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Via E-mail – [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549

Attention: Jonathan G. Katz, Secretary

Re: File No. S7-45-02  
Release Nos. 33-8150; 34-46868; IC-25829  
Implementation of Standards of Professional Conduct for Attorneys

Ladies and Gentlemen:

On behalf of the American Bar Association (the “ABA” or the Association”), I am pleased to submit this letter in response to the request of the Securities and Exchange Commission (the “Commission”) for comments on its proposals to implement Section 307 of the Sarbanes–Oxley Act of 2002 (the “Act”) as set forth in Release Nos. 33-8150, 34-46868; IC-25829 dated November 21, 2002 (the “Release”). The Commission has proposed to add Part 205 to its rules and regulations which would require attorneys appearing and practicing before the Commission to report evidence of certain material violations up-the-ladder within an organization and, under certain circumstances, require or permit them to effect a noisy withdrawal and report out. The Commission has also proposed to apply to lawyers the negligence standards for improper professional conduct now applicable to accountants under Section 4C of the Securities Exchange Act of 1934 added by Section 602 of the Act and Rule 102(e) of the Commission’s Rules of Practice. As provided in Section 3 of the Act and proposed by the Commission in Rule 205.6, a violation of Part 205 will be treated in the same manner as a violation of the Securities Exchange Act subject to the same penalties and remedies.

The ABA, with over 400,000 members throughout the U.S. and abroad, supports strong ethical standards for all lawyers, including those who practice in the corporate and securities area. Indeed, for almost one hundred years, the ABA has provided leadership in the field of legal ethics by crafting professional standards that have been adopted by the vast majority of the state and federal courts that oversee the legal profession. The original Canons of Professional Ethics were adopted by the Association in 1908. The current ABA Model Rules of Professional Conduct (the "Model Rules"), first adopted in 1983, are a comprehensive and uniform set of ethical standards for lawyers. In addition, the ABA adopted model rules for enforcement of lawyer ethical standards by state and federal courts in the 1970s.

In March of this year, my predecessor as President of the ABA, Robert E. Hirshon, created the ABA Task Force on Corporate Responsibility to examine the systemic issues relating to corporate responsibility arising out of the corporate failures we have witnessed which have shaken confidence in the effectiveness of governance and disclosure systems for public companies in the United States. This Task Force issued its Preliminary Report on July 16, 2002 addressing potential changes in corporate governance mechanisms and lawyer ethical rules designed to improve corporate responsibility and enhance public trust in corporate integrity. It has held extensive hearings throughout the country on the issues raised by the Preliminary Report and is now in the process of evaluating the comments and formulating a final report and recommendations for submission to the ABA House of Delegates.

In August of this year, Chairman Pitt invited the ABA to participate in a "thoughtful and constructive dialogue" with the Commission as it seeks to craft the rules required by Section 307 of the Act. Accordingly, in November, the ABA Board of Governors authorized me to appoint a task force for the purpose of providing comments to the Commission on this important subject. The ABA Task Force on Implementation of Section 307 of the Sarbanes-Oxley Act of 2002 (the "Task Force") is comprised of a distinguished group of attorneys and judges with expertise in the fields of legal ethics, corporate law and securities law; the members, liaisons, and staff of the Task Force are listed in Attachment 1 to this comment letter. The views expressed in this comment letter were prepared by the ABA Task Force and then approved for release by the Executive Committee of the ABA Board of Governors as the position of the Association.

## **I. Introduction**

The ABA joins the Commission in seeking to restore a culture of integrity and confidence in our financial markets that will warrant the trust of the American public. We recognize the important role lawyers play in this mission. We commend the Commission and its Staff for their efforts in responding to the requirements of Section 307 of the Act and addressing the complex issues involved in the short time period allowed by Congress. In particular, we commend the Commission for exercising restraint in not adopting a comprehensive code of professional standards but rather focusing on the obligations of attorneys to the organization as the client. While we believe that some of the Commission's proposals will adversely affect issuers' ability to obtain sound legal advice and suggest revisions accordingly, we are appreciative that the Commission and its Staff have structured the proposals in a way that facilitates identification of the issues and formulation of comments.

Our comments address principally:

- Implementation of the up-the-ladder reporting requirement mandated by Section 307.
- Noisy-withdrawal and reporting out provisions proposed in the Release that were not mandated by Section 307.
- Revision of the standard for determining improper professional conduct of attorneys that also was not mandated by Section 307.

For ease of reference, please note that the topics discussed in this letter appear in the following order:

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## II. Summary

The ABA strongly believes that lawyers have an important role in assisting clients to comply with the law and meet high standards of ethical and responsible conduct. We therefore agree that when a lawyer representing an issuer becomes aware of material violations of law that are likely to substantially injure the organization, the lawyer has a clear duty to take appropriate remedial action including, in some cases, a duty to bring the matter to the attention of the highest authority in the organization if the violation has not been remedied. These principles, outlined in Model Rule 1.13 and embraced by virtually all state and federal courts, are necessary and appropriate and serve the public interest.

By enacting Section 307 of the Act, Congress has instructed the Commission to adopt a national rule establishing minimum professional standards for lawyers appearing and practicing before the Commission, including a rule requiring lawyers to report misconduct up-the-ladder within the corporate client. This national up-the-ladder reporting requirement, which would override the reporting standard contained in Model Rule 1.13 for lawyers covered by the SEC's rules, rests on the understanding that the highest authority, typically the board, is capable of performing and in fact will perform its responsibilities. In this way, corporate governance will work effectively together with the reporting obligations of attorneys.

The rules that currently govern the professional conduct of lawyers are fashioned from the ABA's Model Rules and promulgated by state high courts, as the regulators of lawyer conduct. These rules seek to ensure that clients, including organizations, have access to independent and effective representation by counsel. An integral part of independent and effective representation is that lawyers must preserve client confidentiality subject to limited exceptions when necessary to prevent significant harm.

Our response to the Commission's Section 307 proposals is made with these considerations in mind, and we stand ready to work with the Commission to fashion final rules that serve the public interest. We agree that, with changes suggested in this letter, the up-the-ladder reporting rule required by Section 307 can be effectively implemented by the January 26, 2003 deadline. We strongly urge, however, that the Commission defer final action and at the least allow more extended comment for provisions in the proposed rules that are not specifically required by Section 307.

The following are the major issues we address in this letter:

- *Up-the-Ladder Reporting Requirements Need Better Definition.* The rules relating to up-the-ladder reporting are ambiguous and need better definition as to the circumstances under which reporting is required in order for lawyers and issuers to comply effectively with the rules. Specifically, the scope of persons proposed to be covered as "attorneys appearing and practicing before the Commission in the representation of an issuer" is too broad and would subject to the requirements of the rules persons who do not know that they are subject to the rules and who are not in a position to comply with them. These could include non-securities specialists only remotely involved with a securities matter, persons licensed as attorneys who are not acting in that capacity, and attorneys for third

parties who do not even have an attorney – client relationship with the issuer. We suggest instead a functional approach that would subject to the requirements of the rules only those lawyers with significant responsibility for the issuer’s compliance with U.S. securities law or with overall responsibility for advising on legal compliance and corporate governance matters under U.S. law.

It would be preferable if the Commission’s concept of “awareness of evidence of material violation” as the triggering standard for reporting were based on a “knowledge” standard, as currently provided in Model Rule 1.13. If the Commission should proceed with the proposed objective standard for determining from the information the attorney knows that a material violation has occurred, is occurring, or is about to occur, this standard would be more acceptable if it were applied to just the category of attorneys we propose rather than to all attorneys that would be covered under the rules as proposed.

The nature of the violations that must be reported should be better defined. They should be limited to violations related to the attorney’s representation in appearing and practicing before the Commission. Also, the term “material” should be defined as the Supreme Court has defined the term, with a clear tie to harm to the issuer. In addition, “violation of securities law” and “breach of fiduciary duty” should be defined in terms more closely related to the subject matter of SEC regulation and expertise, and “similar violation” should be defined so that it does not undermine the defining of the other terms.

- *The Rules Should Allow For More Flexibility.* The rules should be less prescriptive in requiring specific procedures to be followed and should allow issuers and law firms the flexibility to establish legal compliance procedures and policies that work for them. The requisite flexibility includes such matters as identification of a chief legal compliance officer, timing requirements, internal reporting chains, documentation requirements, and establishing which independent committees or the board as a whole is to receive and consider the required reports.
- *Defer Action on the Proposed Rules Not Required by Section 307.* Because the Commission’s noisy withdrawal and disaffirmation proposals raise complex issues that would significantly change the traditional attorney–client relationship, and because of concerns with the substance of these proposals that we identify (including uncertainty as to the effectiveness of the Commission’s attempt to maintain protection of the attorney–client privilege and conflicts with state client confidentiality obligations), we believe that the Commission, acting in the public interest, should for the present not adopt these proposals as part of an up-the-ladder reporting rule or not adopt them at all.

The Commission should instead look to the substantially improved corporate governance systems that have been developed to address legal compliance matters coupled with recognition of the requirements of existing state rules of professional conduct, and should give the Association’s efforts underway to review the related Model Rules an opportunity to proceed.

Similarly, because the Commission's proposal to extend to attorneys the negligence standard applicable to accountants for determining improper professional conduct is not required by Section 307, the Commission should, at the least, defer action on this proposal until there is an opportunity for more considered comment and Commission deliberation or should not adopt it at all. As the Commission has previously recognized, imposition of such a standard can significantly impact an attorney's ability to represent the client's interests zealously and independently before the Commission.

### III. **Limit Rulemaking to Matters Specifically Required by Section 307**

Before addressing the substance of the Section 307 proposals, we express our concern over the scope of the rulemaking the Commission has proposed to undertake in the limited time frame allowed by Congress. The ABA is concerned that adequate time has not been allowed to comment upon the proposed rules relating to noisy withdrawal and disaffirmation of documents and to extending to attorneys a negligence standard for determining improper professional conduct that are not specifically mandated by Section 307 of the Act. These proposals raise fundamental and complex policy issues. A more extended comment period would permit a more careful analysis and response by many constituencies who are or should be vitally interested in the effect of the nonmandated proposals, including public company officials and other lawyer organizations.<sup>1</sup> It would also permit more careful consideration and deliberation by the Commission. Additionally, a deferral will provide an opportunity for the ABA's review of the Model Rules now underway to be completed. There are, moreover, many difficult issues in the proposed Section 307 rules. Our comments relating to the proposals noted below will illustrate why some of the provisions that are not required to be adopted by January 26, 2003 warrant broader comment and further analysis if not omitted entirely.

Our concerns regarding the non-mandated proposals relate to serious problems that we believe would be created not only for attorneys, but also for issuers and their shareholders, including the following:

- The proposals would have the effect of interfering with the relationship of trust and confidence between clients and attorneys and thereby undermine the ability of lawyers to advise clients to comply with legal requirements.
- The uncertain effectiveness of the purported nonwaiver of attorney – client privilege, which is a critical element of requiring or permitting noisy withdrawal or disclosure, would put both attorneys and clients at risk.

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<sup>1</sup> For example, very few state bar associations are capable of responding comprehensively on the lengthy proposed rules contained in the Release within so short a time. Even within the ABA, only a few of the sections and other groups have been able to provide comments to the Task Force. In addition, U.S. and foreign companies, which will be directly affected by the proposals, need time to become aware of their potential impact and to prepare comments.

- The inclusion of investigating and defending attorneys within the reporting requirements would interfere with the ability of clients to have effective representation.
- Mandated noisy withdrawal from representation and disaffirmation of documents filed with the Commission would reduce rather than enhance legal compliance and increase the likelihood of unnecessary disruptions in securities markets.
- The creation of unnecessary, duplicative and, in some instances, contradictory standards of attorney conduct would impede effective representation of issuers.
- The burdens imposed on supervisory attorneys would create overly broad and inappropriate requirements.
- The imposition of a negligence standard on attorneys as a basis for denying the right to practice before the Commission and applying additional sanctions would interfere with the ability of counsel to effectively represent clients.

For these and the other reasons discussed below, the ABA urges the Commission to defer action on those proposals that go beyond the reporting up-the-ladder requirements of Section 307.

#### IV. **Basic Concepts**

Before addressing the proposed rules in detail, we believe it is useful to identify some basic concepts that guide our comments and should help assist the Commission's consideration of them.

- *The ABA concurs in the Commission's overall objectives and concerns.* The American Bar Association concurs with the Commission in recognizing the important role lawyers play in promoting legal compliance and the obligations that lawyers have to the organization as the client. The Model Rules incorporate these important policies. Those rules also recognize the importance of the fundamental policy that require attorneys to preserve client confidences in order to ensure access to counsel and effective representation. We therefore share the concerns expressed by the Commission at page 8 of the Release that zealous advocacy not be impaired and that companies not be discouraged from seeking and obtaining effective and creative legal advice. It is through this access to counsel that lawyers are able on an ongoing basis to counsel their clients to comply with law and to serve as ethical advisers to their clients.
- *Professional independence and preservation of the attorney-client privilege and client confidentiality are important values to be protected.* 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. Also, to have access to effective legal representation and obtain the best legal advice, clients need to feel free to confide all relevant information to counsel without undue concern that counsel will be required to disclose those confidences to others, particularly governmental agencies. Accordingly, the strong principles of attorney-client privilege and a lawyer's obligation to preserve client confidentiality, subject only to limited exceptions, have developed as a bedrock policy of our legal system. An important collateral benefit of this confidentiality policy is that it enhances the ability of lawyers to counsel legal compliance.

- *Lawyers are regulated by state and federal courts.* Recognizing the important role they play in our legal system, lawyers operate under a set of rules of professional conduct established by the highest courts of the states, territories, commonwealths and the District of Columbia.<sup>2</sup> Thus, although the ABA has developed the Model Rules for use by the states, the actual professional rules governing lawyers are adopted and administered by or under the direction of the highest court in each state and in the federal courts. This structure for regulation of lawyer professional conduct is imbedded in our federal system that recognizes the lawyer's primary role as an officer of the judicial branch of government. It also distinguishes regulation of lawyers from systems of self regulation of other professions, such as accountants. Far from being self regulated, lawyers are subject to a detailed system of regulation established by the judicial branch of government, both state and federal.
- *Existing state court rules of professional conduct, patterned on the Model Rules, protect the public interest.* The rules particularly relevant to the Commission's implementation of Section 307, relating to lawyers' conduct involving organizational clients, include:
  - Model Rule 1.13: **Organization as Client**, is the primary rule concerning the duties of a lawyer when representing an organization and the lawyer's relationship to the organization's officers, directors, employees, shareholders and other constituents. Model Rule 1.13 provides that a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. The Rule also provides that if a lawyer learns that an officer, employee, or other person associated with the organization is engaged in, or intends to engage in, a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interests of the organization. Among the enumerated measures a lawyer may employ is reporting the matter to the highest authority in the organization that can, under applicable law, act for the organization. But such reporting is not mandatory. Rather, the rule leaves it to the judgment of the lawyer to proceed as reasonably necessary under the circumstances. Section 96 of the Restatement of the Law Governing Lawyers (ALI 2000) (the "Restatement") provides standards substantially similar to Model Rule 1.13.

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<sup>2</sup> For convenience, we refer throughout this letter just to the states.

- Model Rule 1.2(d) involving the **Scope of Representation** prohibits a lawyer from assisting a client to engage in conduct that the lawyer knows is criminal or fraudulent. The Rule, however, permits a lawyer to discuss the legal consequences of proposed conduct with a client, and to assist a client to make a good faith effort to determine the validity or application of the law. Section 94(2) of the Restatement is generally to the same effect.
- Model Rule 1.16(a)(1): **Declining or Terminating Representation**, requires a lawyer to decline or withdraw from representation of a client if the representation will result in violation of the rules of professional conduct (including Rule 1.2(d) and Rule 4.1), or other law.
- Model Rule 4.1: **Transactions With Persons Other Than Client**, prohibits a lawyer from knowingly failing to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.
- Model Rule 1.6: **Confidentiality of Information**, in paragraph (a), prohibits a lawyer from revealing information relating to the representation of a client except in specified circumstances. Rule 1.6, however, under paragraph (b)(4), permits a lawyer to reveal client confidences “to comply with other law or a court order.” Furthermore, versions of Model Rule 1.6 that have been adopted in most states permit a lawyer to disclose client confidences to prevent, mitigate, or rectify the consequences of a client’s criminal or fraudulent conduct that is likely to result in substantial financial loss. This standard is substantially similar to Section 67 of the Restatement. The ABA’s Task Force on Corporate Responsibility is presently reviewing Model Rule 1.6 in this regard.
- *Consistent state and federal rules governing lawyer conduct would be beneficial.* As an optimal goal, the Commission should seek to make its rules under Section 307 as consistent as possible with the prevailing state court rules of professional conduct. Doing so will help avoid conflicts between SEC requirements and state mandates and will facilitate compliance by lawyers. Consistent rules will also enhance the ability of state authorities to enforce compliance.
- *The organization, and not its various constituencies, is the client.* Section 307 and the SEC’s proposals to implement it focus on the obligations of lawyers to the organization as the client. The Commission, in the Release, as distinguished from some earlier statements, correctly characterizes the organization, and not its shareholders or other constituencies, as the client. This distinction is important in identifying to whom a lawyer owes duties – namely the organization and not particular shareholders, whose interests may differ. The interests of shareholders are, of course, relevant in assessing the consequences of matters affecting the organization – for example, whether a violation is material – but not for defining a duty.

- *Attorney responsibilities should be considered in conjunction with enhanced corporate governance.* As the Commission correctly recognizes in its Qualified Legal Compliance Committee (QLCC) alternative, the duties of a lawyer to the organization as a client need to be considered in conjunction with corporate governance measures in place to effectively address matters reported by the lawyer within the organization. Substantial improvements have been made to corporate governance over the past year in the wake of the corporate scandals that have rocked investor confidence, and these improvements are ongoing. They are provided for in provisions of the Act, SEC initiatives and stock exchange listing standards. The public interest will be best served by a system under which lawyers report matters within the organization to the appropriate body where action can be effectively taken because enhanced corporate governance standards are in place. Establishing effective legal compliance systems should be the responsibility of corporate boards, with lawyer reporting as an important component of those systems.
- *Legal compliance systems need to be flexible.* It is also important that the Section 307 rules allow flexibility in the legal compliance systems and procedures to be followed so that companies can establish those processes that work for them. This flexibility will promote compliance. Companies should be permitted to identify who within the organization performs legal compliance functions, the various steps within the organization to be followed in reporting matters and any particular procedural and documentation requirements. Similarly, flexibility should be allowed for law firms to establish procedures and to designate responsible attorneys.
- *Application of the rules to law firms needs to be clarified.* The distinction between requirements applicable to individual attorneys and those applicable to their law firm or organization should be carefully considered in formulating professional conduct standards. As a general matter, the Model Rules address individual actions and do not impute knowledge or responsibility among members of the firm or organization. This issue becomes particularly acute in the context of withdrawal requirements.
- *Increased sanctions require carefully tailored rules.* The sanctions imposed on attorneys under Rule 205.6 for violation of the Section 307 rules are quite severe and go well beyond the past remedy of censure or denial of the right to practice before the Commission. Consequently, it is especially important that the Section 307 rules be carefully tailored and limited in their reach to permit ready compliance.
- *The corporate and securities areas present issues requiring difficult judgments.* There needs to be recognition that when a material violation is black and white it is easy to understand an attorney's professional obligations, but when the matter is in the gray area the issues are more difficult and complex. Most often, the judgments regarding compliance formulated by lawyers in the corporate and securities area are in the gray area. The Commission's Section 307 rules need to be tested against that situation.
- *Many factors mandate that the Commission exercise restraint in the regulation of lawyers, as it traditionally has in the past.* Finally, the Commission should exercise restraint in regulating attorney professional conduct and should limit its rules at this time

to those the Act requires be adopted by January 26. In addition to the short time frame discussed in Part III above, the reasons for restraint are those considerations that have prompted the Commission's historic restraint in this area. These considerations include (1) recognition of principles of federalism, comity and separation of powers under which lawyers are primarily regulated by the highest courts in jurisdictions in which they are admitted to practice, (2) preservation of the attorney – client relationship that permits clients to obtain quality legal advice and places lawyers in the position to advise on compliance with law in the interests of the investing public, and (3) 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.

It is against the background of these basic concepts that the proposed rules should be evaluated.

## **V. Up-the-Ladder Reporting**

### **A. General**

Section 307 of the Act requires the Commission to issue rules setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission, including a rule requiring the attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof to the chief legal counsel (“CLO”) or the chief executive officer (“CEO”) of the company. Section 307 also requires the rule to provide that if the CLO or CEO does not respond by adopting appropriate remedial measures or sanctions for the violation, the attorney must report the evidence to the board of directors, to the board's audit committee, or to another board committee comprised solely of independent directors.

Both the origin of Section 307 and its subsequent legislative history indicate that the central purpose of the provision was to instruct the Commission to adopt a rule requiring lawyers to report misconduct “up-the-ladder” within the corporate client. The impetus for this rule change began with a letter from forty law professors to SEC Chairman Harvey Pitt dated March 7, 2002. In that letter, the professors criticized the discretionary standard contained in Model Rule 1.13 described above in Part IV and urged the Commission to use its powers under Rule 102(e) of the SEC's Rules of Practice to require lawyers appearing or practicing before the Commission to report violations of the securities laws that senior management refuses to rectify to the company's board of directors. When the Commission's then General Counsel, David Becker, responded by letter dated March 28, 2002, that the proposal might more appropriately be considered through congressional action, Sen. John Edwards (D-NC) decided to introduce legislation on the issue.

On July 10, 2002, Sen. Edwards, with the support of Sens. Michael Enzi (R-WY) and Jon Corzine (D-NJ), offered an amendment to the corporate responsibility legislation then pending in

the Senate, S. 2673, and the Edwards Amendment ultimately became Section 307 of the Act.<sup>3</sup> In explaining his amendment, Sen. Edwards stated that although the proposal directed the Commission to establish minimum standards of professional conduct for attorneys appearing and practicing before the Commission, the one rule the Commission is required to adopt is the up-the-ladder reporting requirement specified in Section 307.

## **B. Scope of Rule's Application**

### ***1. "Appearing and Practicing Before the SEC"***

The Commission states at page 7 of the Release that "the proposed rule would adopt an expansive view of who is appearing and practicing before the Commission." While such an expansive view may be appropriate when addressing whose conduct may be sanctioned by the Commission generally under its Rules of Practice, we believe it is not the appropriate approach for imposing SEC-mandated affirmative obligations subject to severe sanctions in the event of noncompliance. It is fundamental fairness to impose regulatory obligations only on those in a position to know that they are subject to the obligations and who are in a position to comply. As now proposed, the definition could subject to the rules attorneys who do not practice securities law and may have only limited or tangential involvement with particular SEC filings and documents. For example, it could inappropriately encompass non-securities specialists who do no more than prepare or review limited portions of a filing, lawyers who respond to auditors letters or prepare work product in the ordinary course unrelated to securities matters that may be used for that purpose, and lawyers preparing documents that eventually may be filed as exhibits. (See the examples below.) We also believe it is inappropriate for the Commission to include lawyers who simply advise on the availability of exemptions from registration. Consider the non-securities specialist advising smaller non-public companies or municipal bond lawyers advising on the availability of the exemption under Section 3(a)(2) of the Securities Act of 1933. The breadth of coverage of the proposals will have the counterproductive impact of discouraging broad participation in assuring quality disclosure and providing expert transactional planning. Additionally, the overbreadth of coverage makes more acute other problems of the proposal described below, including establishing the proper triggering standard.

We therefore recommend that the Commission provide that the Section 307 rules apply only to those lawyers with significant responsibility for the company's compliance with U.S. securities law, including satisfaction of registration, filing and disclosure obligations, or with overall responsibility for advising on legal compliance and corporate governance matters under U.S. law. This functional approach would subject to the rules those lawyers in the best position to understand their obligations under the rules and to comply with them. Other lawyers who might be encompassed within the expansive proposed definition would not be free of regulation because they would still be subject to the professional obligations under Model Rule 1.13, as well as the other state court rules of professional conduct.

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<sup>3</sup> See Senate floor debate regarding Amendment No. 4187 to S. 2673, Congressional Record, July 10, 2002, pgs. S6551-6559 (hereafter referred to by page number).

If the Commission were nevertheless to retain its expansive definition, it should give clearer guidance as to who is covered by the rules. The following are examples of areas of potential uncertainty:

- Lawyer A, who has a limited non-securities specialty, prepares a draft of a section for inclusion in a prospectus (e.g., description of a patent, regulatory requirements or litigation).
- Lawyer A instead reviews a draft of the section prepared by a securities lawyer.
- Lawyer B, a litigator, prepares a summary of pending litigation for general use, knowing it may be used as a diligence checklist for future securities offerings.
- Lawyer B responds to a routine auditor's request for information on pending litigation in connection with the auditor giving its consent for a registration statement.
- Lawyer C, a real estate specialist, drafts a complex lease that will be filed as an exhibit to the company's Form 10-K.

The potential overbreadth of these examples, even under the expansive approach to "appearing and practicing before the Commission," is obvious and should be circumscribed in the final rules.

In addition, if the Commission decides to follow an expansive approach to coverage under the rules, it becomes even more important to recognize the functional aspect of the supervisory – subordinate attorney relationship. Under this approach, a non-securities specialist should be able to satisfy her obligations by reporting a matter to the responsible securities attorney and, similarly, a foreign attorney could report to a U.S. attorney responsible for securities law compliance.

We also note the importance of allowing organizations and law firms to define procedures and identify responsible persons as discussed in Section D of this Part V below.

We address the special problems that application of the Section 307 rules create for foreign lawyers separately in Part X below. We also discuss the special problems of litigation/enforcement counsel in Section E of Part VI below.

## 2. *“In the representation of an issuer”*

*Acting as an “attorney”*. The up-the-ladder reporting required by Section 307 of the Act is predicated on the professional obligation of attorneys to the organization as the client.<sup>4</sup> That requirement is designed to ensure that lawyers fulfill their professional obligations to the organization as a client by reporting evidence of material wrongdoing up-the-ladder, ultimately, if necessary, to the proper body within the organization authorized to act. It is grounded in a lawyer’s professional obligations to the client and is not intended to be a general whistleblower provision.

Accordingly, the Section 307 rules should not apply to someone who happens to be a lawyer but is not acting in the capacity. Instead, they should apply only to attorneys who are rendering legal advice to the organizational client (or those holding themselves out as doing so) and therefore have the professional obligations of an attorney. It is not uncommon for persons who were attorneys and may still retain their license to move into other non-legal capacities in the organization. For example, an attorney may become a business development officer or even chief executive officer. Similarly, persons in non-legal positions, such as a human resources officer, may be admitted to the bar but continue in their non-legal position. Attorneys may also serve as directors of a company where neither they nor their law firm renders legal services. These persons should be subject to no greater obligations to the organization than someone who is not an attorney.

The concept of acting in the capacity as an attorney is sufficiently understood that it need not be defined separately. It arises from the rendering of legal advice, which creates the duties and obligations, such as the duty of confidentiality, owed by an attorney to the client as a result of the attorney-client relationship. We believe the rules are appropriately applied to any attorney for the issuer acting in that capacity whether or not that attorney is formally a member of a company’s law department.

*Existence of an attorney-client relationship*. In addition, the requirements of the rules should only apply to a lawyer with an attorney – client relationship with the issuer. The Commission should revise the concept of “acting on behalf, at the behest, or for the benefit of an issuer” to make that clear. That concept, unfortunately, can be read broadly to encompass attorneys who have no attorney – client relationship with the issuer. For example, the obligations under the rule should not apply to an attorney in the following situations:

- Lawyer V acts as counsel for the underwriters (whether a firm commitment or best efforts underwriting) or for the placement agent in a securities offering for the company (whether or not that lawyer is designated by the company to serve in that capacity).

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<sup>4</sup> See the discussion of the amendment proposed by Senator Edwards that became Section 307 of the Act, which in turn was based on the March 7, 2002 letter from forty professors to the Commission, at note 3 *supra*.

- Lawyer W, who has no other relationship with the company, is designated by the company to represent certain officers in connection with an internal investigation (even if the lawyer is paid by the company).
- Lawyer X represents the target in an acquisition and in that capacity reviews portions of the prospectus of the acquiring company relating to the securities to be issued in the acquisition.
- Lawyer Y represents the lenders in a going private transaction and is asked to review the description of the loan arrangements in the tender offer documents.
- Lawyer Z represents the counterparty to a material contract that is used as the collateral and source of payment for a securities offering by the company and renders a third party closing opinion as to the validity of the counterparty's obligations that is referred to in the offering documents.

In each of these situations, the lawyer does not have an attorney – client relationship with the issuer and should not be subject to the obligations to that issuer under the rules. It would be contrary to the objectives of the Commission to ensure full and accurate disclosure if these lawyers were discouraged from reviewing disclosure documents for fear that they would become enmeshed in the Commission's professional conduct rules with obligations to a company that was not a client.

*Attorney for subsidiaries.* We are concerned that the Commission does not adequately address the position of an attorney for a subsidiary of an issuer. There is not a problem if the subsidiary is wholly-owned but the attorney can have conflicting interests in the case of a partially-owned subsidiary. The examples given by the Commission of an attorney for a non-public subsidiary at page 18 of the Release are fine as far as they go. However, if the non-public subsidiary is not wholly-owned, the attorney could be in the position of violating a duty to that subsidiary. Therefore, the Commission should provide an exception from reporting to the issuer if the attorney for the subsidiary reasonably believes she would be violating a duty to the subsidiary. The Commission should also make clear whether or not the obligation to report to the issuer applies only to attorneys for consolidated subsidiaries or majority-owned subsidiaries. Finally, the Commission should address whether the obligation to report to the issuer applies to public subsidiaries.

We discuss separately below in Part IX the special issues relating to attorneys for investment advisers of investment companies.

### **3. *Definition of issuer***

In response to the questions at page 20 of the Release, the ABA believes that Section 307 requires that the Commission use the definition of "issuer" set forth in Section 2(a)(7) of the Act as it proposes to do in Rule 205.2(g). We do not believe, however, that the Commission should go beyond "issuers" under the Act to include attorneys for non-public regulated entities, and certainly not during this limited time frame for consideration. Congress focused on the

obligations of attorneys for public companies as part of the efforts to restore investor confidence. These same considerations do not apply to non-public companies, even if they are regulated entities. Moreover, entities regulated by the Commission can present especially difficult problems when imposing obligations on attorneys regarding compliance, and the corporate governance structures that support compliance activities by attorneys may not be present in the non-public company. Additionally, action by the Commission regarding entities it regulates could result in uneven treatment between entities regulated by the Commission and those regulated by other agencies.

## **C. Triggering Standard**

### ***I. Use of reasonably believes standard***

The ABA agrees with the Commission's general approach to dealing with "evidence of material violation" as comprised of three elements: (i) the attorney's knowledge of information, (ii) the standard for evaluating the attorney's determination regarding a material violation and (iii) the standard to be applied to the existence of a material violation. We discuss each of these elements in turn, and suggest changes we believe necessary.

a. *Meaning of "aware."* Rule 205.3(b) uses the phrase "aware of evidence." "Aware" is not defined but we assume that the Commission equates "aware" to "knows." We believe it would be preferable to use the term "knows." Its meaning is defined in Rule 1.0(f) of the Model Rules as "actual knowledge of the fact in question," and includes the concept that "a person's knowledge may be inferred from circumstances" (or put another way – an attorney may not ignore the obvious).<sup>5</sup> We recommend that this important aspect of the term "knows" be emphasized by the Commission in the adopting release so that attorneys fully appreciate the scope of their responsibility.

We believe that it would be helpful if the Commission indicated in the adopting release that the information of which the attorney is aware must be of a quality sufficient to cause the requisite conclusion to be reached (e.g., it must be more than a suggestion, shred of evidence or uncorroborated accusation).

b. *Use of objective standard of belief.* We believe that the more difficult issue is the Commission's use of an objective standard to evaluate an attorney's determination regarding the existence of a material violation. Model Rule 1.13, which addresses up-the-ladder reporting, uses a knowledge standard regarding wrongful action. The ABA believes there are advantages to having SEC rules and state rules of professional conduct as consistent as possible, and these advantages would weigh in favor of utilizing the Model Rules' knowledge standard in the Section 307 rules. The ABA recognizes, however, that Model Rule 1.13 is currently being reevaluated with regard to the proper standard to be used, and is the subject of review by the ABA Task Force on Corporate Responsibility, which may result in recommendations to the ABA House of Delegates. Accordingly, we address the SEC proposal separately.

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<sup>5</sup> See note 6 *infra*.

Although the ABA prefers the use of the knowledge standard,<sup>6</sup> we believe that the suitability of the objective standard proposed by the Commission would depend upon whose conduct will be governed by the rules. If our suggestion that the requirements of the rules be imposed only on lawyers with significant responsibility for securities law compliance or overall responsibility for advising on legal compliance and corporate governance matters, then the objective standard might be a more acceptable measure than it would be if it were applied to all lawyers that would be covered under the rules as proposed. It may be reasonable to hold lawyers with such responsibilities to the standards of comparable securities law or corporate specialists. On the other hand, if the Commission uses the expansive approach it proposed, we believe an objective standard would be difficult to apply, would present problems for compliance, and would subject the non-securities specialist to inordinate second guessing and exposure. If the expansive approach is followed, we would urge that the knowledge standard be used.

If an objective standard is used, however, we believe that it needs to be defined with greater clarity. Section 205.2(1) defines the term “reasonably believes” as meaning that an attorney, acting reasonably, would believe the matter in question. The term “reasonably,” as defined in Model Rule 1.0(h) and Rule 205.2(k), denotes the conduct of a reasonably prudent and competent attorney. The Release states at page 17 that the definition of “reasonably believes” is based on the term’s Model Rule 1.0(i) definition “modified to eliminate any implied subjective element.” But in fact “reasonably believes” under the proposed Section 307 rules establishes a distinctly different standard than do the same words in the Model Rules. Model Rule 1.0(i) defines the term as denoting that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable. Moreover, Rule 1.0(a) defines “believes” as denoting that the person involved actually supposed the fact in question to be true. However, the Release states at page 17 that the personal belief of the attorney does not matter.

Importantly, under the proposed Section 307 rules, “reasonably believes” is used as a standard when a lawyer is obligated, rather than merely permitted, to act in a certain way. But in the Model Rules, “reasonably believes” is used only in circumstances where a lawyer is permitted to take action. We believe that a term familiarly associated with permissive lawyer conduct should not in the Section 307 rules be employed where a lawyer’s conduct is mandatory because it will lead to confusion. Furthermore, its use, as defined by the Commission, is unworkable as a standard for mandated action. For example, if there is a range of reasonable actions, is the lawyer held to the standard of an attorney who *would* reasonably believe when there are others who *would not* reasonably believe? If the Commission decides to apply an

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<sup>6</sup> This standard customarily is used in the Model Rules and other lawyer regulatory codes when obligating a lawyer to act. Model Rule 1.0(f) defines “knowingly”, “known”, or “knows” as denoting “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances”. Thus, a lawyer cannot evade knowledge by closing eyes to the obvious. See Comment [8] under Model Rule 4.2. See also ABA Formal Ethics Opinion 346R (1982) (in preparing tax shelter tax opinions: lawyers cannot shut their eyes to what was plainly to be seen; a lawyer should not accept as true that which he should not reasonably believe; recklessly and consciously disregarding information strongly indicating that the facts expressed are false and misleading involves dishonesty); *United States v. Cavin*, 39 F.3d 1299, 1310 (5<sup>th</sup> Cir. 1994) (lawyer cannot close eyes to the obvious). This standard is akin to the recklessness standard used elsewhere by the Commission (see Rule 101 under Regulations FD).

objective standard, it would be better expressed as “the attorney knows information based upon which it is unreasonable not to believe that a material violation has occurred, is occurring or will occur.” Under this standard, a lawyer would not violate the rules unless the lawyer’s conduct were outside the range of reasonableness.

In addition, under an objective standard, whether formulated as proposed by the Commission or as suggested by us, the lawyer’s conduct should be judged, not only by the standard of what a reasonably prudent and competent attorney” would do, as specified in Rule 205.2(k), but by the standard of what a lawyer with similar training and experience as the lawyer in question would do. Also, that conduct should be judged at the time and under the circumstances of the conduct in question.<sup>7</sup> This more precise standard is especially important because the rules form the basis for sanctions against attorneys, which could include disbarment and substantial fines. As the Commission correctly recognized at page 27 of the Release, referring to an attorney’s “training, experience, position and seniority,” “what the reasonable, experienced securities lawyer might regard as a clear violation of the law may appear different – or not appear at all – to an unseasoned attorney with a different level of expertise.”

c. *Standard for material violation.* The ABA believes that the Commission uses the correct standard for determining a material violation by referring to “evidence that *would lead* an attorney to . . . believe that a material violation *has* occurred, *is* occurring, or *is* about to occur” [emphasis added]. Any lesser standard would prompt a proliferation of reports that would both interfere with efficient corporate operations and attorney – client relationships and would obscure the significant matters that deserve special attention.

## 2. *Nature of violation*

a. *Relation of violation to engagement.* The Commission should make clear that the violation required to be reported is one related to the attorney’s representation of the Company involving appearing and practicing before the Commission. Otherwise, attorneys will be put in an untenable position of having to report violations unrelated to their engagement and practice before the Commission and the rule’s reach will be further expanded.

It would be unfair to subject lawyers to sanctions for failure to report material violations based on an objective standard that would be applied with 20/20 hindsight when those violations were not related to the lawyer’s engagement. Matters unrelated to the lawyer’s engagement are unlikely to be given the same level of attention or to be viewed with the same degree of knowledge and expertness. Consider the position of an attorney whose only engagement for the company is handling a non-recourse project financing who learns through casual conversation with a junior officer of the company of an environmental problem unrelated and not material to the project financing but that might otherwise be material. Although that attorney might choose

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<sup>7</sup> These concepts can be reflected by revising the definition of “reasonable” or “reasonably” to read “denotes the conduct of a reasonably prudent and competent attorney of similar training and experience, judged as of the time and under the circumstances of the conduct in question.”

to take action, it would not be appropriate to require reporting in this situation because the attorney's involvement in the matter is too remote. On the other hand, if the undisclosed environmental problem was material to the project financing the attorney was handling, the reporting obligation would apply. The Commission could address this issue by referencing "material violation related to the representation" in appropriate places, such as, in Rule 205.3(b)(1).

b. *Definition of "material."* The ABA believes that the term "material" should be defined in a manner consistent with the U.S. Supreme Court's decision in *TSC Industries v. Northways*, 426 U.S. 438 (1976), and applied to Rule 10b-5 under the Securities Exchange Act of 1934 (the "Exchange Act") in *Basic v. Levenson*, 485 U.S. 224 (1988). The proposed rules, in Section 205.2(h), define "material" as referring "to conduct or information about which a reasonable investor would want to be informed before making an investment decision."<sup>8</sup> The threshold set in this definition is well below the threshold set by the Supreme Court. In *TSC*, the Supreme Court rejected the Seventh Circuit's standard for materiality, which included "all facts which a reasonable shareholder might consider important," warning of an overly-broad standard which would result in "liability for insignificant omissions or misstatements," and which would give rise to issuers trying to avoid exposure from 20/20 hindsight claims by "simply . . . bury[ing] shareholders in an avalanche of trivial information." Instead, the Court announced as the standard for materiality that a fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important and that there must be a substantial likelihood that the disclosure would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.

The term "material" should also be clarified to make it clear that it relates to matters (i) material to investors generally as opposed to particular investors and (ii) material to the business, financial condition or results of operations of the issuer. The first clarification addresses a violation that may be material to some investors but not to the company as a whole (e.g., a non-exempt unregistered offering that creates a right of rescission for the particular investors but is not material to the company). The second clarification avoids concepts such as "ethical materiality" and other non-financial considerations (such as a director failing to adequately perform his fiduciary duty of attentiveness but without material consequences to the company).

c. *Definition of violations.* The Commission has attempted to clarify the types of violations that trigger an obligation under the rules by indicating, as statutory construction rules would require, that "material" modifies each of the items. We believe, however, that further clarification is necessary if the requirements of the rules are to work as intended and to be properly administered by the Commission.

First, the nature of the violations should be limited to matters over which the Commission has regulatory authority and therefore the competence to assess compliance. Therefore,

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<sup>8</sup> We note the use of this language by Senator Edwards in his statement on the Senate floor on July 10, 2002 (S6552). However, we do not believe that this explanation should be determinative of the correct legal standard to be applied. There is no indication that Congress intended "material" to have a different meaning under Section 307 than otherwise applicable under the Exchange Act.

violations of securities law should be limited to federal securities law and should not include, as proposed, state securities law. State securities laws are varied and subject to different degrees of enforcement, and represent a legal specialty of their own. They therefore provide too difficult a basis upon which to premise a lawyer's reporting obligation. Even more clearly, a lawyer's obligations under the rules should not be based on violations of foreign securities law, of which the U.S. lawyer is likely to have little knowledge. Although the Commission did not include foreign securities law under "violation of securities law," the vague concept "similar violation" discussed below might be construed to cover violations of foreign securities laws, and therefore specific exclusion of such laws may be necessary.

Next, breach of fiduciary duty should be defined in terms of breach of fiduciary duty under state common law involving financial harm to the organization that has not been adequately disclosed to investors. This definition would focus the breach on matters involving harm to the organization for which there has not been adequate disclosure in accordance with SEC requirements. It would avoid a range of breaches that do not result in harm to the organization or that previously have been disclosed. An expanded definition of "materiality" as we suggest would help address these issues but we believe a proper definition of breach of fiduciary duty should also be included.

Also, "similar violation" is so vague as to create serious problems for compliance and subjects attorneys to serious risk of being judged by hindsight. That term, if undefined, could also result in undermining any effort by the Commission to define the terms "securities law violation" and "breach of fiduciary duty." We suggest that the Commission adopt a narrow definition of "similar violation." One approach is to define it in terms of "a violation that the attorney reasonably recognizes as substantially similar to the enumerated violations."

## **D. Process for Reporting**

### ***1. Prescriptive Process***

The ABA believes that it is a mistake for the Commission to be as prescriptive as it has been in the proposal in mandating in a regimented way the process required to be followed. This is an unnecessary intrusion into internal corporate affairs that does not provide the flexibility needed to allow attorneys to take actions they consider appropriate in the circumstances and to allow companies to establish procedures that work for them.

We believe that the objectives of Section 307 will be best served if companies are permitted to define their own legal compliance procedures within parameters established consistent with Section 307. This will then accommodate the different circumstances that can arise and the differences within organizations. By allowing companies to establish their own procedures, the legal compliance function will be enhanced and the requirements of the Section 307 rules will more easily be met.

Specifically, we believe that companies should be able to define their legal compliance and reporting procedures so long as they require timely reporting of unremediated material violations to a designated chief legal compliance officer or the chief executive officer and ultimately, if necessary, to one or more designated independent committees of the board or to the

full board. Companies should be free to designate a chief legal compliance officer, who might be the general counsel or chief legal officer, another in-house lawyer, a non-lawyer compliance official or outside counsel. Not all companies have a general counsel and even some that do look to others to perform the legal compliance function. Some companies, such as defense contractors, financial services organizations and other regulated businesses, may have their compliance functions or parts of them located outside the legal department. Accordingly, flexibility is needed to fit particular circumstances. We also believe that reporting should be permitted to either the legal compliance officer or the CEO to reflect the flexibility specifically provided for in Section 307.

Company legal compliance policies might cover timing requirements for reporting, to whom reports should be made in the first instance (which might vary based on subject matter), the appropriate chain of reporting, opportunities for consultation and further inquiry, and similar topics. The critical point is that companies are more likely to have effective reporting procedures if they have the flexibility to design those that work for the particular company rather than being subject to a one-size-fits-all procedure mandated by the Commission. An attorney who follows a qualifying compliance procedure should be protected in complying with the rules. We believe law firms should similarly be permitted the flexibility to define their procedures, including designating the lawyer or lawyers with responsibility and those acting in a supervisory capacity.

Regardless of the approach adopted with respect to procedures, the Commission should make clear that an attorney may, depending on the immediacy of the violation, make further inquiry if the attorney chooses to elicit more information to better inform the attorney's judgment and to seek to have a matter redressed before a reporting obligation is triggered.

## ***2. Reporting to the Board Level***

Similarly, we do not think that the Commission should be prescriptive with respect to reporting to the board level. We agree that the reporting of material violations that have not been appropriately addressed should be to the board as a whole or to a committee of the board consisting solely of independent directors. However, companies vary in their governance approaches – in some cases the audit committee provides the legal compliance oversight, in others a different or separate committee may perform that function, and sometimes the committee to which a matter is referred depends on the subject (e.g., financial matters might be referred to the audit committee, while violations of company's conflict of interest policies might be referred to another committee); in still other cases, matters might appropriately be referred to the full board. With the enhanced corporate governance standards being put in place, such as requirements for a majority of independent directors and independent committees, we believe the flexibility we suggest is appropriate. Additionally, we are not concerned about bifurcation of reporting that could obscure a pattern of violations because board activities are rarely handled in isolation. Also, an attorney should always have the discretion to report to the full board if the attorney considers that appropriate.

We also do not believe that reporting by the CLO to the board level of remediated violations should be mandated. Rather, it should be left to the reasonable judgment of the CLO and the company's own internal reporting procedures. Mandated reporting would place an

inordinate burden on the CLO by requiring a difficult judgment to be made in numerous cases of remediated violations as to whether a reporting obligation was triggered.

### **3. Documentation**

The Commission should not prescribe a requirement that attorneys maintain documentation but rather should leave appropriate documentation to be decided by lawyers as a matter of good practice. In those cases where the need for documentation is most evident, most lawyers are likely to maintain it. The problem, however, with the Commission's mandating specific documentation and retention requirements is that, (i) it will create an impediment to open discussion and consultation among colleagues for fear that such a discussion will generate a documentation requirement and (ii) it will increase the vulnerability of clients in litigation because the mandated documentation could provide a roadmap for claimants, particularly given the uncertainty as to the effectiveness of the Commission's attempt to protect the privilege and client confidentiality.

#### **E. Determining Appropriate Response**

The concept of "appropriate response" is critical to the determination whether a matter needs to be brought to the board level. We believe it is important that the Commission recognize that a reporting attorney may rely on the considered judgment of the CLO so long as that judgment is in the range of reasonableness even though the reporting attorney would not necessarily come out that way. Lawyers advise clients on matters that fall in the gray area, particularly when dealing with disclosure issues and materiality judgments. We often advise based on a risk analysis when the conclusion is not clear and leave the judgment to the client when that judgment is in the permissible range. Sometimes we advise the client that they do not have a choice because the matter is outside the reasonable judgment range. Lawyers need to be free to continue to advise on that basis, including in assessing the appropriateness of a response, and should not be placed in the position of substituting the lawyer's judgment for that of the client when the client is in the permissible range of reasonable judgment.

#### **F. Supervising – Subordinate Attorneys**

*Ability to report to supervisory attorney.* We believe that the Commission correctly approaches in Rule 205.5 the treatment of subordinate lawyers who report to a supervisory lawyer and in Rule 205.4 (c) the shifting of responsibility for compliance to the supervisory attorney to which the matter was reported. We recommend that the Commission recognize that a designated legal compliance officer, even if not a lawyer, can qualify as playing a supervisory role.

We also recommend that the Commission extend this approach beyond the structural or hierarchical relationships that seem to be contemplated by the rules to a functional relationship. For example a specialist (to the extent subject to the rules)<sup>9</sup> should be able to discharge his or her

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<sup>9</sup> These might include, for example, employee benefits, environmental, intellectual property, litigation, real estate, regulatory and tax lawyers.

responsibility by reporting to the lawyer with general responsibility. Similarly, a lawyer should be able to rely on the advice of another lawyer reasonably believed to have greater expertise or experience. For example, an in-house attorney should be able to consult with an outside expert and rely on that advice; a foreign lawyer, if covered by the rules, should be able to consult with a U.S. lawyer and so rely.

*Obligations imposed on supervisory attorneys.* We believe that the Commission has unnecessarily and inappropriately proposed in Rule 205.4 to impose entirely new and overly-broad obligations on supervisory attorneys. These proposals are not a necessary part of the reporting up-the-ladder provisions required by Section 307 and go well beyond the obligations of supervisory lawyers under Model Rule 5.1.<sup>10</sup> First, Rule 205.4 expands the definition of lawyers subject to responsibility as a supervising attorney by including *any* attorney with supervisory authority over another attorney. This could include all partners in a law firm and even senior associates, and it appears to be unrelated to the particular matter. Model Rule 5.1 is limited to a lawyer who has direct supervisory authority over the other lawyer. Second, the obligation imposed on supervisory attorneys, totally without regard to any particular matter, is to “make reasonable efforts to ensure,” not only that a subordinate attorney conforms with the Section 307 rules, but also that the subordinate attorney complies with the federal securities laws. Rule 205.4 then goes on to deem the supervisory attorney to be appearing and practicing before the Commission to the extent the subordinate attorney appears and practices before the Commission, without regard to whether the supervision relates to the matter involving appearing and practicing before the Commission or whether the supervisory attorney is even aware the subordinate attorney is so practicing. These are extraordinary burdens to place on attorneys and go well beyond the obligations imposed by Rule 5.1. Under that rule, the supervisory lawyer (more narrowly defined) is required to make reasonable efforts to ensure that the subordinate lawyer conforms to the Model Rules and is responsible for a violation of those rules if he orders or knowingly ratifies the conduct or knows of the conduct and fails to take reasonable remedial action.

The ABA urges the Commission to refrain from adopting rules that impose these unprecedented burdens on supervisory lawyers. Instead, the Commission should rely on the existing Model Rules, referencing them for emphasis in its release. At most, the Commission should make compliance with Rule 5.1, as it relates to the Section 307 rules, part of its rules rather than creating a whole new set of supervisory attorney obligations.

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<sup>10</sup> Model Rule 5.1 imposes an obligation on partners, managers and supervisory lawyers in law firms (including company legal departments) to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm comply with the rules of professional conduct. It also imposes an obligation on supervisory lawyers to ensure that lawyers they directly supervise conform to the rules. The Rule also makes partners, managers and supervising lawyers responsible for violations of the rules committed by other lawyers if they knew about the violations at a time when something could have been done to prevent or mitigate the consequences and took no action. Model Rule 5.2(b) provides that a subordinate lawyer does not violate the rules if the lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.

### **G. Discharged Attorney**

The Commission recognizes the problem of an attorney who has been discharged for reporting evidence of a material violation in Rule 205.3(d)(4) but does not adequately address the responsibilities of that attorney. We believe that the Commission should make clear that, as a general matter, once an attorney is discharged, her obligations under the rules cease since the attorney-client relationship is ended. Because the organization, acting through its highest authority, is the client, we believe that it would be appropriate, if an attorney believes that he or she has been discharged to prevent the reporting of a material violation that has not been remedied, for that attorney to be entitled, but not required, to report the circumstances of the dismissal to the board or an appropriate committee of the board.

We would not make the reporting mandatory in recognition of the difficulties a discharged attorney might face in trying to report. We also would not require reporting out of the discharge because that would pose the same difficulties as the noisy withdrawal proposal discussed in Part VI.

## **VI. Noisy Withdrawal and Disaffirmation**

### **A. Deferral of Action**

As discussed in Part III above, the Commission should limit its actions at this time to the matters specifically required by Section 307. The Commission's noisy withdrawal and disaffirmation proposals are not required by Section 307. Quite to the contrary, the legislative history of the Act indicates that Congress did not intend there to be an external reporting requirement.<sup>11</sup> The Commission should not make such a fundamental change in the role of counsel and the attorney-client relationship that would result from its noisy withdrawal and disaffirmation proposals in the limited time frame for adoption of the required rules. These are

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<sup>11</sup> During Senate debate on the Edwards amendment on July 10, 2002, in addition to the statement of Sen. Enzi referenced in note 57 to the Release (which the Commission attempts to distinguish), the following colloquy (which the Release does not cite) took place between Sen. Edwards and the chief sponsor of the Act, Sen. Paul Sarbanes (D-MD):

MR. SARBANES. It is my understanding that this amendment, which places responsibility upon the lawyer for the corporation to report up the ladder, only involves going up within the corporate structure. He doesn't go outside of the corporate structure. So the lawyer would first go to the chief legal officer, or the chief executive officer, and if he didn't get an appropriate response, he would go to the board of directors. Is that correct?

MR. EDWARDS. Mr. President, my response to the question is the only obligation that this amendment creates is the obligation to report to the client, which begins with the chief legal officer, and, if that is unsuccessful, then to the board of the corporation. There is no obligation to report anything outside the client—the corporation.

MR. SARBANES. I think that is an important point. I simply asked the question in order to stress the fact that that is the way this amendment works. This has been a very carefully worked out amendment...

among the most controversial of ethical proposals because they involve difficult and competing public policy considerations.<sup>12</sup> At the least, they deserve the thoughtful analysis, extensive comment and deliberative Commission consideration that the present schedule does not permit.

## **B. Consideration of the Merits**

We address the merits of the noisy withdrawal/disaffirmance proposals both to illustrate the difficulties of dealing with them at this time and to provide the Commission with the benefit of our views should it nevertheless proceed to consider these proposals. We start with the premise that an objective of the Section 307 rules is to assist attorneys to guide an issuer's managers and board to make decisions in compliance with law that are in the best interests of the issuer and its shareholders. We believe the standards in the Model Rules accomplish this purpose.

It is clear under the Model Rules and under virtually all state court rules of lawyer conduct that a lawyer *must withdraw* from representing a client if the lawyer's services will be used to assist the client to commit a crime or fraud. Model Rule 1.16(a)(1) or its state court rule counterpart, adopted in virtually all jurisdictions, requires that a lawyer withdraw from the representation of a client "*if...the representation will result in...violation of the rules of professional conduct or other law.*"<sup>13</sup>

Comment [10] to Model Rule 1.2 also makes clear that by reason of Model Rule 1.2(d),<sup>14</sup>

A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal *and to disaffirm any opinion, document, affirmation or the like.* See Rule 4.1.<sup>15</sup>

In addition to these provisions, many jurisdictions *permit* disclosure of client confidences to the extent necessary to prevent, mitigate or rectify the consequences of a client crime or fraud

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<sup>12</sup> We note that deferral of action on the noisy withdrawal and disaffirmation proposals would avoid issues regarding the authority of the Commission to impose such requirements.

<sup>13</sup> Rule 1.16(a) also prohibits commencing the representation in such circumstances.

<sup>14</sup> Rule 1.2(d) prohibits a lawyer from assisting a client in conduct that the lawyer knows is criminal or fraudulent.

<sup>15</sup> Emphasis added. Model Rule 4.1(b) requires that "a lawyer shall not knowingly...fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." See also Comment [3] to Model Rule 4.1. Disclosure would not be prohibited by Model Rule 1.6 "to the extent lawyer reasonably believes necessary:...to comply with other law or court order..." Model Rule 1.6(b)(4). See ABA Formal Opinion 92-366 (lawyer must withdraw from representation if lawyer knows services are being used to perpetrate a fraud and may disaffirm documents being so used). See also Hazard & Hodes, *The Law of Lawyering* (2000 ed.) § 9.31, 9.23, and 9.26-9.27 (disclosure under the circumstances also might be permitted under Model Rule 1.6(b)(3) to establish a defense by the lawyer to a charge or claim based on a client's conduct).

that is likely to result in substantial financial harm to another. The ABA Task Force on Corporate Responsibility in its preliminary report has recommended that the Association again consider the ABA Ethics 2000 Commission's proposals to amend the Model Rules to allow similar disclosures.<sup>16</sup>

We believe that the proposed Section 307 rules that mandate withdrawal from representation, notice to the SEC and disaffirmance<sup>17</sup> 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. 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, and may itself be a violation of the attorney's duties to the client under state court rules, because it will promptly trigger an enforcement investigation and potentially civil lawsuits. As a consequence, some issuers might not even consult qualified attorneys regarding close issues of whether or not to disclose information in a filing or otherwise because the attorney might engage in a noisy withdrawal even though all that may have been involved was a matter of business judgment as to the materiality of certain information.

Moreover, mandating withdrawal and disaffirmance removes the flexibility that lawyers need in order to have time to counsel their corporate clients effectively. In some instances, premature withdrawal and disaffirmance of documents might seriously and unfairly harm the issuer and its shareholders or create disruption in the market for issuer's securities, when more time spent with managers or expert advisers might have avoided the need for the attorney to employ so extreme a measure. Such consultations also may prove the attorney to be wrong in believing any material violation will occur. Indeed, one wonders whether noisy withdrawal is not an undesirable, costly and unnecessary supplement to reporting up-the-ladder as specifically required by Section 307 of the Act.

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<sup>16</sup> The ABA House of Delegates declined to adopt the Ethics 2000 Commission proposal to provide exceptions to confidentiality:

to the extent the lawyer reasonably believes necessary:...

- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

These exceptions are substantially similar to § 67 of the Restatement.

<sup>17</sup> See Rule 205.3(d)(i) respecting ongoing or future material violations likely to result in substantial financial injury to the issuer or investors. Under Rule 205.3(d)(2)(ii), in-house counsel need not withdraw, but must disaffirm material the attorney assisted in preparing and reasonably believes is or may be materially false or misleading. Rule 205.3(d)(2) permits withdrawal and disaffirmance by a retained attorney and disaffirmance by in-house counsel. This provision may not often apply because the ongoing effects of many SEC filings are unclear and attorneys therefore might opt for disclosure to protect themselves.

The proposed Section 307 rules provide that they preempt the professional conduct rules of the states. The proposed withdrawal/disclosure standards are, however, sure to increase the attorney's exposure to civil liability if the attorney discloses client confidences or otherwise violates a duty to the client under the state court's rules in the mistaken belief that noisy withdrawal is mandated or permitted under the standards of the Section 307 rules. We discuss the issues regarding attorney-client privilege and confidentiality in more detail in Part VII below.

The noisy withdrawal proposal focuses principally (although not entirely) on the conduct of individual attorneys. Unclear, however, is how the noisy withdrawal rules would operate when either the same firm handles many matters for the issuer or when a large multinational corporation is represented on multiple matters by many lawyers in a firm from offices in several states and foreign jurisdictions. For example, must the firm withdraw from representing the multinational corporation in all the different matters it is currently handling for the large multinational corporation when the rules call for noisy withdrawal in one matter? Even if the Section 307 rules do not so require, the applicable rules of professional conduct may require withdrawal from all matters because the noisy withdrawal and disaffirmance and its consequences might create such adversity between the law firm and its clients as to result in an impermissible conflict of interest. The problems law firms may face is discussed in greater detail in Part XI below.

Under these circumstances, we urge that the Section 307 rules omit any standards for either mandatory or permissive withdrawal. They should instead on the lawyer conduct rules adopted by the applicable state courts to govern proper lawyer conduct before the SEC. This is especially important in view of the broad coverage of the Section 307 rules to govern the conduct of attorneys wholly unfamiliar with securities law and not providing any securities services, but who represent issuers in isolated transactions that must be reported or documents which must be filed with the Commission.

The ABA recommends that the Commission at the very least wait until there is clearer justification than now exists for providing rules that differ in significant respects from those applicable in the state courts, particularly when Section 307 does not mandate promulgation of those rules.

### **C. Alternatives**

We believe that there are preferable alternatives for addressing the Commission's concerns underlying its noisy withdraw/disaffirmance proposals.

*Enhanced corporate governance.* In providing the QLCC alternative, the Commission properly acknowledged the importance of corporate governance mechanisms in ensuring proper legal compliance once material violations are reported to the board level. We believe it is important to recognize that a sea change has taken place in corporate governance since the failures that contributed to the corporate scandals and produced the Act and other measures designed to restore investor confidence. Dramatic corporate governance reforms are being put in place to address these failures, spurred by the requirements of the Act, SEC actions and stock exchange responses through enhanced listing standards. These include requirements for a

majority of independent directors on boards, committees comprised solely of independent directors under tighter standards of independence, executive sessions of independent directors, corporate governance guidelines and codes of conduct and ethics. Most importantly, the attitude of directors and their recognition of their role and responsibilities to provide critical oversight have changed. We believe these corporate governance reforms and changes in attitude have made substantial progress in addressing the problems of the past and make it far more likely that appropriate action will be taken in response to reports of material violations.

We recommend therefore that the Commission embrace the strengthening of corporate governance coupled with up-the-ladder reporting to address the problems of past failures of compliance by putting responsibility for compliance in the right place in the organization. The Commission should give this new system the time and opportunity to work before taking further significant actions beyond those contemplated by Congress which could have unintended consequences. Those consequences would include interfering with the attorney-client relationship with the result that lawyers will be left out of the process and therefore less able to counsel legal compliance, which would undermine the very purpose for which Congress enacted Section 307. In order to further strengthen corporate governance mechanisms to ensure legal compliance, we recommend that the Commission encourage the exchanges to require companies, as part of listing standards, to adopt legal compliance procedures that include an independent committee of the board (which may be an existing committee, such as the audit committee) with responsibility for overseeing the company's legal compliance function and addressing any material violations brought to its attention. Additionally, the exchanges could require the legal compliance committee to regularly meet in executive session with the chief legal officer and other counsel and compliance personnel in order to ensure that the committee receives timely and candid reports. These requirements could be buttressed by disclosure requirements.

We do not believe, however, that an external reporting obligation should be imposed on members of the committee. Besides the inappropriateness of requiring self reporting of violations, such a requirement would discourage able people from serving on such a committee. Moreover, requiring reporting by individual members would be especially disruptive because it would give a single member of the QLCC or other independent committee the ability to dictate decisions.

*Application of existing professional conduct rules.* The Commission should also expressly recognize and emphasize the existing professional conduct rules applicable in most states discussed above. These include rules prohibiting an attorney from assisting a client in the commission of a crime or fraud and requiring withdrawal and disaffirmation under certain circumstances when the attorney's services are being used and those permitting an attorney in certain circumstances to disclose client confidences to the extent necessary to prevent a client crime or fraud.

#### D. Specific Suggestions

If the Commission should nevertheless decide that additional obligations should be imposed on attorneys when there is a failure at the board level to appropriately respond to a report of evidence of a material violation, we make the following specific suggestions:

- **Withdrawal in all circumstances should not be mandated by the Commission.** Rather it should be left to the attorney to decide what action is appropriate under the circumstances consistent with applicable state codes. Clearly an attorney may not permit her services to be used to assist the violation, but an attorney's continuing to counsel compliance may serve the public interest and the interests of the company and its investors. The Commission recognized the value of continued lawyer representation in its *Carter and Johnson* decision.<sup>18</sup> One can imagine a situation where the violation does not involve self-interest and the board is seeking in good faith to act, perhaps mistakenly, in the company's best interests.
- Even if withdrawal from a particular representation is necessary, this **should not automatically require withdrawal from all matters**, even those unrelated to the violation. This withdrawal requirement could be a concern for individual attorneys, but it would be a major concern if the attorney's law firm had to withdraw from unrelated matters. Withdrawal in these circumstances could be injurious to the company and its shareholders and might be inconsistent with state professional codes and court rules.
- Even if withdrawal is required, for the reasons discussed above, **notice to the SEC and disaffirmation of documents should not be required in all cases.** Rather, this should be addressed by existing requirements of state court rules that require a lawyer to disaffirm documents when the failure to do so would result in the lawyer's assisting her client to perpetrate a crime or fraud. This would provide a clearer standard that attorneys can understand and follow than the Commission's proposal.
- Because of the significant consequences flowing from a noisy withdrawal and disaffirmation of documents, the attorney's **actual knowledge** that a material violation is ongoing or about to occur and is likely to result in substantial financial injury should be the standard to trigger the obligation. The Commission acknowledges this at page 40 of the Release when it refers to "actually believes," but Rule 205.3(d) uses the term "reasonably believes," which the Commission has defined in Rule 205.2(1), contrary to the Model Rules' definition of the same term, as an objective standard. As discussed above, if the Commission uses the Model Rule definition of "reasonably believes," it would then be the appropriate term and more understandable. If the Rule 205.2(1) definition is retained, Rule 205.3(d) should be revised to include a knowledge standard.

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<sup>18</sup> *In the matter of William R. Carter, Charles J. Johnson*, 22 S.E.C. Docket No. 292 (Feb. 28, 1981).

- The **time periods** established by the Commission in Rule 205.3(d) for attorneys to act **are unrealistically prescriptive and inflexible**. In practice, the circumstances surrounding a withdrawal and the reasons for it are not always clear. Attorneys may need time to consult in order to evaluate the situation and determine their obligations. The rule should provide for a “reasonably promptly” standard to allow sufficient flexibility and permit the exercise of reasonable discretion based on the particular circumstances.
- The rules or accompanying release should make clear that **an attorney may initiate the QLCC alternative at any stage in the process**. For example, an attorney could start the process of reporting to the CLO pursuant to Rule 205.3(b) and then decide to take the matter to the QLCC. Similarly, an attorney might decide to report to the QLCC after a matter has been brought to another committee. Alternatively, the company or the board or another committee of the board might, on its own motion, refer a matter to the QLCC. In each case, because the matter has gotten before the QLCC, the alternative of Rule 205.3(c) should apply.
- We do not believe that a distinction should be drawn between the obligations of a retained attorney and of a CLO if a matter has been reported to the QLCC. In each case, the matter has gotten to the appropriate authority within the organization in a position to address the matter. Accordingly, we urge **eliminating the requirement in Rule 205.3(b)(3) that the CLO notify the Commission** and disaffirm documents if remedial measures directed by the QLCC are not taken. It is the responsibility of the QLCC and the board to see that their directives are implemented.

#### **E. Problems of Investigative or Defense Counsel**

Rules 205.2(a)(1), (2) and (3) would broadly include within the definition of appearing and practicing before the Commission the defense of a party in a Commission administrative proceeding or investigation. Conducting internal investigations into allegations of impropriety within public companies also would be included. Apparently, this would include counsel retained by the QLCC or other board committee to assist in dealing with a matter brought to its attention.

Literally read, Rule 205.3(b) and (d) would then require the attorney representing the issuer to ask the client to publicly correct the defective filing that is the subject of the investigation or administrative proceeding. Absent correction, the attorney would then be required to withdraw from the representation and disaffirm the defective filing the attorney is attempting to investigate or to defend.

It is well established that the attorney-client privilege belongs to the client, and only the client can waive it. In practice, to require investigating or defending attorneys to withdraw and disaffirm would change this principle, and thereby threaten to chill the free flow of communication and candor between attorney and client that is the cornerstone of our legal

system.<sup>19</sup> Not only would this impair the ability of organizations to obtain an effective defense, but, by creating an impediment to the use of and communication with investigative and defense counsel, the benefits that these counsel bring to the remediation of problems and resolution of proceedings would be less available.

This is particularly the case insofar as the proposed rules require reporting/noisy withdrawal with respect to completed, past conduct if such conduct implicates what could be an on-going violation of law. To recognize the serious issues that are thereby raised for attorney and client, one need only consider the discussion between them concerning a previously-filed document which, in the context of the fraud-on-the-market doctrine, may be deemed to give rise to an on-going violation, as the Commission recognizes.<sup>20</sup>

If it is not feasible to exclude such attorneys from the definition in Rule 205.2(a)(1), (2) or (3), we suggest that they be excepted from the responsibilities in Rule 205.3(b) and (d) to the extent that the operation of those sections would interfere with the judgment of the CLO and CEO whether to release the results of internal investigations or with the ability of the attorney to properly defend the client. Rule 205.2(j)(5) also should be revised to make clear, at the least, that a QLCC member has no obligation to notify the Commission that a material violation has occurred if the QLCC determines that such action would impair the ability of the issuer zealously to defend itself in a Commission administrative proceeding or lawsuit or in a lawsuit brought by a third party.

A similar problem applies to attorneys who advise in specialized areas involving investigation or defense of claims. For example, environmental investigations performed by lawyers could be encompassed within the Section 307 rules requirements. Accordingly, environmental lawyers would be required not only to report up the ladder, but absent correction by the issuer, would be required to withdraw from the representation and to disaffirm.

Although reporting up the ladder in such cases may be appropriate in order to assure that proper attention is given to the matter by the CLO and CEO, environmental lawyers and other specialty lawyers in similar circumstances ought not be required to withdraw or disaffirm. Other lawyers representing the issuer and utilizing the specialists' services would, of course, remain fully subject to the Section 307 rules with up the ladder reporting responsibilities and be subject to any withdrawal or disaffirmance requirements in connection with false or misleading filings.

## VII. Attorney-Client Privilege and Confidentiality

The proposed rules provide that a *noisy withdrawal*, including notice to the Commission that the attorney is withdrawing *for professional considerations*, and subsequent disclosure of

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<sup>19</sup> Such a result directly contradicts the Commission's expressed intent that "the Commission does not want the rule to impair zealous advocacy, which is essential to the Commission's processes." Release at 8.

<sup>20</sup> See Release at 14: "A past instance of misconduct that nevertheless may have an ongoing impact (e.g., a misstatement contained in a prior Commission filing that investors may continue to rely upon) will need to be rectified."

information by the attorney to the Commission, *shall not constitute a waiver of any otherwise applicable privilege or protection as to other persons*. See Rules 205.3(d)(1)(i), 205.3(d)(3), and 205.3(e)(3). The Commission relies heavily on these proposed rules as avoiding the risk of liability of, or disciplinary action against, attorneys that is inherent in the proposed rules. The provision, however well-motivated, may not provide the protection that the Commission intends and may indeed prove to be a trap for the well-intentioned and unwary.

While it is true that *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc), and several district courts have ruled that privilege is not waived by disclosure to the Commission, in other jurisdictions the *Diversified* approach has been rejected.<sup>21</sup> The Commission cites the dissent in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002), in support of its position; but the majority in that case rejected the selective waiver approach.

Moreover, under Federal Rule of Evidence 501, privileges are to be governed by state law or federal common law unless there is an Act of Congress or a rule prescribed by the Supreme Court providing otherwise. Thus, while the courts may (and often do) recognize the selective waiver principle, it is not apparent how the Commission can adopt a rule that will control the courts and that will determine the nature, scope and applicability of a privilege, absent legislation specifically granting such authority. It is unclear whether the Act grants such authority.<sup>22</sup>

The uncertainty of whether the Commission's proposed rules will preempt state privilege laws is itself a problem. It would place an attorney who has initiated up-the-ladder reporting without receiving an appropriate response in the untenable position of having to decide whether complying with the Commission's notification provisions will waive the attorney-client privilege. A wrong decision to withdraw, disaffirm and notify the Commission can cause substantial injury to the attorney's client, who may now find that a wide range of communications between the client and the attorney (and possibly the documentation the attorney is required to prepare and retain under the proposed rules) are no longer protected from disclosure or discovery in other matters. Once again, there is the threat of a malpractice action against attorneys acting in good faith.

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<sup>21</sup> See, e.g., *In re Subpoena Duces Tecum*, 738 F.2d 1367, 1370 (D.C. Cir. 1984); *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991). In yet other jurisdictions, "selective waiver" may be found in certain circumstances. See generally *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993). Case law also suggests that the applicability of any judicially recognized rule as to selective waiver may vary as between attorney-client privilege and work-product privilege, and may turn on the existence of an appropriate confidentiality agreement with the governmental agency to which documents are provided, or other circumstances. As the Release (at 49) notes, protection through a confidentiality agreement as Rule 205.3(e)(3) contemplates represents the Commission's position on an unsettled question. The Commission itself concedes that the noisy withdrawal and disclosure rules exceed the standards explicitly required by Section 307 of the Act. Release at 7.

<sup>22</sup> In 1984, the Commission proposed legislation in this regard, but Congress did not adopt it. See 16 Sec. Reg. & L. Rep. at 461 (BNA March 2, 1984) (SEC statement in support of proposed Section 24(d) of the Exchange Act), referenced in *Westinghouse*, *supra* n. 21, 951 F.2d at 1425.

It is fundamentally unfair to clients and their attorneys to require the attorneys to make these two decisions regarding the pre-emptive effect of the Commission's rules when the consequences of a wrong decision may be disastrous to the attorney or the client. It creates an unreasonable conflict between the interests of attorney and client. The uncertainty also will have a chilling effect on the attorney-client relationship, as companies will be uneasy about retaining or freely communicating with counsel that may or may not eventually rely on the Commission's privilege rules and disclose confidential information to the Commission.

Most troubling, there is no easy way for the Commission to resolve this uncertainty. The Commission cannot itself establish its authority to preempt state privilege rules. Only Congress can speak to that. In light of the uncertainty regarding preemption, and the inability for the Commission to resolve the uncertainty, the Commission should refrain from considering noisy withdrawal, disaffirmation, and disclosure provisions unless and until it receives express Congressional authority to preempt state privilege rules.

#### **VIII. Sanctions and Liability**

The rules should state expressly that they may be enforced only by the Commission and that a violation of the rules does not provide a basis for claims by any third parties. This is important because 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. In addition, the Commission should provide that actions by an attorney pursuant to the rules do not subject the attorney to claims by a client for breach of professional duty to the client. Such a provision would be consistent with the legislative intent of Congress.<sup>23</sup>

We also believe that it is important that the Commission expressly reaffirm its historic policy of restraint in bringing actions against attorneys for violation of professional conduct rules because of the chilling effect such actions would have on the ability of attorneys to effectively represent clients before the Commission. The Commission should make clear that proceedings under Part 205 will only be brought when there are clear violations<sup>24</sup> and that the Commission's policy of not bringing proceedings against attorneys for violation of other state professional rules, absent a judicial or administrative determination that the attorney has violated the securities laws, will continue.<sup>25</sup> This would help foster confidence in the bar that lawyers may

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<sup>23</sup> Sen. Edwards, in his statement on the Senate floor on July 10, 2002 (S6552), stated: "Nothing in this bill gives anybody a right to file a private lawsuit against anybody. The only people who can enforce this amendment are the people at the SEC." In response to Sen. Sarbanes' question whether the amendment can only be enforced by the SEC through an administrative proceeding, Sen. Edwards responded (S6557): "The answer is yes. The only way to enforce this legal requirement is through an administrative process." Sen. Sarbanes responded: "That was an effort, of course, to deal with the idea that somehow it might bring causes of action from outside, or somewhere else. So it is limited to the SEC." Sen. Enzi, a co-sponsor of the amendment, similarly stated (S6555): "... [T]his amendment creates a duty of professional conduct and does not create a right of action by third parties."

<sup>24</sup> A "clear and convincing" standard of proof generally prevails in disciplinary proceedings for violation of state professional conduct rules for lawyers.

<sup>25</sup> See Edward F. Greene, Lawyer Disciplinary Proceedings before the Securities and Exchange Commission, Remarks to the New York County Lawyers' Association, (Jan. 18, 1982), Fed. Sec. L. Rep. (CCH) ¶ 83,089.

continue to vigorously represent their client's interests before the Commission without fear of retribution unless they have clearly violated the requirements of Part 205.

Furthermore, the Commission should seek to forestall courts from using the requirements of the Section 307 rules as establishing a standard for attorney performance by expressly negating their use that way. We suggest inclusion of the following:

Proof of violation of these Rules does not (1) give rise to an implied cause of action for professional negligence or breach of fiduciary duty, or (2) except for willful or reckless conduct, establish a standard of care that is relevant to prove professional negligence or breach of a fiduciary duty.<sup>26</sup>

Finally we recommend that the Commission provide a transition period before the Section 307 rules become effective so that companies and law firms can establish appropriate procedures for compliance and education of the bar and clients can take place.

#### **IX. Special Issues Relating to Counsel for Investment Advisers**

We are concerned that the Commission's views in the Release that would apply the requirements of the Section 307 rules to attorneys representing privately-held investment advisers to registered investment companies would fundamentally change the nature of the attorney-client relationship between those investment advisers and their counsel. We note that the Commission did not state whether these views extend to publicly-held investment advisers that are otherwise "issuers" under the Act, nor did the Commission state that its views extend to investment advisers, either privately-held or publicly held, to investment companies that are not registered with the Commission, when an issuer may not be involved at all.

Under the proposal, an attorney employed by a privately-held investment adviser who prepares, or assists in preparing, materials that the attorney has reason to believe will be submitted to or filed with the Commission by or on behalf of a registered investment company, or will be incorporated into any document submitted to or filed with the Commission, would be considered to be "appearing and practicing before the Commission in the representation of an issuer" and thus subject to the requirements of Rule 205.3(b). By implication, the "issuer" being represented by counsel to a privately-held investment adviser would be the registered investment company contracting with the investment adviser.

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<sup>26</sup> See the Restatement §52 (The Standard of Care), providing:

- (1) For purpose of liability under §§ 48 and 49, a lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances.
- (2) Proof of a violation of a rule or statute regulating the conduct of lawyers:
  - (a) does not give rise to an implied cause of action for professional negligence or breach of fiduciary duty;
  - (b) does not preclude other proof concerning the duty of care in Subsection (1) or the fiduciary duty; and
  - (c) may be considered by a trier of fact as an aid in understanding and applying the standard of Subsection (1) or § 49 to the extent that (i) the rule or statute was designed for the protection of persons in the position of the claimant and (ii) proof of the content and construction of such a rule or statute is relevant to the claimant's claim.

The release states that an attorney for a privately-held *investment adviser* who discovers “evidence of a material violation by an officer of the investment adviser that is related to the investment company” must report the evidence to the chief legal officer of the *investment company* client of the investment adviser as required by Rule 205.3(b).

The Commission, applying an agency theory, states that the obligation to report “up the ladder” to the chief legal officer of the investment company (and which ultimately may lead to a noisy withdrawal) does “no violence to the attorney-client privilege,” because the attorney is “providing legal services for the registered investment company.” In effect, the Commission is stating that an attorney retained by a privately-held investment adviser also represents the registered investment company, regardless of whether that investment company had any role in the retention of that attorney, and regardless of whether the investment company has otherwise retained separate counsel (which may also serve as independent legal counsel to the independent directors).

The Commission points out that the investment adviser is an agent of the investment company and owes the investment company a fiduciary duty under common law and under Section 36 of the Investment Company Act of 1940. We acknowledge that the investment adviser is a fiduciary of the investment company, but we question the basis for concluding that this fiduciary duty extends to an attorney retained by the investment adviser.

We believe that obligating an attorney to report client confidences to a third party fundamentally changes the nature of the traditional attorney-client relationship, which is based on concepts of trust and confidentiality. We further believe that there is nothing inherent in the relationship between a privately-held investment adviser and its registered investment company clients that requires so radical an overhaul in this context.

It goes without saying that investment advisers frequently consult with counsel to discuss business strategies, disclosure issues and other matters. The possibility that an investment adviser’s counsel may be required to reveal to advisory clients the nature of any consultation would undermine the essence of the attorney-client privilege and would discourage advisers from seeking the advice of counsel, perhaps when they could most benefit from it. Moreover, the nature of these consultations often concern matters of business judgment that could be subject to second-guessing after the fact should the attorney decide it would not be appropriate to reveal the confidence.

The sound structure of the Investment Company Act of 1940 and the Commission’s long history of interpretations under it, recognize that the nature of the relationship between an investment adviser and its investment company clients is arms-length and can at times be adverse. The Commission has taken the position that counsel representing an investment adviser or its affiliates is conflicted from many representations involving an investment company’s board of directors.

Given the conceptual inconsistency between that position and the Section 307 rule proposals, we suggest that the Commission simply require counsel to report up the ladder within the investment adviser organization, and not report to the third party investment company. Absent that, the Commission, in effect, is forcing a model in which counsel to the investment adviser also represents the investment company, whether or not the independent board members have retained their own independent legal counsel.

#### **X. Application of Section 307 Rules to Foreign Attorneys**

The Commission proposes to include foreign attorneys within the scope of the definition of “attorney” in the proposed rules, and foreign attorneys employed or retained by issuers, domestic or foreign, who may be deemed to be “appearing and practicing” before the Commission, would be subject to the obligations imposed on attorneys. While the breadth of the Commission’s proposals create problems for U.S. attorneys, we believe that the adverse impact will be even stronger on foreign attorneys. Therefore, for the reasons set forth below, the ABA believes that the Commission should, at the very least, defer subjecting foreign attorneys to the obligations of attorneys under the rules until the problems created for foreign attorneys can be adequately addressed. If the Commission chooses to subject them to the rules at this time, the ABA urges the Commission to do so only in a limited way.

First, the proposed rules would impose extremely burdensome obligations on many foreign attorneys who are employed or retained by companies that are or may become issuers, many of whom may prepare or review home country disclosures or documents that later will be reflected or included in documents filed with or submitted to the Commission. Because a foreign private issuer must submit to the SEC on Form 6-K whatever information the issuer (i) makes or is required to make public pursuant to the law of the jurisdiction of its domicile or in which it is incorporated or organized, (ii) files or is required to file with a stock exchange on which its securities are traded and which was made public by that exchange, and (iii) distributes or is required to distribute to its security holders, a great number of foreign attorneys would be subject to obligations under the proposed rules, often without knowing it. We believe that, especially in the case of foreign attorneys, the extraordinary breadth of the term “appearing and practicing” is likely to lead to confusion as to who is subject to the obligations of the rules, and to its sanctions in the event of noncompliance.

An attorney subject to the rule is obligated to determine if he or she has evidence of a material violation of the securities laws, material breach of fiduciary obligations or similar material violations. While many U.S. attorneys are not familiar with the U.S. securities laws, or laws relating to fiduciary duty, the information is at least generally accessible. This is not necessarily the case for foreign attorneys. Except those attorneys with an international practice, very few foreign attorneys have any knowledge of U.S. securities laws. In addition, because fiduciary obligations in many non-U.S. jurisdictions are governed by civil law rather than common law, attorneys practicing in jurisdictions other than in the jurisdiction where the issuer is organized may not necessarily be familiar with the standards applicable to determining breaches. Foreign attorneys who provide services for foreign subsidiaries of issuers are also affected by the proposed rules, insofar as the burden imposed on them under the rule would appear to require that they be obligated to respond to violations at levels above that of the entity

for whom they provide services. Many foreign attorneys do not believe they are adequately positioned to serve in this capacity.

A number of foreign jurisdictions treat the attorney-client privilege as a “professional secret,” and treat the violation as a matter of criminal law and professional ethics. [examples are Code Penal art 226-13 in France; Section 203(1) No. 3 and Section 356 Strafgesetzbuch in Germany.] Compliance by an attorney with the obligations imposed by the proposed rules could possibly result in sanctions against the attorney under the laws of the jurisdiction where the attorney is admitted to practice. Although the federal system of the United States may provide an arguable basis for the pre-emption of attorney-client and confidentiality obligations applicable to U.S. attorneys, it is hard to understand the basis upon which the Commission can claim that the proposed rules would supervene obligations of attorneys admitted to practice outside the U.S.

Implicit in the proposed rules is the view that an attorney is in a position, even if he or she believes to have evidence of a violation, to determine its materiality. In the event a foreign attorney were to be performing work for a subsidiary of an issuer, or with respect to a single document or disclosure by that issuer, it may be unrealistic to expect that the attorney will be in the position to know whether a perceived violation would be material at the parent level. Too sensitive a trigger will result in the activation of significant corporate resources to the potential waste of resources by the issuer and detriment of the reporting attorney. Moreover, most foreign attorneys are not in a position to assess whether the issuer has adopted an appropriate remedial response.

We are also concerned that foreign attorneys’ fears as to the scope and consequences of the proposed rules may cause foreign attorneys to advise clients not to list their securities in the United States or, if possible, to delist in the United States. Additionally, we are concerned that foreign private issuers, operating under a different governance structure, will not respond appropriately as mandated by the Commission, thereby precipitating excessive remedial actions by attorneys that will be disruptive to the markets.

Finally, we are concerned that subjecting foreign attorneys to regulation by the SEC could result in foreign agencies seeking to regulate the conduct of U.S. attorneys representing U.S. companies abroad or foreign companies.

If the Commission proceeds to include foreign attorneys under the rules, we believe use of the functional approach we suggest above for defining “appearing and practicing before the Commission” could mitigate somewhat the problems for foreign lawyers. Under that approach, only those foreign lawyers with responsibility for compliance with U.S. securities law, and therefore in a position to know their responsibilities, would be subject to the rule. Because of the possibility of inconsistent foreign law requirements, however, even those foreign lawyers should be exempt from taking any action that would be inconsistent with or violative of governing local law.

## **XI. Application of Section 307 Rules to Law Firms**

A client often retains a law firm to provide legal services rather than an individual attorney. Although the proposed rules appear on the surface to impose obligations only on individual attorneys, the scope of the definitions and the obligations imposed on attorneys under the proposed rules create the possibility that in many cases the rules would apply to an entire law firm, and that sanctions for violation could also effectively be imposed on an entire firm. The Release does not specifically address these important issues. We have a number of concerns regarding this issue.

First, it is not clear from the definition of “appearing and practicing” whether the term is limited to individual attorneys at a law firm or could apply to the entire firm. The Commission should make clear that the term “appearing and practicing” is intended to relate solely to individuals, rather than to a firm. To do otherwise would risk subjecting many attorneys at a firm to obligations they may not have the capacity to undertake.

Related to the above, as discussed elsewhere the proposed rules provide that if a subordinate attorney appears and practices before the Commission on behalf of an issuer, that subordinate attorney’s supervisory attorneys also appear and practice before the Commission. This has serious implications for law firms. We believe that only the supervisory attorney or attorneys to whom a subordinate attorney actually reports evidence of a material violation should be subject to the requirements of the rules pursuant to Rule 205.4.

We also believe that it should be made clear in the adoption of final rules that information known to or in the possession of an attorney at a law firm will not be imputed to any other attorney. For example, knowledge of a potential violation of a fiduciary duty by an attorney practicing in the area of employee benefits (and who would not otherwise be deemed to be “appearing and practicing” before the Commission) should not be attributed to another attorney at the firm who would be deemed to be “appearing and practicing.” If such knowledge were to be attributed, each attorney at a law firm could be deemed to have an affirmative obligation to determine the information other attorneys may possess, a burden that would be excessive and unrealistic. We believe that the rules as adopted should clarify that attorneys in a law firm should only be held responsible for information actually known by them.

It is unclear to us how an attorney employed by a law firm is required to act under the proposed rules where a law firm, rather than an individual, is retained by an issuer. If withdrawal is required, is it by the individual attorney or by the law firm, particularly where the law firm was engaged? If the entire firm were required to withdraw from all matters, the consequence could be severe and may well result in significant prejudice not only to the issuer but also to its shareholders. In some cases, resignation may not be possible, as in the situation of a litigation matter where resignation will require leave of a court. In other cases, the forced termination of regulatory attorneys, intellectual property attorneys and others could result in significant disruption to the issuer’s ongoing business, and consequential harm and cost to the issuer and its shareholders.

We also are concerned that if an entire firm were deemed to be subject to the proposed rules, a determination that an entire firm had violated the rules could potentially lead to disastrous consequences for the entire law firm and for its clients. This exposure might cause law firms to decline representation of certain public companies, making it more difficult, for example, for smaller issuers to obtain quality counsel.

Because of the serious consequences of imposing obligation under the Section 307 rules, directly or indirectly, on a law firm, the ABA recommends that the Commission clearly limit their application to individual attorneys and to individual supervisory attorneys.

## **XII. Revision of Standards for Practice Before the Commission**

The Commission proposes to amend the standards for practice by attorneys before the Commission by subjecting attorneys to the negligence standards applicable to accountants. This change in the standards is not required by the Act and should not be dealt with by the Commission during this short time period.

When the Commission amended Rule 102(e) in 1998, it specifically did not impose the negligence standard on attorneys but limited it to accountants. The Commission recognized that the roles and responsibilities of attorneys and accountants differed significantly. Even imposing a negligence standard on accountants was not without controversy.<sup>27</sup>

The Commission's decision to refrain from including lawyers was consistent with its historical recognition that, as a regulatory agency with enforcement authority, subjecting lawyers to discipline by the SEC for negligence would have a chilling effect on the ability of lawyers to represent their client's interests zealously and independently. Congress, in codifying Rule 102(e) in Section 602 of the Act, recognized this distinction and limited the negligence standard to accountants.

There is no justification for the Commission to change the decision it made in 1998 and that Congress codified in the Act, particularly in the limited time frame for comment and Commission deliberation imposed by Congress for implementing the up-the-ladder reporting requirement. Subjecting lawyer conduct across the board to a negligence standard, even one with ostensibly higher thresholds, puts a powerful and potentially coercive tool in the hands of enforcement staff that could seriously interfere with the independence of counsel and the freedom of counsel to effectively represent the interests of the client. This is even more problematic today because of the additional sanctions available for a violation of Section 4C of the Exchange Act as a result of Section 3 of the Act. The reasons that led the Commission to decline to impose a negligence standard on attorneys in 1998 remain equally, if not more, applicable today.

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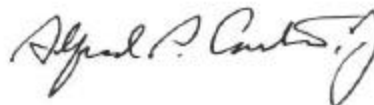
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<sup>27</sup> See Dissenting Statement of Commissioner Norman S. Johnson, Release No. 33-7593, File No. S7-16-98 (Oct. 19, 1998). Among other issues raised by Commissioner Johnson was the authority of the Commission to impose a negligence standard.

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Attention: Jonathan G. Katz, Secretary  
December 18, 2002  
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The ABA appreciates the opportunity to submit these comments, and we are available to meet with the Commission or the Staff, to respond to any questions and to assist in the formulation of final rules. We also stand ready to work with the Commission, as we have with state and federal courts and other agencies, on an ongoing basis to develop appropriate rules governing the professional conduct of lawyers that serve the public interest.

Respectfully submitted,



Alfred P. Carlton, Jr.  
President, American Bar Association

cc: Hon. Harvey L. Pitt  
Chairman

Hon. Paul Atkins  
Commissioner

Hon. Roel Campos  
Commissioner

Hon. Cynthia A. Glassman  
Commissioner

Hon. Harvey Goldschmid  
Commissioner

Giovanni P. Prezioso  
General Counsel

Alan L. Beller  
Director, Division of Corporation Finance  
and Senior Counselor to the Commission



## American Bar Association

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### Task Force on Implementation of Section 307 of the Sarbanes-Oxley Act of 2002

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The ABA Task Force on Implementation of Section 307 of the Sarbanes-Oxley Act of 2002, appointed by ABA President Alfred P. Carlton, Jr. in November 2002, is comprised of the following members, liaisons, and staff:

#### Members:

- **M. Peter Moser, Chair of the ABA Task Force.** Mr. Moser is of counsel to Piper Rudnick LLP, Baltimore, Maryland, and is a former Chair of the ABA Standing Committee on Ethics and Professional Responsibility. Mr. Moser has written articles on judicial conduct and professional responsibility and has taught these subjects at the University of Baltimore and University of Maryland Law Schools and in CLE programs. He has been Chair of the Maryland State Ethics Commission and of the Maryland Attorney Grievance Commission and was an Adviser to the ALI Law Governing Lawyers Restatement project. He served in the ABA House of Delegates (1978-2002), was ABA Treasurer and a member of the ABA Board of Governors and its Executive Committee. Mr. Moser is President of the American Bar Foundation and has been President of the Maryland State and Baltimore City Bar Associations;
- **James H. Cheek, III.** Mr. Cheek is a senior member of the law firm of Bass, Berry & Sims PLC, Nashville, TN. He served as Chair of the ABA Section of Business Law during 1998-1999 and currently serves as Chair of the ABA Task Force on Corporate Responsibility. He is a member of the Legal Advisory Committee of the New York Stock Exchange, having served as its Chair from 1989 to 1992. He also served as Chair of the Legal Advisory Board to the National Association of Securities Dealers from 1995 to 1997. He chaired the Federal Regulation of Securities Committee of the American Bar Association from 1986 to 1991. Mr. Cheek has served for a number of years as a member of the ABA Corporate Laws Committee which reviews and revises the Model Business Corporation Act. He is the Chair of the Securities Regulation Institute (San Diego) and a member of the Advisory Planning Committee of the annual PLI Securities Institute in New York and of the annual Ray Garrett Corporate and Securities Law Institute in Chicago. Mr. Cheek is also a member of the American Law Institute and a Trustee of the Securities and Exchange Commission Historical Society.
- **The Honorable Barbara Kerr Howe.** From 1988 until her recent retirement from the bench, Ms. Howe was an Associate Judge of the Circuit Court for Baltimore County, MD. Prior to 1988, she was a partner in a law firm engaged in general practice. Judge Howe currently serves as Chair of the ABA Standing Committee on Professional Discipline and as a member of the Professionalism and Professional Responsibility Committee of the ABA General Practice, Solo and Small Firm Section. In addition, from 1995-1998, she served as a member of the ABA Standing Committee on Professionalism. Judge Howe has also served as President of the

Maryland State Bar Association (1996-1997), as a member of the Judicial Disabilities Commission of Maryland (1991-1995) and then as its Chair (1995), and as a director of the Attorney Grievance Commission in Maryland (1983-1985), after having served on its Inquiry Panels for a number of years. She is also a former member and director of the American Judicature Society and the National Association of Women Judges and is currently a Fellow of the Maryland Bar Foundation and of the American Bar Foundation;

•**Marvin L. Karp.** Mr. Karp is a partner with Ulmer & Berne LLP in Cleveland, OH, Chair of the ABA Standing Committee on Ethics and Professional Responsibility, and a member of the ABA House of Delegates. Mr. Karp served as Chair of the ABA Section of Tort and Insurance Practice from 1990-1991 and as Chair of that section's Committee on Professionalism from 1987-1988. Mr. Karp also served as President of the Federation of Insurance and Corporate Counsel (1994-1995). In addition, he served the Cleveland Bar Association as President (1988-1989), as Chair of its Professional Responsibility Committee (1978-1979), as Chair of its Ad Hoc Commission on ABA Proposed Model Rules of Professional Conduct (1980-1982), and as Chair of its Special Committee on Professionalism (1987-1988). Mr. Karp has also served as a member of the Supreme Court of Ohio Special Committee on Creeds of Professionalism (1989-1990), and he currently is a Fellow of the American College of Trial Lawyers, International, the Academy of Trial Lawyers, and the American Bar Foundation;

•**Barry Nagler.** Mr. Nagler is the Senior Vice President, General Counsel and Secretary of Hasbro, Inc., one of the world's leading maker of games, toys and family entertainment products. Prior to joining Hasbro in January of 2000, Mr. Nagler spent twelve years with Reebok International Ltd., most recently as Senior Vice President and General Counsel, and six years with the Boston law firm of Foley, Hoag & Eliot. Mr. Nagler is a member of the national Board of Directors of the American Corporate Counsel Association, as well as a member of ACCA's Executive Committee and the incoming ACCA Advocacy Chair. In addition, he is a member of the Board of ACCA's Northeast Chapter;

•**The Honorable Benjamin R. Civiletti.** Mr. Civiletti has been Chairman of the law firm of Venable, Baetjer and Howard, LLP since July 1993 and a partner since 1981. He had been Managing Partner of that firm from 1987 to 1993. He previously served as Attorney General of the United States from 1979 to 1981. Mr. Civiletti is a director of several national and international corporations. He possesses a record of active service to the American Bar Association as a member of the House of Delegates and a former Chairman of the Litigation Section. He is also a member of numerous other professional and civic groups. He is a Fellow of the American College of Trial Lawyers and the American Law Institute.

### **Liaisons:**

•**The Honorable E. Norman Veasey,** liaison from the Conference of Chief Justices, is the Chief Justice of the Delaware Supreme Court in Wilmington, DE, an office he has held since 1992. Chief Justice Veasey also is the Chair of the ABA Special Committee on the Evaluation of the Rules of Professional Conduct ("Ethics 2000"), and from 1994-1995, he served as Chair of the ABA Section of Business Law. He was the President of the Conference of Chief Justices and the Chair of the Board of the National Center for State Courts during the 1999-2000 term. From 1957 until he took office as Chief Justice, he practiced law with the Wilmington, Delaware law firm of Richards, Layton and Finger, where he concentrated on business law, corporate transactions, litigation, and counseling. He served at various times as managing partner and the chief executive officer of the firm. During 1961-1963, he was Deputy Attorney General and

Chief Deputy Attorney of the State of Delaware and from 1982-1983, he served as President of the Delaware State Bar Association. Chief Justice Veasey is a Judicial Fellow of the American College of Trial Lawyers and a Director of the Institute for Law and Economics at the University of Pennsylvania. He is also a member of the American Law Institute, the International Advisory Board of the Centre for Corporate Law and Securities Regulation and numerous other professional organizations.

•**Leslie W. Jacobs**, liaison from the ABA Board of Governors. Mr. Jacobs is a partner with Thompson Hine LLP in Cleveland, OH and is a member of the ABA Board of Governors, House of Delegates, and Task Force on Corporate Responsibility. He also has served as Chair of the Ethics and Professionalism Committee of the ABA Section of Antitrust, as the ABA Board of Governors' Liaison to the ABA Standing Committee on Professionalism, and as a member of the ABA Section Officers Conference Committee on Professionalism. In addition, Mr. Jacobs served on the American Law Institute's Members Consultative Group, Restatement of the Law Governing Lawyers (1996-1999). Mr. Jacobs was a member of the Ohio Board of Bar Examiners and Past President of the Ohio State Bar Association. He is a Life Fellow of the American and Ohio State Bar Foundations.

•**Stanley Keller**, liaison from the ABA Business Law Section. Mr. Keller is a partner with Palmer & Dodge LLP in Boston, MA, and is engaged in a business and securities law practice. He is chair of the Federal Regulation of Securities Committee of the ABA Business Law Section, co-chair of the Boston Bar Association's Task Force on Revision of the Massachusetts Business Corporation Law, and former chair of the BBA's Business Law Section, Corporation Law Committee, and Legal Opinions Committee. He is also a member of the TriBar Opinion Committee. Mr. Keller lectures for various continuing legal education organizations, and has authored and edited a number of articles and treatises on corporate and securities law matters, including "Massachusetts Business Lawyering," "International Securities Law Handbook" and "Massachusetts Limited Liability Company Forms and Practice Manual";

•**Jan Lawrence Handzlik**, liaison from the ABA Criminal Justice Section. Mr. Handzlik is a partner in the Los Angeles, CA office of Chicago's Kirkland & Ellis, where he specializes in white collar criminal defense and business fraud litigation. Mr. Handzlik has represented individuals and corporations throughout the United States in the full spectrum of white collar crime investigations and prosecutions, emphasizing complex financial, environmental, healthcare, securities fraud and regulatory matters. Before going into private practice, Mr. Handzlik served as an Assistant U.S. Attorney in the Fraud and Special Prosecutions Unit in Los Angeles. Most recently, he was Deputy General Counsel to the Rampart Independent Review Panel, a commission to study and report to the L.A. Police Commission on LAPD policies and practices in the wake of the Rampart Corruption Incident. Mr. Handzlik also served in the Christopher Commission and Webster Commission investigations of the LAPD following the Rodney King incident. Mr. Handzlik is the former Chair of the American Bar Association's White Collar Crime Committee, a nationwide group of over 700 white collar crime prosecutors and defense counsel. He currently serves on the Council of the American Bar Association's Criminal Justice Section. He lectures widely on many aspects of criminal and civil fraud, and has extensive experience conducting corporate internal investigations.

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