Lawyers: The Key to Instilling Trust in Corporate America

Robert Snyder

Follow this and additional works at: https://scholarsarchive.byu.edu/byuplr

BYU ScholarsArchive Citation
Available at: https://scholarsarchive.byu.edu/byuplr/vol18/iss1/6

This Article is brought to you for free and open access by the All Journals at BYU ScholarsArchive. It has been accepted for inclusion in Brigham Young University Prelaw Review by an authorized editor of BYU ScholarsArchive. For more information, please contact scholarsarchive@byu.edu, ellen_amatangelo@byu.edu.
future corporate crime. We first need to focus on those who own stock. By educating and encouraging stockholders to own stocks for longer periods of time, we shift the prevailing attitude to where stocks represent investment, not gambling. By focusing attention on changing corporate cultures that seem to encourage crime, we can make it less likely that an individual will feel the pressure to commit a crime in such an environment. Further, by introducing the idea of trust back into corporate culture, we can stop corporate crime before it occurs. Finally, by prosecuting corporations and individuals with sanctions that will actually have an effect, we can make the cost of crime too high for those that would commit it in the face of stockholders' desires and a trust-centric corporate culture. Through this multitiered approach we can work towards a more effective means of preventing corporate crime and make it possible for American businesses to regain the confidence of the investing public.

Lawyers: The Key to Instilling Trust in Corporate America

Robert Snyder*

The possibilities of fraud occur at the moment when an attorney needs to work out the details of an agreement while under tremendous pressure from his or her client . . . [to] work around laws to reach company goals.

The year is 2001 and Americans feel betrayed. Major corporations have swindled them out of their money. Investors watch in horror as these public companies file for bankruptcy. The shareholders know the chances of their money being returned are slim. Many of the stockholders have put their life savings into corporations such as Enron and WorldCom that are now paying major settlements for fraud. Not only are these corporations leaving the American people's portfolios empty, but they are also robbing them of their trust. As a result, investments in the market plummet. The economy is in a state of turmoil. Everyone wants to know what caused the corporate chaos. The finger naturally points to those occupations within the fraudulent companies that have been exposed.

Responsibility for Fraud

Former Securities and Exchange Commission (SEC) chairman Harvey Pitt points the finger at attorneys. He says, "One of the biggest disappointments for me since I came to the SEC has been observing the way lawyers are often involved in violations of securities laws." Pitt's statement appears to have weight,

* Robert Snyder is a senior majoring in accounting and minoring in Spanish. He plans to graduate with honors. He will graduate in April 2006 and plans to attend law school in fall 2006.

with major law firms making large settlements out of court. Among those firms are Jennings, Strouss, & Salmon and Baker & Hostetler. These law firms and others like them often find themselves in difficult ethical situations. Corporate executives are often the cause of the lawyers' ethical bind because they have come to see the role of lawyers as "helping businesses getting around the clear purposes of the law." Imagine a major business with millions of dollars in a corporate deal. A lawyer feverishly works for the business to structure the legalities of its deal. The corporation discovers there are some loopholes in the security laws. With the help of their lawyer, the corporation can save a lot of money if they correctly circumvent the technicalities of the securities laws.

The possibilities of fraud occur at the moment when an attorney needs to work out the details of an agreement while under tremendous pressure from his or her client. The attorney's stress comes from the client's insistence that he or she work around laws to reach company goals.

America's complex legal system requires people in business to rely on (and persuade) attorneys and accountants. The securities laws are clearly meant to check individual and corporate greed, limiting it and channeling it to socially useful ends. However, they do so through the persons of professional advisors and experts, and, to put it bluntly, those experts are not doing their job. Why? Because they don't know what their job really is or should be.

Because of this flaw in corporate responsibility, America needed to redefine the roles within a corporation. The result was the Sarbanes-Oxley Act.

SOLUTIONS TO FRAUD

The Sarbanes-Oxley Act redefines roles, responsibilities, and ethics within the corporate workplace. By redefining corporate roles, Congress intends the Act to increase liability for people working in corporate positions that corrupted America's trust. By increasing the liability for "bad" behavior, the Act attempts to regain confidence in those occupations that seemed to play a large role in the fraudulent cases of 2001. As a result of Congress's efforts, President Bush signed the Sarbanes–Oxley Act into law on July 30, 2002.

In section 307 of the Act, Congress specifically responded to concerns like Pitt's—about lawyers' involvement in fraud—by including new standards and ethics for attorneys. This section emphasizes lawyers' loyalty to the company as whole (e.g., employees and investors) rather than individual corporate leaders. Section 307 also requires lawyers to report "evidence of a material violation of securities law or breach of fiduciary duty" within the company to the chief legal counsel or the chief executive officer. If the chief officers do not respond to the attorney's concern, the attorney will then need to report the concern to the board of directors—comprised solely of directors not employed by the company. Additionally, the Act also calls for the SEC to create a new code of ethics for corporate attorneys.

In the proposed code of ethics, the SEC plans to require lawyers to make a "noisy withdrawal." The "noisy withdrawal" provision requires lawyers to resign from a company after they have determined that the company is guilty of fraud. After resigning, the lawyers must advise the SEC of his or her resignation. The SEC will then conduct an investigation to discover the reasons for the lawyer's withdrawal. Many critics worry that this rule will flood the SEC with frivolous resignations after a first inevitable disagreement between lawyers and their clients. But a provision within the rule would drastically reduce the possibilities of frivolous resignations. The provision states that a lawyer would withdraw from a company only if they determine "that a (1) continuing (2) material violation is (3) probable, and that (4) the general counsel and (5) board are ignoring it." If enacted in...
with major law firms making large settlements out of court. Among those firms are Jennings, Strouss, & Salmon and Baker & Hostetler. These law firms and others like them often find themselves in difficult ethical situations. Corporate executives are often the cause of the lawyers' ethical bind because they have come to see the role of lawyers as "helping businesses getting around the clear purposes of the law." Imagine a major business with millions of dollars in a corporate deal. A lawyer feverishly works for the business to structure the legalities of its deal. The corporation discovers there are some loopholes in the security laws. With the help of their lawyer, the corporation can save a lot of money if they correctly circumvent the technicalities of the securities laws.

The possibilities of fraud occur at the moment when an attorney needs to work out the details of an agreement while under tremendous pressure from his or her client. The attorney's stress comes from the client's insistence that he or she work around laws to reach company goals.

America's complex legal system requires people in business to rely on (and persuade) attorneys and accountants. The securities laws are clearly meant to check individual and corporate greed, limiting it and channeling it to socially useful ends. However, they do so through the persons of professional advisors and experts, and, to put it bluntly, those experts are not doing their job. Why? Because they don't know what their job really is or should be.1

Because of this flaw in corporate responsibility, America needed to redefine the roles within a corporation. The result was the Sarbanes-Oxley Act.

SOLUTIONS TO FRAUD

The Sarbanes-Oxley Act redefines roles, responsibilities, and ethics within the corporate workplace. By redefining corporate roles, Congress intends the Act to increase liability for people working in corporate positions that corrupted America's trust. By increasing the liability for "bad" behavior, the Act attempts to regain confidence in those occupations that seemed to play a large role in the fraudulent cases of 2001. As a result of Congress's efforts, President Bush signed the Sarbanes-Oxley Act into law on July 30, 2002.2

In section 307 of the Act, Congress specifically responded to concerns like Pitt's—about lawyers' involvement in fraud—by including new standards and ethics for attorneys. This section emphasizes lawyers' loyalty to the company as whole (e.g., employees and investors) rather than individual corporate leaders. Section 307 also requires lawyers to report "evidence of a material violation of securities law or breach of fiduciary duty" within the company to the chief legal counsel or the chief executive officer. If the chief officers do not respond to the attorney's concern, the attorney will then need to report the concern to the board of directors—comprised solely of directors not employed by the company. Additionally, the Act also calls for the SEC to create a new code of ethics for corporate attorneys.

In the proposed code of ethics, the SEC plans to require lawyers to make a "noisy withdrawal." The "noisy withdrawal" provision requires lawyers to resign from a company after they have determined that the company is guilty of fraud. After resigning, the lawyers must advise the SEC of his or her resignation. The SEC will then conduct an investigation to discover the reasons for the lawyer's withdrawal. Many critics worry that this rule will flood the SEC with frivolous resignations after a first inevitable disagreement between lawyers and their clients.3 But a provision within the rule would drastically reduce the possibilities of frivolous resignations. The provision states that a lawyer would withdraw from a company only if they determine "that a (1) continuing (2) material violation is (3) probable, and that (4) the general counsel and (5) board are ignoring it."4 If enacted in

1 Ibid.
3 Ibid.
this way, the "noisy withdrawal" provision under the Sarbanes-Oxley Act would guarantee increased trust in corporate America.

TWO CASES FOR THE "NOISY WITHDRAWAL" PROVISION

This Act would put lawyers on the company's side (i.e., investors) instead of on the executives' side. The benefits of having lawyers defending the right interests, by merely pointing a finger in the general direction of fraud, can be immense. In one such case, the SEC could have prevented one of the largest insurance fraud cases in history had they heeded the advice of an attorney who left them a tip. In 1992, Terry Davis, the attorney who left the tip, was pursuing a civil suit against Martin R. Frankel on behalf of several investors. Terry Davis told the SEC that Frankel, the man they were investigating, was lying to them. The SEC was investigating Frankel for misrepresenting an investing record about his small brokerage firm and using clients' money for personal expenses. The investigation focused mainly on just one of Frankel's funds. After investigating, the SEC settled the case with Frankel for $200,000. Had the SEC followed Terry Davis's tip, they would have discovered Frankel was hiding other fraudulent accounts in Swiss bank accounts under several different aliases.

Seven years later, Frankel's name resurfaced. This time he was accused of fraud that involved upwards of $13 million. Had the SEC taken the heed of Davis, investors would not have lost $13 million. If more lawyers come forward and the SEC seriously considers their claims, millions of dollars can be saved for the economy. The Sarbanes-Oxley Act helps both the lawyers and the SEC coordinate more effectively to prevent such fraud.

With lawyers employing a second set of eyes for the SEC, investors will be able to have more trust and confidence that corporations are being run the way they should be. Many of the fallen corporations would not have had so many problems if lawyers had been required to make "noisy withdrawals." Problems with Tyco International, for instance, could have been avoided if its lawyers had spoken up. The SEC exposed Tyco International for fraud in June of 2002. An outside law firm working for Tyco knew about the fraud early in 2000. The law firm did nothing about the fraud other than inform their clients that there might be a problem.

The SEC discovered the fraud two years later. Tyco's attorneys should have stopped representing their client. Yet the attorney's continued representing Tyco even after Tyco persisted in its fraudulent ways. The reason Tyco's attorneys avoided doing anything was "there's no legal obligation to rat out the client... and if the documents aren't responsive, it's OK to withhold them," said Alan Bromberg, a professor at Southern Methodist University's Law School.

The attorneys and the executives were protected under the attorney-client privilege. Had lawyers not been tied by the attorney-client privilege, the Tyco attorneys could have indicated that fraud was occurring by making a "noisy withdrawal." Attorneys' required departure from a company committing fraud would thereby give investors confidence that investment dollars were not solely representing the companies executives' interests. Thus, many argue that the trade-off in fraud cases under the "noisy withdrawal" rule would be the investor's sense of security for the attorney-client privilege.

THE ATTORNEY-CLIENT PRIVILEGE AND "NOISY WITHDRAWAL"

Many argue that trading the attorney-client privilege for preventing fraud is not worth the trade-off. "It paints a target on your client," said Lawrence J. Fox, a securities litigator in Philadelphia. Many lawyers, like Fox, argue that the "noisy withdrawal" rule puts constraints on client-attorney relationships. Clients, some attorneys argue, will be unable to fully confide in their attorney because they are afraid that the attorney will turn and run to tell the SEC. This complaint is well justified. Without their clients' full support, attorneys will not be able to accurately represent their clients. To strengthen confidence between attorneys and their clients, no other country compared to the U.S. has tried to protect the attorney-client privilege quite so avidly. America believes every client deserves fair and just representation.

stead of on the executives’ side. The benefits of having lawyers defending the
businesses would guarantee increased trust in corporate America.

**TWO CASES FOR THE “NOISY WITHDRAWAL” PROVISION**

This Act would put lawyers on the company’s side (i.e., investors) instead of on the executives’ side. The benefits of having lawyers defending the right interests, by merely pointing a finger in the general direction of fraud, can be immense. In one such case, the SEC could have prevented one of the largest insurance fraud cases in history had they heeded the advice of an attorney who left them a tip. In 1992, Terry Davis, the attorney who left the tip, was pursuing a civil suit against Martin R. Frankel on behalf of several investors. Terry Davis told the SEC that Frankel, the man they were investigating, was lying to them. The SEC was investigating Frankel for misrepresenting an investing record about his small brokerage firm and using clients’ money for personal expenses. The investigation focused mainly on just one of Frankel’s funds. After investigating, the SEC settled the case with Frankel for $200,000. Had the SEC followed Terry Davis’s tip, they would have discovered Frankel was hiding other fraudulent accounts in Swiss bank accounts under several different aliases.

Seven years later, Frankel’s name resurfaced. This time he was accused of fraud that involved upwards of $13 million. Had the SEC taken the heed of Davis, investors would not have lost $13 million. If more lawyers come forward and the SEC seriously considers their claims, millions of dollars can be saved for the economy. The Sarbanes-Oxley Act helps both the lawyers and the SEC coordinate more effectively to prevent such fraud.

With lawyers employing a second set of eyes for the SEC, investors will be able to have more trust and confidence that corporations are being run the way they should be. Many of the fallen corporations would not have had so many problems if lawyers had been required to make “noisy withdrawals.” Problems with Tyco International, for instance, could have been avoided if its lawyers had spoken up. The SEC exposed Tyco International for fraud in June of 2002. An outside law firm working for Tyco knew about the fraud early in 2000. The law firm did nothing about the fraud other than inform their clients that there might be a problem.

The SEC discovered the fraud two years later. Tyco’s attorneys should have stopped representing their client. Yet the attorney’s continued representing Tyco even after Tyco persisted in its fraudulent ways. The reason Tyco’s attorneys avoided doing anything was “there’s no legal obligation to rat out the client . . . and if the documents aren’t responsive, it’s OK to withhold them,” said Alan Bromberg, a professor at Southern Methodist University’s Law School.

The attorneys and the executives were protected under the attorney–client privilege. Had lawyers not been tied by the attorney–client privilege, the Tyco attorneys could have indicated that fraud was occurring by making a “noisy withdrawal.” Attorneys’ required departure from a company committing fraud would thereby give investors confidence that investment dollars were not solely representing the companies executives’ interests. Thus, many argue that the trade-off in fraud cases under the “noisy withdrawal” rule would be the investor’s sense of security for the attorney–client privilege.

**THE ATTORNEY–CLIENT PRIVILEGE AND “NOISY WITHDRAWAL”**

Many argue that trading the attorney–client privilege for preventing fraud is not worth the trade-off. “It paints a target on your client,” said Lawrence J. Fox, a securities litigator in Philadelphia. Many lawyers, like Fox, argue that the “noisy withdrawal” rule puts constraints on client–attorney relationships. Clients, some attorneys argue, will be unable to fully confide in their attorney because they are afraid that the attorney will turn and run to tell the SEC. This complaint is well justified. Without their clients’ full support, attorneys will not be able to accurately represent their clients. To strengthen confidence between attorneys and their clients, no other country compared to the U.S. has tried to protect the attorney–client privilege quite so avidly. America believes every client deserves fair and just representation.

---


Cohen and Maremont, 27.

Pacelle and Schroeder, A1.

France, 54.
When corporate lawyers consider protecting their clients however, they should consider who their clients really are—the investor and shareholder who pay the lawyer's legal fees. Unfortunately, up until this point in time, lawyers have seemed to represent the company executives who were defrauding investors. The investors who are paying the attorneys' bills should be those who receive the legal defense, not the corporate executives. The "noisy withdrawal" policy under the Sarbanes-Oxley Act would give the legal defense to the "true" attorneys' clients. With attorneys representing the investors, America's confidence will be regained in corporate America.

On the other hand, concern about lawyers considering investors or entire corporations as their clients instead of the individual corporate leaders, is that executives will no longer confide in the company's legal representation. "If somebody thinks you are going to expose them, they won't talk to you," said Alfred P. Carlton, president of the American Bar Association. The legal system need not worry about executives failing to confide in their attorneys. Florida, New Jersey, Virginia, and Wisconsin all require attorneys to blow the whistle on wrongdoing, and no evidence has demonstrated that executives in those states do not confide in their attorneys. Even if business leaders mistrust their attorneys, the business executives cannot draft legal documents. For a corporation to function, in light of all of the technical legalities and requirements that exist, business executives must confide in their attorneys. In this way the Sarbanes-Oxley Act defends investors without drastically altering relations between attorneys and corporate executives.

Another example within our own legal system supports the "noisy withdrawal" provision under the Sarbanes-Oxley Act. In 1998, a lawyer named Charles J. Hecht helped a client named William N. Levy of Voorhees. The SEC accused Levy of manipulating the stock of Electro-Optical Systems Corporation, defrauding investors of more than $12 million. During the court hearing, Hecht agreed to let his client provide regulators with an accounting of his client's financial dealings. In fall of that same year, the SEC accused Hecht of allowing Levy to submit an incomplete and misleading accounting. Hecht settled the case with the SEC, paying a total of more than $170,000.

When a lawyer for the SEC was asked why it moved so forcefully against Hecht, he explained, "We don't have vast resources, say like the IRS does or the Justice Department, to investigate things. . . We have to be able to rely on accounting ordered by the court that are fair and accurate and complete and not misleading in any respect." Like the SEC, investors' resources are scarce and limited. Thus, misleading court submissions are not the only acts that should be punished by law. Lawyers submitting legal work for clients should be held accountable even if the legal work is not submitted in a court of law. Lawyers have taken an oath to obey and sustain the law—not to turn their heads when their clients are misleading the public.

**CONCLUSION**

Lawyers are the missing link of trust between the community and the corporation. They hold high positions of honor and prestige within our nation. They interpret the laws of the land and define the bounds that the laws intend Americans to stay within. The laws give U.S. citizens peace and security by assuring them that businesses are fairly representing themselves. When those laws are bent and twisted, the trust and confidence they instill in our nation are also bent and twisted. Legal advisors with such awesome responsibility need to have their jobs more clearly defined. Once attorneys' roles in corporate America are redefined, they will better balance companies' pressure for profits with our nation's laws, giving us security. The Sarbanes-Oxley Act with the "noisy withdrawal" provision defines attorneys' roles well enough to give them the power to uphold our laws. When attorneys appropriately use this power, trust will once again be instilled in corporate America.

---

13 Ibid.
14 Ibid.

---

When corporate lawyers consider protecting their clients however, they should consider who their clients really are—the investor and stockholder who pay the lawyer's legal fees. Unfortunately, up until this point in time, lawyers have seemed to represent the company executives who were defrauding investors. The investors who are paying the attorneys' bills should be those who receive the legal defense, not the corporate executives. The "noisy withdrawal" policy under the Sarbanes-Oxley Act would give the legal defense to the "true" attorneys' clients. With attorneys representing the investors, America's confidence will be regained in corporate America.

On the other hand, concern about lawyers considering investors or entire corporations as their clients instead of the individual corporate leaders, is that executives will no longer confide in the company's legal representation. "If somebody thinks you are going to expose them, they won't talk to you," said Alfred P. Carlton, president of the American Bar Association. The legal system need not worry about executives failing to confide in their attorneys. Florida, New Jersey, Virginia, and Wisconsin all require attorneys to blow the whistle on wrongdoing, and no evidence has demonstrated that executives in those states do not confide in their attorneys. Even if business leaders mistrust their attorneys, the business executives cannot draft legal documents. For a corporation to function, in light of all of the technical legalities and requirements that exist, business executives must confide in their attorneys. In this way the Sarbanes-Oxley Act defends investors without drastically altering relations between attorneys and corporate executives.

Another example within our own legal system supports the "noisy withdrawal" provision under the Sarbanes-Oxley Act. In 1998, a lawyer named Charles J. Hecht helped a client named William N. Levy of Voorhees. The SEC accused Levy of manipulating the stock of Electro-Optical Systems Corporation, defrauding investors of more than $12 million. During the court hearing, Hecht agreed to let his client provide regulators with an accounting of his client's financial dealings. In fall of that same year, the SEC accused Hecht of allowing Levy to submit an incomplete and misleading accounting. Hecht settled the case with the SEC, paying a total of more than $170,000.

When a lawyer for the SEC was asked why it moved so forcefully against Hecht, he explained, "We don't have vast resources, say like the IRS does or the Justice Department, to investigate things. . . . We have to be able to rely on accounting ordered by the court that are fair and accurate and complete and not misleading in any respect." Like the SEC, investors' resources are scarce and limited. Thus, misleading court submissions are not the only acts that should be punished by law. Lawyers submitting legal work for clients should be held accountable even if the legal work is not submitted in a court of law. Lawyers have taken an oath to obey and sustain the law—not to turn their heads when their clients are misleading the public.

CONCLUSION

Lawyers are the missing link of trust between the community and the corporation. They hold high positions of honor and prestige within our nation. They interpret the laws of the land and define the bounds that the laws intend Americans to stay within. The laws give U.S. citizens peace and security by assuring them that businesses are fairly representing themselves. When those laws are bent and twisted, the trust and confidence they instill in our nation are also bent and twisted. Legal advisors with such awesome responsibility need to have their jobs more clearly defined. Once attorneys' roles in corporate America are redefined, they will better balance companies' pressure for profits with our nation's laws, giving us security. The Sarbanes-Oxley Act with the "noisy withdrawal" provision defines attorneys' roles well enough to give them the power to uphold our laws. When attorneys appropriately use this power, trust will once again be instilled in corporate America.

---