering Legal Opinions*, 1989 COLUM. BUS. L. REV. 283, 287 (noting that lawyers' Rule 10b-5 opinions "are not addressed to the public and the public is not entitled to rely upon them"). However, the regulations do require lawyers to issue and file as an exhibit a very limited certification. *See* Item 601, Exhibits of Regulation S-K, 17 C.F.R. § 229.601(b)(5) (2009) (requiring the inclusion as an exhibit of "[a]n opinion of counsel as to the legality of the securities being registered, indicating whether they will, when sold, be legally issued, fully paid and non-assessable, and, if debt securities, whether they will be binding obligations of the registrant").

347. *See* Securities Act of 1933 § 11, 15 U.S.C. § 77k(a) (2006).

348. Due diligence is performed by lawyers for both underwriters and issuers, although underwriters' counsel typically engage in the most formal and comprehensive undertaking, except in shelf registrations under SEC Rule 415. *See* Christian A. Young, *Looking Back on WorldCom: Addressing Underwriters' Due Diligence in Shelf Registration Offerings and the Need for Reform*, 40 SUFFOLK U. L. REV. 521, 521 (2007). Due diligence enables underwriters to prove that they met their screening obligations to public investors—that they

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ditioning relief from section 11 liability on due diligence standards that reference the perspective of the reasonable investor, the law has ensured that lawyers, to whom these crucial functions have been delegated, fully consider investor interests.[349] Although the securities bar will predictably demur, the reality is that when corporate lawyers perform disinterested evaluations for their clients or issue certifications for their clients or counterparties, lawyers are in fact assisting them in discharging their investigatory duties to the investing public.[350]

In sum, by highlighting real world overlaps in attributes and by activating alternative prototypes, the mental distance between the categories of lawyer and gatekeeper can be significantly reduced. We may come to see the situation more like this:

had conducted a "reasonable investigation" which had formed the basis of their reasonable belief in the accuracy of the company's assertions. *See* 15 U.S.C. § 77k(b) (2006); COX ET AL., *supra* note 346, at 483-84 (summarizing the various affirmative defenses available to eligible section 11 defendants). Due diligence enables the issuer to minimize material errors for which it would normally be strictly liable. COX ET AL., *supra* note 346, at 483. Also, due diligence enables the issuer's directors and officers to establish their due diligence defenses. *Id.* Of course, there are reasons other than establishing a defense to civil liability for conducting due diligence. For example, due diligence enables underwriters to evaluate the risks associated with the particular transaction, which may result in the deal being restructured, delayed, or terminated and what, if any, "third party consents or approvals are necessary in order to consummate the transaction." *See* Jacob, *supra* note 326, at 93.

349. The perspective of the reasonable investor is prescribed by statute as the standard of liability for section 11 lawsuits. Section 11(c) clarifies that "in determining . . . what constitutes a reasonable investigation and reasonable ground[s] for belief, the standard of reasonableness shall be that required of a *prudent man in the management of his own property*." Securities Act of 1933 § 11(c), 15 U.S.C. § 77k(c) (2006) (emphasis added). Accordingly, courts have employed that standard in determining liability for section 11 defendants. *See, e.g.*, *In re* WorldCom Inc. Sec. Litig., 346 F. Supp. 2d 628, 662-63 & n.41 (S.D.N.Y. 2004) (citing the standard and section 11). Also, since the overriding purpose of the lawyer's due diligence is to minimize the section 11 liability of her clients, any competent lawyer would consider the perspective of a potential section 11 class action plaintiff: a reasonable investor. *See id.* Further, failure to catch a material misstatement or omission in the company's registration statement may subject the lawyer to a malpractice claim by the client (the issuer or the underwriter). *See* Darrel A. Rice & Marc I. Steinberg, *Legal Opinions in Securities Transactions*,16 J. CORP. L. 375, 388, 410 (1991). Conversely, the successful identification of a misstatement may win the praise of clients and enhance the lawyer's reputation. For example, Sullivan & Cromwell garnered praise after it advised its underwriter client, Goldman Sachs & Co., that the financial statements of Penn Central (which later declared bankruptcy) were not reliable. *See* COFFEE, *supra* note 5, at 235 n.27.

350. Courts have noted that receipt of a lawyer's certification (Rule 10b-5 opinion) is one factor in evaluating whether underwriters have satisfied their investigatory duties. *See* Jacob, *supra* note 326, at 103. If the opinion is addressed to the directors of the issuer, it assists them in establishing a due diligence defense. *See* Howe, *supra* note 346, at 287; Richard W. Painter, *Toward a Market for Lawyer Disclosure Services: In Search of Optimal Whistleblowing Rules*, 63 GEO. WASH. L. REV. 221, 226 n.19 (1995). For the proposition that underwriters have duties to public investors, see *In re WorldCom Inc. Securities Litigation*, 346 F. Supp. 2d at 662-63 (citing the SEC's statement that "[t]he underwriter who does not make a reasonable investigation is derelict in his responsibilities to deal fairly with the investigating public").

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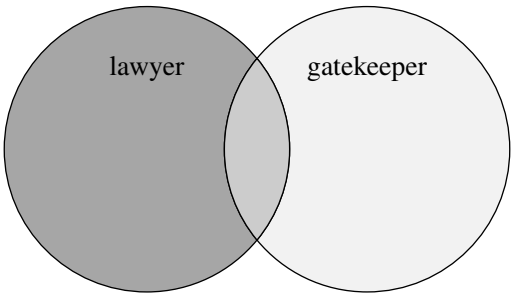

Having disrupted the automatic tendency to associate lawyers with litigators engaged in zealous advocacy, on the one hand, and gatekeepers with auditors engaged in disinterested evaluation and certification, on the other, the bar's descriptive claim that lawyers are functionally unique is no longer self-evident. As a consequence, the descriptive basis for lawyer exceptionalism has been undermined.

B. Clarifying the Client

Above, I've argued that the bar's rhetoric conjures up the prototype of the human manager to represent the category of clients. Indeed, the bar's comments mistake who the true client is. I've also argued that this confusion fuels the bar's normative claim that lawyers should be free to perform their noble role as zealous advocates without competing loyalties to the state.

The straightforward debiasing response is to remind lawyers of what they learned in law school: the client (and not the senior managers) is the corporation, and scofflaw managers are nothing more than disloyal co-agents. Accordingly, it is the corporate enterprise and its harmed shareholders who deserve the solicitude that lawyers have overwhelmingly shown for errant managers.[351] But more importantly for purpose of this Article, clarifying the identity of the client renders the bar's normative claim irrelevant. After all, section 307 of Sarbanes-Oxley and Part 205 do not infringe upon the lawyer's duties to her true client—the

351. Comment letters evince solicitude for misbehaving managers by downplaying the graveness of a material violation, asserting the likelihood of only Type I errors (false positives) and ignoring Type II errors (false negatives). *See, e.g.*, Letter from 77 Law Firms, *supra* note 143 ("The threat of withdrawal thus may effectively force a client to acquiesce in following the lawyer's advice even when in good faith it strongly disagrees with the advice and the advice may even be wrong or highly debatable."); Letter from 79 Law Firms, *supra* note 131 ("Significantly, clients will understand the potential adverse consequences of consulting counsel and thereafter having an honest disagreement with that counsel."); Letter from the Ass'n of the Bar of the City of N.Y. (2003), *supra* note 142 ("In fact, if numerous public disclosures turn out to be the result of nothing more than over-anxious lawyers allowing their conservatism to result in disagreements with clients resulting in public disclosure, clients as a whole will become more and more leery of working with, or disclosing information to, cautious counsel and the risk of failures to comply with laws will only increase."); Letter from the Ass'n of the Bar of the City of N.Y. (2002), *supra* note 122 ("Reasonable people, even prudent attorneys, can differ in drawing the conclusion that an officer or employee has breached a duty or broken a law.").

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corporation.[352]

We can further point out that mandatory noisy withdrawal was not only consistent with most states' professional ethics codes when Part 205 was enacted,[353] but it also remains entirely consistent with the common law of agency. After all, the lawyer is an agent of its principal, the corporation. According to the Restatement of Agency, an agent is privileged to reveal confidential information in the protection of a "superior interest of himself or of a third person," including information that the "principal is committing or about to commit a crime."[354] In other words, agency law

352. *See supra* note 241 and accompanying text.

353. As of 2002, the states generally had in place more public-spirited rules than what the ABA had adopted in its Model Rules. Every state required the lawyer to withdraw from representation to avoid assisting the commission of a crime or fraud or to avoid violating professional conduct rules or "other law." *See* Cramton et al., *supra* note 86, at 783; Letter from Marshall L. Small, Senior Counsel, Morrison & Foerster LLP to Jonathan G. Katz, Sec'y, SEC (Dec. 17, 2002), *available at* http://www.sec.gov/rules/proposed/s74502/mlsmall1.htm (presenting a Schedule of Jurisdictions Requiring Withdrawal to Avoid Assisting in Commission of Crime or Fraud). Furthermore, every state permitted withdrawal in many other situations, some far less serious than the situations contemplated by Part 205. For example, lawyers are permitted to withdraw whenever "the client insists upon pursuing an objective the lawyer considers repugnant or imprudent." MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (1983) (the language of the rule was changed in 2002); GILLERS & SIMON, *supra* note 249, at 181 (detailing state versions of Model Rule 1.16 governing withdrawals). With respect to "noise," as of 2002, forty-one states allowed (and four of them required) the lawyer to disclose confidential information to third parties to prevent a criminal fraud. *See* THOMAS D. MORGAN & RONALD D. ROTUNDA, SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 161-66 (2003) (detailing state versions of Model Rule 1.6 as of February 2002); Cramton et al., *supra* note 86, at 784. Also, thirty states allowed (and two of them required) disclosure to prevent a crime. Eleven states allowed (and two of them) required disclosure to prevent a non-criminal fraud. As noted by Morgan and Rotunda, "In some states, criminal statutes may be interpreted broadly, such that virtually any fraud likely to result in injury to the financial interest or property of another would be a crime." MORGAN & ROTUNDA, *supra*, at 161. Forty-four states allowed (and three of them required) a lawyer to disclose confidential information relating to a client's ongoing crime or fraud. MORGAN & ROTUNDA, *supra*, at 161-66; Cramton et al., *supra* note 86, at 784.

There is, however, a potential argument that the SEC's other *permissive* noisy withdrawal proposal (for a past, and not ongoing, material violation that is likely to have caused substantial harm to the company and its investors) might have conflicted with certain states' rules that prohibit disclosure of past (not ongoing) violations. *See supra* note 119. That rule for *past* material violations *arguably* went further than the majority of state jurisdictions, if one deems "noise" to be tantamount to "disclosure." Only eighteen states allowed (and two of them required) the lawyer to disclose confidential information to rectify or mitigate a *past* crime or fraud in which the lawyer's services were used. *See* MORGAN & ROTUNDA, *supra*, at 161-66. That said, the proposed optional noisy withdrawal provision would have rarely been triggered. Since a good portion of undisclosed "material violations" (as defined by 17 C.F.R. § 205.2(i) (2009)) are likely be deemed securities frauds, which—by their very nature—will continue to mislead new investors until the fraud is publicly disclosed (or at least until a significant amount of time has elapsed), those undisclosed material violations are likely to be classified as "ongoing" violations rather than as "past" violations. As a result, the provision more likely to be triggered would have been the *mandatory* noisy withdrawal provision for ongoing or future violations rather than the optional noisy withdrawal provision for past violations. *See* Cramton et al., *supra*, note 86, at 783 (discussing the "ongoing" nature of undisclosed frauds).

354. RESTATEMENT (SECOND) OF AGENCY § 395 cmt. f (1958); *see* Hale v. Mason, 160 N.Y. 561, 567 (1899) (noting that the trustee of the company performed "an obvious duty" when disclosing to third parties "material facts in regard to the condition" of the company, which "had been concealed from them" by the president of the company); Willig v. Gold,

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allows an agent to reveal confidential information to prevent or mitigate serious harm to third parties or the agent himself. Thus, *a fortiori*, an agent would be privileged to reveal confidential information relating to a co-agent's commission of crime for purposes of averting or mitigating harm to its own *principal*.

In fact, the situations that implicate mandatory noisy withdrawal are precisely those situations where significant harm to the principal is threatened. For material violations that amount to a securities fraud (which can constitute a crime),[355] the corporation's own shareholders are among those who are defrauded and harmed.[356] And, once the fraud is revealed,[357] it is the corporate principal that must ordinarily compensate the defrauded shareholders[358] through judgment or settlement. This po-

75 Cal. App. 2d 809, 814 (1946) (finding no case law to support the proposition that "an agent is under a legal duty not to disclose his principal's dishonest acts to the party prejudicially affected by them"); RESTATEMENT (THIRD) OF AGENCY § 8.05 cmt. c (2006).

355. The proposed noisy withdrawal requirement, which the SEC ultimately retracted, would have been triggered only if (i) the lawyer did not receive an appropriate response to her up-the-ladder report, and (ii) she "reasonably believe[d] that a material violation [was] ongoing or [was] about to occur and [was] likely to result in substantial injury to the financial interest or property of the issuer or of investors." SEC Initial Rule, *supra* note 59, at 71,705-06 (discussing what is now 17 C.F.R. § 205.3(d)(1) (2009)). Given the definition of "material violation" under the rules, only those unrectified violations serious enough to potentially be classified as a securities fraud (which can amount to a crime) or other crime would likely have triggered the lawyer's duty of noisy withdrawal. *See id.* Under Part 205, the "materiality" of alleged violations is defined by reference to the federal securities case law interpreting section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. *See* Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988). Accordingly, the alleged violation of federal or state law or breach of fiduciary duty must be serious enough that there is a "substantial likelihood that the disclosure" of such violation "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *See Basic Inc.*, 485 U.S. at 231-32; TSC Indus. v. Northway, Inc., 426 U.S. 438, 448 (1976), *see also* SEC Final Rule, *supra* note 114, at 6303 n.59 (citing *Basic Inc.*, 485 U.S. at 281-86 and *TSC Indus.*, 426 U.S. at 438); SEC Initial Rule, *supra* note 59, at 41,679 n.35 and accompanying text (citing the same precedents but defining "material" as that of "which a reasonable investor would want to be informed before making an investment decision"). To be sure, "a duty to disclose . . . does not arise from the mere possession of nonpublic market information" and, thus, cannot in and of itself be deemed as a securities fraud. *See* Chiarella v. United States, 445 U.S. 222, 235 (1980). That said, the exceptions "threaten to swallow up the rule." *See* COX ET. AL, *supra* note 346, at 691, 694; Donald C. Langevoort & G. Mitu Gulati, *The Muddled Duty to Disclose Under Rule 10b-5*, 57 VAND. L. REV. 1639, 1643-44 (2004). Since it is a crime for any person to "willfully" violate any statutory provision, rule, or regulation of the federal securities laws, some of the material violations would be classifiable as criminal violations. Also, a criminal case can be made against a defendant for mail or wire fraud or violation of the Racketeering Influenced and Corrupt Organizations Act. *See* COX ET AL., *supra* note 346, at 862-63; *see also* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1487-99 (noting the broad and expanding scope of U.S. corporate criminal liability under environmental, antitrust, securities, and other laws).

356. Arlen & Carney, *supra* note 4, at 692-93.

357. *Id.* at 701 (noting reasons why ultimate detection of securities fraud is relatively certain).

358. *See* Securities Act of 1933 § 11(a), 15 U.S.C. § 77k(a) (2006) (providing for strict liability of an issuer for false statements in a registration statement); *id.* § 12(a), 15 U.S.C. § 77*l*; *id.* § 15, 15 U.S.C. § 77o (control person liability); Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j (2006) (broadly prescribing liability for any "person"); *id.* § 20(a), 15 U.S.C. § 78t(a) (control person liability); Robert A. Prentice, *Conceiving the Inconceivable and Judicially Implementing the Preposterous: The Premature Demise of Respondeat*

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tentially enormous payout, of course, hurts the corporation's bottom line directly (by impacting earnings) and indirectly (through a negative share price adjustment).[359]

For material violations that do not amount to securities fraud, civil or criminal liability is nonetheless likely to be imputed to the corporate principal—either expressly by statute or through respondeat superior.[360] Also, in the long run, material violations undermine the company's share price by impairing the company's reputation for financial integrity,[361] which in turn may hamstring the company's ability to obtain financing down the road.[362]

Therefore, under agency law, mandatory noisy withdrawal calculated to avert or mitigate harm to the corporate principal is entirely consistent with the agent's duty of loyalty. Moreover, after acknowledging that the client is the corporation, it becomes clear that noisy withdrawal may be the only proper way to discharge one's duty of loyalty where intra-corporate remedies prove futile. As Stephen Gillers has observed, telling the lawyer that she must clam up while high-level co-agents are harming the client is nonsensical, given that "[w]e would never tolerate that instruction to a lawyer who has an individual client."[363] Just because the client is a corporation (and not an individual) does not justify adopting a double standard that sacrifices the firm's interests in favor of disloyal co-agents.

Also, clarifying the identity of the true client significantly deflates the emotional appeal of the bar's normative claim. As Robert Gordon has observed:

> [T]hough businessmen running large public corporations love to grumble about the SEC, the EPA, and OSHA—and products-liability class-action suits—they are hardly in a position to claim that they are like Jim Crow southern blacks, or vagrants picked up and accused of crimes: powerless outcasts and victims. Big American business firms are not discrete and insular minorities. They have exceptional access to influence in legislatures, administrative agencies, and the courts through government advisory commissions, trade associations, lobbies, and lawyers.[364]

Superior Liability Under Section 10(b), 58 OHIO ST. L.J. 1325, 1327 n.8 (1997) (citing widespread appellate court support for respondeat superior liability under section 10(b) of the Exchange Act).

359. *See* Arlen & Carney, *supra* note 4, at 699 ("[R]evelation of the fraud, and of the corporation's prospective liability, has an immediate impact on the price of the issuing corporation's stock . . . ."). A downward adjustment in share price burdens the company's ability to raise capital in the equity markets on favorable terms.

360. *See* Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 858-59 (1984) (noting the dominance of enterprise liability in civil and criminal law).

361. Simon, *supra* note 265, at 1466 n.47.

362. *See* Arlen & Carney, *supra* note 4, at 701 ("Corporations relying on public markets for sources of future financing expect to be repeat players in securities markets; consequently, they would find the long-term costs of Fraud on the Market far higher than any short-term payoffs.").

363. Gillers, *supra* note 250, at 304.

364. Gordon, *supra* note 191, at 1199.

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In truth, the lawyer's client is not a vulnerable human being who faces imminent catastrophe (such as imprisonment or deportation) but rather a legally sophisticated and economically powerful organization[365] which has no "soul to be damned, and no body to be kicked."[366] Thus, it is difficult to characterize the lawyer's role as safeguarding the dignity and autonomy of her client. In truth, the client has not yet been charged with the alleged law violation and either is or will be a "repeat player" in handling these types of situations.[367] Accordingly, it is difficult to see the distinctive valor and sanctity of the lawyer's efforts when guiding her client to redress potential violations in compliance with Part 205.[368]

Finally, since the client corporation is a creature of law—a juridical person whose character the law has the power to construct[369]—why shouldn't the lawyer's relationship to that entity be constrained by duties crafted to protect the long-term interests of that entity, its shareholders, or the integrity of the capital markets?[370] After all, even the zealous ad-

365. Some will object to my characterization of public companies as legally sophisticated and economically powerful organizations and will argue that, in the context of criminal prosecutions, the power of any individual corporation is vastly outstripped by the power of the "United States of America." But this objection suffers from at least three complications. First, this objection masks the reality of many understaffed government agencies, which face tremendous opportunity costs in prosecuting any single case and especially white-collar criminal cases, which tend to be resource-intensive. *See* Seigel, *supra* note 293, at 17-20. Second, this objection overstates the vulnerability of some criminal defendants and their lawyers. As David Luban notes, there are two worlds of criminal defense lawyers: (i) "public defenders and panel attorneys working for $40 an hour" and (ii) "white-collar defense lawyers, the mob lawyers, the Miami drug bar." David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1763 (1992). Third, as pointed out in Part III.A, *supra*, it is unclear why criminal prosecution is the relevant context. After all, legitimate advocacy of criminal defense lawyers is expressly exempted from the Part 205 reporting requirements. *See* 17 C.F.R. § 205.3(b)(7)(ii) (2009); *supra* note 294 and accompanying text.

366. *See* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1980) (quoting Edward, First & Baron Thurlow, 1731–1806).

367. *See* Galanter, *supra* note 270, at 97-104 (describing the category of "repeat players" in litigation, which may include insurance companies, prosecutors and finance companies).

368. To be clear, I do not believe that corporations are bad or that advising them is tantamount to working with the devil. In fact, my fiduciary duty analysis calls for taking the entity seriously and treating corporations with the due regard that lawyers give (or are supposed to give) individual clients. *See* George C. Harris, *Taking the Entity Theory Seriously: Lawyer Liability for Failure to Prevent Harm to Organizational Clients Through Disclosure of Constituent Wrongdoing*, 11 GEO. J. LEGAL ETHICS 597, 599-600 (1998) (advocating a theory of loyal disclosures). One can believe that corporations, as collective enterprises, do tremendous good and that serving them has social value and still believe that corporate representation should be constrained by explicit duties designed to prevent harm to the corporation, its constituents, or the capital markets. Because of the limited purposes of this Article, I do not revisit the wisdom of having adopted the entity theory of legal representation for corporations (which is the current state of the law), as opposed to an alternative theory, e.g., the group theory of legal representation. Practically speaking, that ship has long sailed. I do believe, however, that a more public-spirited conceptualization of the lawyer's role is reconcilable with the entity theory of representation.

369. Gordon, *supra* note 191, at 1199-1200.

370. I do not address the issue of whether the SEC should formally designate "shareholders" or "public investors" as the explicit intended beneficiaries of lawyers' gatekeeping duties. *See* Bainbridge & Johnson, *supra* note 249, at 324 (raising the possibility of mea-

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vocacy of the litigator is constrained by explicit duties to protect the integrity of judicial proceedings.[371]

CONCLUSION

The gatekeeping wars have been going on for decades. After some scandal, the SEC attempts to place greater gatekeeping responsibilities on lawyers, who predictably backlash, and the SEC backs down. In each major battle, the details differ, and minor gains and losses are made on the battlefield. But the overall script remains the same.

A powerful component of that script is the appeal to lawyer exceptionalism—the basis for the legal profession's resistance to gatekeeping. It contends that lawyers *are* different. Accordingly, they *should* be treated differently, *sans* gatekeeping obligations. And this line of argument seems so compelling because it taps into basic categorical processing that generates a contrast effect and client confusion. Because we think of the lawyer as the litigator engaged in zealous advocacy and the gatekeeper as the auditor engaged in disinterested evaluation and certification, the contrast between the categories seems stark. Because we think that the client is the human manager, we slip easily into client confusion. It quickly becomes a stylized story of the lone wolf individual against authoritarian government, with the lawyer's virtue of loyalty on the line.

Again, the goal of this Article has not been to make the substantive case that lawyers should be gatekeepers with elevated obligations enforceable by the SEC, although I do think that the case for gatekeeping is strong.[372] To make that case would require a comprehensive cost–benefit analysis of integrating securities lawyers into a gatekeeper enforcement regime.[373] Moreover, such analysis would have to address all considerations, including the common objection that gatekeeping duties will chill

sures that "would effectively transform securities lawyers into auditors"); Coffee, *supra* note 344, at 1293, 1295 (arguing in favor of securities attorney having "guardian-like responsibilities to investors who rely upon the disclosures that the securities attorney typically prepares or at least reviews"); Gordon, *supra* note 191, at 1207-16 (advancing "an alternative conception of the corporate counselor's role"). *See generally* Coffee, *supra* note 331 (exploring the issue of whether lawyers issuing legal opinions owe a duty to the public).

371. *See supra* Part III.A.1.a.

372. As Robert Gordon has pointed out to me, lawyers are valuable to their clients to the extent, but only to the extent, that they can be trusted by constituents and third parties not to game the system in a way that damages the entity, the integrity of the capital markets, and the legal framework. Stated another way, by closing fraudulent deals and vouching for dubious transactions on the pretext that the manager is entitled to make all risk management decisions, lawyers are "squandering the stock of legitimacy and credibility" that the profession has accrued and continues to sustain through its rhetoric of public authority and responsibility. Dezalay, supra note189, at 279.

373. *See, e.g.*, Coffee, *supra* note 344, at 1302 (arguing that lawyers should be gatekeepers and noting that the social costs of exempting lawyers from gatekeeping "would be real and adverse"). To perform the cost-benefit analysis, one might consider the relative strengths and weaknesses of various gatekeeping professionals. *See* Kim, *supra* note 5, at 415-22 (setting forth a framework by which the gatekeeping potential of various professionals may be compared and applying that framework to compare inside and outside lawyers). For a proposal about how to evaluate a gatekeeper enforcement strategy, see Kraakman, *supra* note 5, at 61-66.

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lawyer–client communications.[374] Instead, my focus has been narrower: to unpack the rhetorical scripts, to lay bare their deficiencies, and to suggest how they might be neutralized.

In the end, we know that lawyers will fight to preserve a world in which their legal duties rarely, if ever, require them to take an ethical stand against errant managers. In that world, lawyers like Carter and Johnson never have to resign and can continue to do what they've always done: give advice, get paid, and watch. They can sincerely say that they are just doing their jobs—and performing a valiant service at that.[375] That world happens to be a more psychologically comfortable world where there are "no hard choices to be made, no price to be paid in the name of ethics."[376] Those who seek a different world must learn how to frame it. My suggestions are offered to help us see that world come to be.

374. The "chilling communications" objection represents the most commonly invoked cost consideration. For responses to this objection, see, for example, WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 54-62 (1998); Coffee, *supra* note 344, at 1307-10; Cramton et al., *supra* note 86, at 814-17; Simon, *supra* note 265, at 1453-55; Gillers, *supra* note 249, at 303; Kim, *supra* note 110, at 1069-71; Rotunda, *supra* note 34, at 477-78; Seigel, *supra* note 293, at 32-46.

375. *See* Rhode, *supra* note 86, at 594 ("For most attorneys, advancing client interests remains the primary means of securing financial success and professional status. A critical function of professional ideology is to make a virtue out of that necessity.").

376. Wetlaufer, *supra* note 244, at 1272.

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