

## COLLOQUIUM

# CORPORATE LAWYERS: ETHICAL AND PRACTICAL LAWYERING WITH VANISHING GATEKEEPER LIABILITY

## FOREWORD

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### INTRODUCTION

I am pleased to author the introductory article for the *Fordham Law Review's* insightful Colloquium focusing on the corporate attorney. As the articles in this Colloquium illustrate, the role of the corporate lawyer—both as in-house and outside counsel—is instrumental in effectuating ethical lawyering, sound corporate governance practices, and law compliance.<sup>1</sup> These timely contributions that are summarized at a later point in this Article<sup>2</sup> comprise a valuable resource to assess the functions, obligations, and perceptions of the corporate attorney, as well as the public policy ramifications of counsel's conduct.

At least since the 1970s, the corporate lawyer's instrumental role in shaping the client company's culture and conduct has been a subject of analysis by courts,<sup>3</sup> the Securities and Exchange Commission (SEC),<sup>4</sup> bar

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1. For my law school text on this subject, see Marc I. Steinberg & Stephen B. Yeager, *INSIDE COUNSEL: PRACTICES, STRATEGIES, AND INSIGHTS* (2d ed. 2020).

2. *See infra* Part II.

3. *See, e.g.*, SEC v. Coven, 581 F.2d 1020 (2d Cir. 1978); SEC v. Spectrum, Ltd., 489 F.2d 535 (2d Cir. 1973); Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901 (D.D.C. 1990); Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberg, 660 F. Supp. 1362 (D. Conn. 1987).

4. *See, e.g.*, SEC v. Nat'l Student Mktg. Corp., 457 F. Supp. 682 (D.D.C. 1978); Carter & Johnson, Exchange Act Release No. 17,597, 1981 WL 384414 (Feb. 28, 1981); Hodgin, Exchange Act Release No. 16,225, Securities Act Release No. 6131, 18 SEC Docket 458 (Sept. 27, 1979).

associations,<sup>5</sup> and commentators.<sup>6</sup> As exemplified by the articles in this Colloquium, this dialogue continues today, as traditional topics are revisited and new subjects are explored. Nonetheless, one pressing development merits scrutiny: although the multifaceted issues implicating corporate counsel remain vibrant, the specter of liability has dramatically decreased.

For decades, corporate counsel has been characterized as a “gatekeeper.”<sup>7</sup> Serving in that capacity, the corporate attorney acts as the red or green light to the consummation of securities transactions as well as other endeavors sought to be undertaken by the client.<sup>8</sup> This gatekeeper role remains intact today.<sup>9</sup> However, what has fundamentally changed is the liability exposure for attorneys who fail—either negligently or knowingly—in performing this function.<sup>10</sup> Hence, the key premise of this Article is that, while corporate counsel’s adherence to ethical norms comprises an important component of sound corporate governance and law compliance, failure to do so ordinarily does not incur attorney liability exposure. The consequence, as the discussion in this Article’s next Part will address, is the vanishing of gatekeeper liability.

### I. THE VANISHING OF GATEKEEPER LIABILITY

It remains true that corporate attorneys continue to face liability exposure to their clients for malpractice<sup>11</sup> and to nonclients when authoring opinion

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5. See MODEL RULES OF PROF’L CONDUCT *rr.* 1.2, 1.6, 1.13, 1.16, 4.1 (AM. BAR ASS’N 2018); see also ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 92-366 (1992). See generally *Report of the New York City Bar Association Task Force on the Lawyer’s Role in Corporate Governance*, 62 BUS. LAW. 427 (2007); *The Code of Professional Responsibility and the Responsibility of Lawyers Engaged in Securities Practice—A Report by the Committee on Counsel Responsibility and Liability*, 30 BUS. LAW. 1289 (1975).

6. See generally MARC I. STEINBERG, ATTORNEY LIABILITY AFTER SARBANES-OXLEY (Supp. 2018); Samuel H. Gruenbaum, *Corporate/Securities Lawyers: Disclosure, Responsibility, Liability to Investors, and National Student Marketing Corp.*, 54 NOTRE DAME L. REV. 795 (1979); Simon M. Lorne, *The Corporate and Securities Adviser, the Public Interest, and Professional Ethics*, 76 MICH. L. REV. 423 (1978); Morgan Shipman, *The Need for SEC Rules to Govern the Duties and Civil Liabilities of Attorneys Under the Federal Securities Statutes*, 34 OHIO ST. L.J. 231 (1973).

7. See, e.g., Stephen Choi, *Market Lessons for Gatekeepers*, 92 NW. U. L. REV. 916 (1998); John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293 (2003); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984).

8. See, e.g., *Spectrum*, 489 F.2d at 536; *United States v. Benjamin*, 328 F.2d 854, 863 (2d Cir. 1964); *Felts v. Nat’l Account Sys. Ass’ns*, 469 F. Supp. 54, 59–60 (N.D. Miss. 1978); Gruenbaum, *supra* note 6, at 804.

9. See, e.g., *Lawson v. FMR LLC*, 571 U.S. 429, 449 (2014) (“Emphasizing the importance of outside professionals as ‘gatekeepers who detect and deter fraud,’ the Senate Report concludes: ‘Congress must reconsider the incentive system that has been set up that encourages accountants and lawyers who come across fraud in their work to remain silent.’” (quoting S. REP. NO. 10-146, at 2 (2002))).

10. See *infra* notes 44–122 and accompanying text.

11. See, e.g., RONALD E. MALLIN, *LEGAL MALPRACTICE* (2019 ed.).

letters that are designed to be relied on by such third parties.<sup>12</sup> Moreover, in certain instances, attorneys under state law may incur liability for fraud<sup>13</sup> and for aiding and abetting violations of applicable state securities laws,<sup>14</sup> as well as breaches of fiduciary duty or fraud committed by corporate fiduciaries (such as those perpetrated by directors and officers).<sup>15</sup> Outside of these settings, in the performance of a corporate attorney's customary tasks, the incurrence of liability is relatively rare.<sup>16</sup>

The premise of this discussion is to illustrate that the liability of the corporate attorney to nonclients today is greatly diminished as compared to twenty-five years ago.<sup>17</sup> This eventuality has been accentuated by the failure of the SEC to take meaningful action against miscreant corporate counsel who act solely in their advisory roles.<sup>18</sup> Logically, one would conclude that the corporate attorney's liability exposure would have become enhanced after the financial scandals of two decades ago and the 2008 financial crisis.<sup>19</sup> Surprisingly, the very opposite has occurred: corporate counsel's vanishing gatekeeper liability.<sup>20</sup>

#### *A. Historical Perspective: Corporate Attorney Liability as Gatekeeper*

The corporate counsel as gatekeeper is a fixture that has been entrenched for nearly half a century.<sup>21</sup> Gatekeepers may be defined as follows:

Gatekeepers are reputational intermediaries that, in the securities context, enhance market integrity by staking their reputation on the credibility of an investment [or other matter] through their certification, assessment, or verification of facts surrounding it. Depending on the circumstances, gatekeepers have the ability to detect and deter fraud. Gatekeeper reliability is thus an integral component of the integrity of the securities markets.<sup>22</sup>

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12. See, e.g., *Horizon Fin., F.A. v. Hansen*, 791 F. Supp. 1561 (N.D. Ga. 1992) (applying Georgia and Pennsylvania law); *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 128 Cal. Rptr. 901 (Ct. App. 1976); *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996).

13. See, e.g., *Lawson v. Cagle*, 504 So. 2d 226 (Ala. 1987); *Brownell v. Garber*, 503 N.W.2d 81 (Mich. Ct. App. 1993); *Veras Inv. Partners, LLC v. Akin Gump Strauss Hauer & Feld LLP*, 851 N.Y.S.2d 61 (Sup. Ct. 2007).

14. See, e.g., *Houston v. Seward & Kissel LLP*, No. 07-cv-6305, 2008 WL 818745 (S.D.N.Y. Mar. 27, 2008) (allowing an aiding and abetting claim under Oregon securities fraud statutes to proceed).

15. See, e.g., *Thomas H. Lee Equity Fund V, L.P. v. Mayer Brown, Rowe & Maw LLP*, 612 F. Supp. 2d 267 (S.D.N.Y. 2009) (applying New York law).

16. See *infra* notes 44–122 and accompanying text.

17. See *infra* notes 44–122 and accompanying text.

18. See *infra* notes 85–97 and accompanying text.

19. See generally KURT EICHENWALD, *CONSPIRACY OF FOOLS: A TRUE STORY* (2005); MICHAEL LEWIS, *THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE* (2010).

20. See *infra* notes 44–122 and accompanying text.

21. See generally *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014); Choi, *supra* note 7; Coffee, *supra* note 7; Kraakman, *supra* note 7.

22. Marc I. Steinberg & James Ames, *From the Regulatory Abyss: The Weakened Gatekeeping Incentives Under the Uniform Securities Act*, 35 YALE L. & POL'Y REV. 1, 4–5 (2016).

As the SEC observed in *Fields*,<sup>23</sup> handed down in 1973, the securities attorney “works in his office where he prepares prospectuses, proxy statements, opinions of counsel, and other documents that we, our staff, the financial community, and the investing public must take on faith.”<sup>24</sup> Similarly, as the Second Circuit asserted that same year, “[e]ffective implementation of [the securities laws’] safeguards . . . depends in large measure on the members of the bar who serve in an advisory capacity to those engaged in securities transactions.”<sup>25</sup> Hence, the corporate attorney’s function as gatekeeper has been a constant presence for several decades.<sup>26</sup> As broadly expressed by Fred Zacharias, “[l]awyers are gatekeepers and always have been.”<sup>27</sup>

Consistent with this rationale, private and SEC actions against corporate lawyers based on noncompliance with their gatekeeping function occurred with regularity prior to the mid-1990s.<sup>28</sup> With significant frequency, securities attorneys were sued as aiders and abettors in private actions under the key antifraud provisions of the federal securities laws—section 10(b) of the Securities Exchange Act of 1934<sup>29</sup> and SEC Rule 10b-5 promulgated thereunder.<sup>30</sup> The SEC likewise invoked these provisions in numerous enforcement actions against attorneys.<sup>31</sup> In addition, the commission utilized its Rule 2(e) disciplinary authority<sup>32</sup> against legal counsel who allegedly

23. Securities Act Release No. 5404, 1973 WL 149285 (June 18, 1973).

24. *Id.* at \*3 n.20.

25. SEC v. Spectrum, Ltd., 489 F.2d 535, 536 (2d Cir. 1973).

26. See *supra* notes 7–9, 21–25 and accompanying text.

27. Fred Zacharias, *Lawyers as Gatekeepers*, 41 SAN DIEGO L. REV. 1387, 1389 (2004); see *Developments in the Law—Corporations and Society*, 117 HARV. L. REV. 2169, 2245 (2004) (“By withholding his or her support (such as a lawyer’s opinion letter or an accountant’s certification), the professional gatekeeper may be able to prevent the fraud.”).

28. See generally *Molecular Tech. Corp. v. Valentine*, 925 F.2d 910 (6th Cir. 1991); SEC v. Coven, 581 F.2d 1020 (2d Cir. 1978); *Spectrum*, 489 F.2d 535; *Lincoln Sav. & Loan Ass’n v. Wall*, 743 F. Supp. 901 (D.D.C. 1990); SEC v. Elec. Warehouse, Inc., 689 F. Supp. 53 (D. Conn. 1988), *aff’d*, 891 F.2d 457 (2d Cir. 1989); *Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberg*, 660 F. Supp. 1362 (D. Conn. 1987); *Morgan v. Prudential Grp., Inc.*, 527 F. Supp. 957 (S.D.N.Y. 1981), *aff’d*, 729 F.2d 1443 (2d Cir. 1983).

29. 15 U.S.C. § 78(b) (2018).

30. 17 C.F.R. § 240.10b-5 (2019); see *supra* notes 3, 28. The merits of private securities litigation are succinctly set forth by Steven Ramirez:

First, private enforcement operates in a depoliticized context . . . [R]obust private actions operate as a check upon the dangers of agency capture. Second, private claims of securities fraud require no government bureaucracy or other government funding support, other than the routine operation of a court system . . . Third, only private litigation both strips the fraudfeasor of the benefits of their wrongdoing and compensates the victim . . . Fourth, private remedies allow a reduced reliance upon ex ante government regulation . . . Fifth, the broad definition of a security for purposes of the federal securities laws assures that virtually all financial transactions with the ability to disturb financial stability and macroeconomic conditions fall within the scope of the private remedy under Rule 10b-5.

Steven A. Ramirez, *The Virtues of Private Securities Litigation: An Historic and Macroeconomic Perspective*, 45 LOY. U. CHI. L.J. 669, 722–26 (2014).

31. See *supra* notes 3, 4, 8, 23, 25, 28.

32. 17 C.F.R. § 201.102(e). Rule 2(e) was renumbered to Rule 102(e). Pursuant to section 602 of the Sarbanes-Oxley Act of 2002, Rule 102(e) was codified in significant part by adding section 4C(a) to the Securities Exchange Act.

engaged in unprofessional conduct when counseling their clients,<sup>33</sup> seeking to suspend or bar these professionals from practicing before the SEC.<sup>34</sup>

Of course, since the enactment of the Securities Act of 1933,<sup>35</sup> attorneys are subject to liability under section 11<sup>36</sup> for issuing materially false and misleading opinions that are contained in a registration statement.<sup>37</sup> That remains true and represents a rare situation where an attorney realistically today may incur liability under the federal securities laws.<sup>38</sup> In days of yesteryear, however, more expansive theories of attorney liability were advanced with some success, including that the defendant lawyer was a “seller” of the subject securities and, hence, liable under section 12 of the Securities Act<sup>39</sup> to the affected purchasers based on a registration violation<sup>40</sup> or a material misstatement contained in an offering document.<sup>41</sup> In addition, with some frequency, legal counsel was sought to be held liable as a control person of the primary violator.<sup>42</sup>

The days of expansive attorney liability under the federal securities laws are gone. Today, outside of section 11 liability, an attorney ordinarily incurs liability exposure only when she engages in blatant fraud, such as stock manipulation or insider trading.<sup>43</sup> The following discussion focuses on this changed environment.

### *B. The Dissipating Liability Exposure of Corporate Counsel*

Beginning in 1994, the liability exposure of corporate counsel was significantly reduced due to the U.S. Supreme Court’s decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*<sup>44</sup> that aider and abettor liability is impermissible in private actions under section 10(b) and Rule 10b-5. That decision was followed by the enactment of the Private Securities Litigation Reform Act of 1995<sup>45</sup> (PSLRA). PSLRA, among other

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33. See generally Gibson, Exchange Act Release No. 18,314, 1981 WL 28249 (Dec. 7, 1981); Hodgins, Exchange Act Release No. 16,225, Securities Act Release No. 6131, 18 SEC Docket 458 (Sept. 27, 1979); Keating, Muething & Klekamp, Exchange Act Release No. 15,982, 1979 WL 186370 (July 2, 1979).

34. See sources cited *supra* notes 4, 23, 33.

35. Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77bbb (2018)).

36. 15 U.S.C. § 77k (2018).

37. See *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643, 683 (S.D.N.Y. 1968).

38. See generally DONALD W. GLAZER ET AL., *GLAZER AND FITZGIBBON ON LEGAL OPINIONS* (3d ed. 2008 & Supp. 2018).

39. 15 U.S.C. § 771.

40. *Id.* § 771(a)(1); cf. *Pinter v. Dahl*, 486 U.S. 622, 629–630 (1988) (defining the term “seller” under section 12(a)(1) of the Securities Act).

41. 15 U.S.C. § 771(a)(2). See generally *Abell v. Potomac Ins. Co.*, 859 F.2d 1104 (5th Cir. 1988), *vacated as moot*, *Fryar v. Abell*, 492 U.S. 1914 (1989); *Junker v. Crory*, 650 F.2d 1349 (5th Cir. 1981).

42. See, e.g., *In re Rospatch Sec. Litig.*, 709 F. Supp. 1239 (W.D. Mich. 1992); *Seidel v. Pub. Servs. Co.*, 616 F. Supp. 1342 (D.N.H. 1985).

43. See *infra* notes 82–84 and accompanying text.

44. 511 U.S. 164 (1994).

45. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

provisions,<sup>46</sup> greatly enhanced the pleading requirements<sup>47</sup> and precluded the undertaking of discovery, including the production of documents and witness testimony, until and unless the plaintiff hurdled a motion to dismiss.<sup>48</sup> With these onerous pleading requirements, a large percentage of securities cases alleging fraud do not proceed beyond the motion to dismiss stage.<sup>49</sup> Not surprisingly, due in part to the absence of discovery and the presence of rigorous pleading mandates, lawyers today are rarely sued in private litigation alleging violations of section 10(b) and Rule 10b-5.<sup>50</sup> This consequence is reinforced by the PSLRA's limitation of liability to that of proportionate fault unless the subject defendant acts with actual knowledge of the fraudulent conduct.<sup>51</sup>

Seeking to evade the strictures of the PSLRA, plaintiffs filed class actions in the state courts, predominantly in the California courts.<sup>52</sup> Reacting to this attempt to vitiate the PSLRA, Congress enacted the Securities Litigation Uniform Standards Act of 1998<sup>53</sup> (SLUSA). With certain exceptions,<sup>54</sup> SLUSA mandates that securities class actions involving nationally traded

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46. Other provisions, for example, include a safe harbor for forward-looking statements in private securities litigation, provisions addressing contribution and proportionate liability, and class action reform (such as selection of lead plaintiff). *See generally* JOHN T. BOSTELMAN ET AL., PUBLIC COMPANY DESKBOOK: SARBANES-OXLEY AND FEDERAL GOVERNANCE REQUIREMENTS (2d ed. 2009).

47. 15 U.S.C. § 78u-4(b)(1); *see* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 314 (2007) (interpreting the PSLRA's pleading requirements to require a strong inference of fraudulent intent).

48. *See* 15 U.S.C. § 78u-4(b)(3)(B).

49. *See* STEFAN BOETRICH & SVETLANA STARYKH, NERA ECON. CONSULTING, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2018 FULL-YEAR REVIEW 20 (2019), [https://www.nera.com/content/dam/nera/publications/2019/PUB\\_Year\\_End\\_Trends\\_012819\\_Final.pdf](https://www.nera.com/content/dam/nera/publications/2019/PUB_Year_End_Trends_012819_Final.pdf) [<https://perma.cc/2N62-678U>] (“Out of the motions to dismiss for which a court decision was reached, the following three outcomes classify all of the decisions: granted with or without prejudice (45%), granted in part and denied in part (30%), and denied (25%).”).

50. *See* Marc I. Steinberg, *Pleading Securities Fraud Claims—Only Part of the Story*, 45 LOY. U. CHI. L.J. 603, 607 (2014) (stating that collateral actors, including attorneys, are rarely named as defendants in class actions).

51. 15 U.S.C. § 78u-4(g)(2)(A).

52. *See* Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 82 (2006) (“Rather than face the obstacles set in their path by the Reform Act, plaintiffs and their representatives began bringing class actions under state law, often in state court.”). *See generally* Lisa L. Casey, *Shutting the Doors to State Court: The Securities Litigation Uniform Standards Act of 1998*, 27 SEC. REG. L.J. 141 (1999); Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL L. REV. 1 (1998).

53. Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended in scattered sections of 15 U.S.C.).

54. Generally, individual actions, derivative suits, and actions alleging state law violations in the merger and acquisition context may continue to be brought in state court. In addition, class actions alleging solely federal claims under the Securities Act (such as section 11 claims) may continue to be instituted in state court. *See* 15 U.S.C. §§ 77p(b), 77p(f), 78bb(f)(3); *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061 (2018). As expected, the effect of *Cyan* is that plaintiffs increasingly are bringing their class actions alleging only federal Securities Act claims in state court. *See* Martin L. Seidel & Mary Eaton, *The Supreme Court's Cyan Decision: Implications for Securities Class Actions*, REV. SEC. & COMMODITIES REG., Apr. 10, 2019, at 69, 71 (observing plaintiffs “flock[ing]” to state courts after *Cyan*).

securities must be brought in federal district court with only federal law applying.<sup>55</sup> SLUSA thereby not only requires that these class actions be instituted in federal court but also precludes the filing of state law claims, including otherwise applicable state securities law claims as well as claims premised on breaches of fiduciary duty.<sup>56</sup> This legislation thereby drastically reduces attorney liability exposure, as it forbids the bringing of otherwise meritorious state law claims.<sup>57</sup>

Plaintiffs have tried, but thus far have failed, to allege that legal counsel who drafts a client's materially misleading disclosure document or otherwise meaningfully renders advice with respect to the disclosure process is primarily liable under section 10(b) and Rule 10b-5. This position initially was met with approbation by a number of courts, including the federal district court in the Enron litigation.<sup>58</sup> Nonetheless, this approach ultimately failed before the Supreme Court.<sup>59</sup> Rejecting a flexible "scheme to defraud" rationale,<sup>60</sup> the Court held that plaintiffs must show that they had knowledge of and relied on the defendant's alleged misconduct.<sup>61</sup> Unless the subject law firm is identified in the disclosure documents or other materials provided to investors, proving reliance on the law firm's allegedly improper conduct is problematic.<sup>62</sup> And, of course, such fraudulent conduct must be sufficiently alleged without the availability of discovery.<sup>63</sup>

In a subsequent decision, the Supreme Court further restricted primary liability under Rule 10b-5(b)<sup>64</sup> by holding that this provision encompasses only those persons who "make" the subject material misstatement(s).<sup>65</sup> Construing the term "make" narrowly, the Court reasoned that the term is confined to those who have control over the contents of the subject statements and the manner in which such statements are disseminated.<sup>66</sup>

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55. See 15 U.S.C. § 78bb(f)(1); *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014).

56. See *Dabit*, 547 U.S. at 82–89.

57. See *supra* note 52 and accompanying text.

58. *Newby v. Enron Corp. (In re Enron Corp. Sec. Derivative & ERISA Litig.)*, 235 F. Supp. 2d 549, 610–11 (S.D. Tex. 2002).

59. See generally *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008).

60. *Id.* at 159–60 ("Invoking what some courts call 'scheme liability,' petitioner nonetheless seeks to impose liability on respondents even absent a public statement." (citation omitted)).

61. *Id.* at 159 ("No member of the investing public had knowledge, either actual or presumed, of respondents' deceptive acts during the relevant times. Petitioner, as a result, cannot show reliance upon any of respondents' actions . . .").

62. See generally *Pac. Inv. Mgmt. Co. v. Mayer Brown LLP*, 603 F.3d 144 (2d Cir. 2010).

63. See *supra* notes 47–48 and accompanying text.

64. 17 C.F.R. § 240.10b-5(b) (2019).

65. See generally *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135 (2011).

66. *Id.* at 144 (stating that "the maker of a statement is the entity with authority over the content of the statement and whether and how to communicate it").

Because attorneys rarely have such control, the decision provides another avenue for liability avoidance.<sup>67</sup>

*Lorenzo v. SEC*,<sup>68</sup> a more recent Supreme Court decision, may give plaintiffs a glimmer of hope. In this SEC enforcement action, the Court held that people who disseminate materials knowing they contain disclosure deficiencies may be liable under specified antifraud provisions of the federal securities laws.<sup>69</sup> However, applied to legal counsel, prudent attorneys decline to act as disseminators of their clients' disclosure documents to investors.<sup>70</sup> Moreover, even if an expansive "indirect" dissemination standard were to apply,<sup>71</sup> plaintiffs ordinarily still must show that they knew of and relied on the conduct of the recalcitrant lawyer(s)—a challenging standard to satisfy. In view of these Supreme Court decisions—precluding the application of aider liability in section 10(b) and Rule 10b-5 private actions, along with a narrow construction of primary actor status—corporate counsel's liability exposure in federal securities class actions is minimal.<sup>72</sup>

### C. *The SEC's Abstention in Disciplining Corporate Counsel*

The SEC has key weapons in its arsenal to use against alleged miscreant lawyers.<sup>73</sup> For example, the SEC has statutory authority to bring enforcement actions against attorneys based on aiding and abetting violations of section 10(b) and Rule 10b-5.<sup>74</sup> In its administrative enforcement proceedings, the SEC can pursue attorneys under its cease and desist authority for "causing" their clients' misconduct.<sup>75</sup> With respect to the SEC's disciplinary authority, Rule 102(e) proceedings<sup>76</sup> may be instituted against lawyers based on unethical conduct<sup>77</sup> or actions premised on a breach

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67. Thus, the decision signifies that attorneys ordinarily will be subject to Rule 10b-5(b) primary liability exposure only when they themselves "make" a statement, such as an attorney opinion letter or other communication conveyed to investors. *See, e.g., Rubin v. Schottenstein, Zox & Dun*, 143 F.3d 263, 266–68 (6th Cir. 1998); *Tr. Co. of La. v. N.N.P. Inc.*, 104 F.3d 1478, 1490 (5th Cir. 1997); *Kline v. First W. Gov't Sec., Inc.*, 24 F.3d 480, 491 (3d Cir. 1994).

68. 139 S. Ct. 1094 (2019).

69. *Id.* at 1100 (holding that persons who knowingly disseminate materially false or misleading statements may be subject to liability under section 17(a)(1) of the Securities Act, section 10(b) of the Securities Exchange Act, and Rule 10b-5(a) and (c)).

70. If counsel engages in such conduct, she incurs the risk of being a "participant" or "seller" in the transaction. *Cf. Hines v. Data Line Sys., Inc.*, 787 P.2d 8, 14 (Wash. 1990).

71. This argument may be based on the "direct or indirect" language of section 10(b). 15 U.S.C. § 78j(b) (2018).

72. The major exception to this proposition is if the attorney makes a statement, such as pursuant to an opinion letter or other communication to investors. *See supra* note 67 and accompanying text.

73. *See generally* MARC I. STEINBERG & RALPH C. FERRARA, *SECURITIES PRACTICE: FEDERAL AND STATE ENFORCEMENT* (2d ed. 2001 & Supp. 2019–2020).

74. *See, e.g.*, 15 U.S.C. § 78t(e).

75. *See, e.g., id.* § 78u-3.

76. *See supra* note 32 and accompanying text.

77. *See, e.g.*, sources cited *supra* note 33.



of the SEC's standards of professional conduct for attorneys.<sup>78</sup> In addition, in the brokerage firm setting, enforcement actions may be brought based on a subject attorney's alleged failure to adequately oversee a subordinate employee under such attorney's supervision.<sup>79</sup>

Thus, the SEC's arsenal is impressive and was historically invoked against legal counsel with some frequency.<sup>80</sup> Attorneys from "Wall Street" firms were sued by the SEC and law firms, at times, were named as defendants.<sup>81</sup> Today, however, unless engaged in palpably improper conduct, such as insider trading,<sup>82</sup> stock manipulation,<sup>83</sup> or the issuance of false opinion letters,<sup>84</sup> enforcement actions against attorneys are rare.<sup>85</sup> Although the SEC occasionally will name accounting firms as defendants,<sup>86</sup> it declines to do so in regard to law firms.<sup>87</sup> Perhaps most telling is that, since the adoption in

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78. See Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8186, Exchange Act Release No. 47,282, 68 Fed. Reg. 6296 (Feb. 6, 2003) (to be codified at 17 C.F.R. pt. 205).

79. See 15 U.S.C. § 78o(b)(6)(E); Urban, Securities Act Release No. 66,259, 2012 WL 1024025 (Jan. 26, 2012) (finding the general counsel of a brokerage firm not liable on a failure to supervise charge).

80. See STEINBERG, *supra* note 6, §§ 4:01–4:05 (collecting cases).

81. See generally Keating, Muething & Klekamp, Exchange Act Release No. 15,982, 1979 WL 186370 (July 2, 1979); Plotkin, Yolles, Siegel & Turner, Exchange Act Release No. 5841, 1977 WL 175975 (July 5, 1977).

82. See generally SEC v. Levoff, No. 2:19-CV-05536 (filed D.N.J. Feb. 13, 2019); SEC v. Marks, No. 2-CV-12325 (D. Mass. filed Dec. 3, 2002); Wiest, Exchange Act Release No. 72155, 2014 WL 1894492 (May 13, 2014).

83. Cf. SEC v. Zouvas, No. cv-17-00427, 2019 WL 4016687, at \*2 (D. Ariz. Aug. 26, 2019) (alleging negligent involvement in a scheme to manipulate the market for the subject company's stock).

84. See, e.g., SEC v. Atlas, No. 19-CV-62303 (S.D. Fla. filed Sept. 17, 2019).

85. Occasionally, the SEC institutes enforcement actions against attorneys alleging other types of misconduct. See, e.g., SEC v. Heinen, No. C-07-2214 (N.D. Cal. filed Apr. 24, 2007) (alleging fraudulent backdating of stock options by attorneys); SEC v. Isselmann, No. CV-04-1350 (D. Or. filed Sept. 21, 2004) (instituting proceedings alleging subject company's general counsel did not provide key accounting information to the company's audit committee, board of directors, or independent auditors); Google, Inc., Securities Act Release No. 8523, 2005 WL 82435 (Jan. 13, 2005) (instituting proceedings against Google and its attorney for alleged registration and disclosure violations). Note that these actions occurred over a decade ago. See Monson, Investment Company Act Release No. 28,323, 2008 WL 2574441, at \*5 (June 30, 2008) (stating that "[a]s far as we are aware, we have not sanctioned attorneys in litigated enforcement proceedings based on alleged negligent acts or omissions they may have committed in providing non-public legal advice to clients" and also asserting that "the Commission has established that it will pursue cases against lawyers who allegedly violate the securities laws with scienter, render misleading opinions used in public disclosures, or engage in conduct that would render a non-lawyer liable for the same activity under comparable circumstances").

86. See, e.g., PricewaterhouseCoopers LLP, Exchange Act Release No. 87,052, 2019 WL 4596714 (Sept. 23, 2019) (announcing a settlement whereby an accounting firm did not admit wrongdoing involving the alleged auditor independence violations); Grant Thornton, LLP, Exchange Act Release No. 76,536, 2015 WL 7755463 (Dec. 2, 2015) (announcing a settlement whereby the accounting firm admitted wrongdoing in auditor independence violations).

87. Indeed, insofar as I am aware, the SEC has not named a "prestigious" law firm as a defendant since the 1980s.

2003 of its standards of professional conduct,<sup>88</sup> mandated by the Sarbanes-Oxley Act of 2002,<sup>89</sup> the SEC has not instituted a single proceeding against an attorney based on an alleged violation of these standards.<sup>90</sup> Hence, for several years, the SEC has refused to invoke statutory and regulatory mechanisms that clearly come within the ambit of its authority.<sup>91</sup>

The SEC's lack of zeal in implementing its rightful authority is not confined to attorneys. For example, in the aftermath of the financial crisis, the SEC elected to fine publicly held companies billions of dollars<sup>92</sup> while declining to utilize the control person provision of the Securities Exchange Act of 1934<sup>93</sup>—even on one occasion—to bring suit against corporate insiders, including chief executive officers and chief financial officers.<sup>94</sup> As applied to the context of this Colloquium, the point is that, so long as corporate attorneys perform the “daily grist of the mill”<sup>95</sup> and confine their role to the performance of legal services for their clients,<sup>96</sup> the initiation of enforcement or disciplinary action by the SEC against corporate counsel is relatively remote.<sup>97</sup>

#### D. Corporate Counsel Liability Exposure Under State Law

Unquestionably, corporate counsel's greatest risk of liability is under state law. For example, malpractice exposure to one's client is a continual concern.<sup>98</sup> In the opinion letter setting,<sup>99</sup> counsel should be mindful of liability exposure to intended nonclient recipients based on negligent misrepresentation.<sup>100</sup> In situations involving an alleged breach of fiduciary

88. See Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8186, Exchange Act Release No. 47,282, 68 Fed. Reg. 6296 (Feb. 6, 2003) (to be codified at 17 C.F.R. pt. 205).

89. 15 U.S.C. § 7245 (2018).

90. I made this point in my recent book. See MARC I. STEINBERG, *THE FEDERALIZATION OF CORPORATE GOVERNANCE* 278–82 (2018).

91. The SEC's refusal to invoke clear provisions of the securities laws is not confined to the legal profession. For example, in the aftermath of the 2008 financial crisis, the SEC declined to pursue control persons (such as chief executive officers and chief financial officers) of major financial enterprises that paid hundreds of millions of dollars, if not billions, in money penalties. See 15 U.S.C. § 78t(a). I have addressed this failure in a previous article. See Marc I. Steinberg & Forrest C. Roberts, *Laxity at the Gates: The SEC's Neglect to Enforce Control Person Liability*, 11 VA. L. & BUS. REV. 201 (2017).

92. See, e.g., Steinberg & Roberts, *supra* note 91, at 217–28 (discussing proceedings).

93. 15 U.S.C. § 78t(a).

94. See Steinberg & Roberts, *supra* note 91, at 247 (asserting that “with respect to the ‘big players’ on Wall Street, the SEC has declined to pursue any individual liability at all, except on rare occasions”).

95. *Woodward v. Metro Bank of Dall.*, 522 F.2d 84, 97 (5th Cir. 1975).

96. See, e.g., *Pinter v. Dahl*, 486 U.S. 622, 651 (1988) (In ascertaining the definition of the term “seller” under section 12(a)(1) of the Securities Act, 15 U.S.C. § 771(a)(1), the Supreme Court stated that application of a broad test “might expose securities professionals, such as accountants and lawyers, whose involvement is only the performance of their professional services [to liability].”).

97. See *supra* notes 85–91 and accompanying text.

98. See MALLEN, *supra* note 11 (collecting cases).

99. See generally GLAZER ET AL., *supra* note 38.

100. See *supra* note 12 and accompanying text.

duty by corporate officers and directors, actions against corporate counsel premised on aiding and abetting occur with some frequency.<sup>101</sup> As a last example, the state securities laws provide recourse against corporate lawyers who aid and abet their clients' violations.<sup>102</sup>

This seeming expansive presence of state law to redress alleged corporate counsel misconduct, however, is greatly exaggerated. First, as discussed above, with few exceptions,<sup>103</sup> state law does not apply to class actions involving nationally traded securities.<sup>104</sup> Hence, absent a SLUSA exception, the state securities laws, as well as common law, are irrelevant in this setting.<sup>105</sup> Second, although some states have broader provisions,<sup>106</sup> the Uniform Securities Act<sup>107</sup> (USA), adopted in some significant form by a majority of states,<sup>108</sup> only encompasses in-house counsel who aids and abets a primary violation.<sup>109</sup> Outside corporate counsel who engage in their customary professional roles thus are not within the provision's reach.<sup>110</sup> Accordingly, under the USA, in-house and outside counsel can engage in identical improper conduct, yet only in-house counsel is subject to liability in private litigation.<sup>111</sup> This clear gap in gatekeeper liability is antithetical to investor protection.<sup>112</sup> Third, although corporate counsel may be subject to liability as aiders and abettors under state common law,<sup>113</sup> such liability is predicated in many states on actual knowledge rather than reckless conduct.<sup>114</sup> Proof of an attorney's actual knowledge is frequently problematic.<sup>115</sup> And last, in a small number of states, courts have invoked

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101. *See supra* note 15 and accompanying text.

102. *See supra* note 14 and accompanying text.

103. *See supra* note 54 for examples of these exceptions.

104. This consequence is due to the application of SLUSA. *See supra* notes 52–53 and accompanying text.

105. *See supra* notes 53–55 and accompanying text.

106. For example, Texas has an aider provision that encompasses any person who materially aids with reckless disregard of the truth. TEX. REV. CIV. STAT. ANN. art. 581-33(F)(1) (West 2020).

107. Currently, there are three versions of the USA. Evidently, the most widely adopted is the USA of 1956. *See* UNIF. SEC. ACT prefatory note (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2002)

108. Some version of the USA has been adopted by approximately forty states. STEINBERG, *supra* note 6, § 5.03[1]; *see also* Marc I. Steinberg & Chris Claassen, *Attorney Liability Under the State Securities Laws: Landscapes and Minefields*, 3 BERKELEY BUS. L.J. 1 (2005).

109. *See* UNIF. SEC. ACT § 410(b) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1956).

110. *See, e.g.*, *Bennett v. Durham*, 683 F.3d 734 (6th Cir. 2012) (applying Kentucky law).

111. To come within the scope of section 410(b), an attorney who materially aids must be an employee of the subject "seller." This provision thus encompasses in-house counsel but not outside law firms and their lawyers.

112. For elaboration on this subject, *see* Steinberg & Ames, *supra* note 22, at 39–47.

113. *See supra* note 15 and accompanying text.

114. *See generally* *Eurycleia Partners LP v. Seward Kissel, LLP*, 910 N.E.2d 976 (N.Y. 2009).

115. Nonetheless, state court actions against corporate attorneys occur with some frequency. In a number of states, an attorney also may incur liability based on conspiracy. *See, e.g.*, *Siegmund v. Bian*, 2018 U.S. Dist. LEXIS 55725 (S.D. Fla. Apr. 2, 2018) (applying Florida law).

the attorney immunity doctrine to protect corporate counsel against claims brought against them by nonclients—even based on fraud and violations of the applicable state’s securities laws—so long as such counsel acted within the scope of client representation.<sup>116</sup>

The inescapable conclusion is that state law remains pertinent in the corporate attorney context with respect to malpractice suits, actions by nonclients based on negligent misrepresentation, and individual actions in certain states based on fraud, as well as aider and abettor liability.<sup>117</sup> Otherwise, corporate attorney liability under state law largely is nonexistent.<sup>118</sup> Moreover, generally, the state bar disciplinary authorities have lacked vigilance in holding miscreant lawyers accountable for their misconduct.<sup>119</sup>

### E. *The Lack of Accountability*

In view of the preceding discussion, one may logically conclude that although ethical precepts are plentiful with respect to the corporate attorney, relatively little meaningful enforcement currently exists. The current lack of enforcement stands in marked contrast to the days of yesteryear when more rigorous standards were implemented in both private and government litigation.<sup>120</sup> This absence of accountability has little bearing on the great majority of corporate lawyers who act with competence and integrity.<sup>121</sup> But the absence of meaningful enforcement enables miscreant lawyers to perpetrate misdeeds upon investors and other affected persons who are without adequate redress. This outcome is detrimental to investors, our securities markets, and the public’s perceptions of corporate attorneys.<sup>122</sup>

## II. THIS COLLOQUIUM’S ARTICLES

In this Issue of the *Fordham Law Review*, timely contributions are authored by preeminent academicians focusing on the corporate lawyer. The following discussion provides a succinct overview of each article.

116. See, e.g., *Troice v. Greenberg Traurig, LLP.*, 921 F.3d 501, 507–08 (5th Cir. 2019) (applying Texas law). For criticism of this broad immunity doctrine, see generally Marc I. Steinberg & Logan J. Weissler, *The Litigation Privilege as a Shelter for Miscreant Legal Counsel*, 97 OR. L. REV. 1 (2018).

117. See *supra* notes 11–15 and accompanying text.

118. This is certainly true when the provisions of SLUSA apply. See *supra* notes 51–55 and accompanying text.

119. See Steinberg & Weissler, *supra* note 116, at 44–45 (setting forth statistics regarding state disciplinary proceedings against attorneys and stating that “state bar associations have shown themselves hesitant to hold attorneys accountable for alleged misconduct”).

120. See *supra* notes 21–42 and accompanying text.

121. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 1 (1986) (“Lawyers, more than the members of any other profession, enjoy power, prestige, income, and the genuine affection of both clients and nonclients.”). But see Megan Brenan, *Nurses Keep Healthy Lead as Honest, Ethical Profession*, GALLUP (Dec. 26, 2017), <http://news.gallup.com/poll/224639/nurses-keep-healthy-lead-honest-ethical-profession.aspx> [<https://perma.cc/D8HU-4N6D>] (ranking attorneys sixteenth out of twenty-two professions polled).

122. See generally Marc I. Steinberg, *The Corporate/Securities Attorney as a “Moving Target”—Client Fraud Dilemmas*, 46 WASHBURN L.J. 1 (2006).

A. *Miriam H. Baer: "Compliance Elites"*

Professor Miriam H. Baer's essay addresses the emergence of an elite cadre of lawyers increasingly attaining the positions of chief compliance officers (CCOs) at publicly held enterprises.<sup>123</sup> She focuses on the positive aspects of this development, as well as the inherent drawbacks of a legal elite attaining the compliance seat. The essay posits that, while this development is beneficial, there exist drawbacks due to the elite compliance officer's "performance blind spots."<sup>124</sup>

Professor Baer's essay contains three distinct discussions. First, she highlights the impressive growth of the corporate world of compliance that is forecast to exceed \$50 billion within the next five years.<sup>125</sup> This growth has facilitated the emergence of elite attorneys serving as CCOs and consultants.<sup>126</sup> Second, she addresses and synthesizes the positive aspects that accrue to corporations and other business enterprises that retain elite compliance personnel.<sup>127</sup> Third, Professor Baer focuses on certain drawbacks of this development.<sup>128</sup>

In theory, more talented professionals should result in more effective overall compliance.<sup>129</sup> On the other hand, Professor Baer argues, precisely because the elite attorney has been such a superb performer throughout her career, she may not be the best compliance gatekeeper.<sup>130</sup> Due to her high level of achievement, she may not be as apt to flag performance regimes whose characteristics (high pressure, high variability between hitting one's targets and falling just shy of them) pose enhanced risks of unethical conduct.<sup>131</sup> Because the elite attorney has always performed at a high level, she is unable to recognize the extent to which a high-stakes performance requirement induces cheating, fraud, corruption, or other hallmarks of noncompliance. At the same time, the elite attorney may also be less primed to recognize performance that is just too good to be true.<sup>132</sup> Collectively, these "performance blind spots" impede the elite lawyer from recognizing unethical behavior and from correcting the conditions that promote such behavior.<sup>133</sup>

Professor Baer ends her essay with a recognition that compliance elites are here to stay.<sup>134</sup> Recognizing this fact, she suggests that such elite CCOs and other compliance personnel engage in additional deliberation with an eye towards debiasing themselves of their blind spots.<sup>135</sup> She theorizes as well

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123. *See generally* Miriam H. Baer, *Compliance Elites*, 88 *FORDHAM L. REV.* 1599 (2020).

124. *Id.* at 1602–05.

125. *Id.* at 1607.

126. *Id.* at 1607–14.

127. *Id.* at 1614–17.

128. *Id.* at 1617.

129. *Id.* at 1605–07.

130. *Id.* at 1623–25.

131. *Id.*

132. *Id.* at 1624–25.

133. *Id.* at 1626–28.

134. *Id.* at 1629–30.

135. *Id.* at 1627–29.

that strong internal reporting programs that reward employee whistleblowers may be additionally valuable in alerting compliance personnel that their companies' high achievers—and their high performance standards—merit a greater degree of skepticism and at least a second (or third) look.<sup>136</sup>

*B. Claire Hill, Brett McDonnell & Aaron Stenz: "Bad Agent, Good Citizen?"*

The next article by Professor Claire Hill, Professor Brett McDonnell, and Aaron Stenz focuses on the role of attorneys in client representation as good or bad agents, as well as good or bad citizens.<sup>137</sup> The authors address the duties owed by an attorney as agent to her client and whether such attorney's conduct makes her a good or bad citizen based on the positive or negative effects her advice has on society.<sup>138</sup> The authors posit that attorneys have duties to society and that their advice may prove injurious to society irrespective of whether they act as good or bad agents.<sup>139</sup> Accordingly, reconsideration of the attorney's role is merited when a lawyer acts as a bad citizen even if she serves as a good agent to her client.<sup>140</sup>

Within this framework, the authors describe four situations: bad agent/bad citizen, bad agent/good citizen, good agent/bad citizen, and good agent/good citizen.<sup>141</sup> Viewed generally, a bad agent is one who engages in self-serving conduct and whose services are not truly beneficial to the principal.<sup>142</sup> In contrast, the good versus bad citizen distinction ascertains whether the agent's actions serve a public interest.<sup>143</sup> As an example, the authors discuss the bad agent/bad citizen attorney as one who initiates meritless lawsuits for their settlement or nuisance value with the primary objective of procuring attorney's fees.<sup>144</sup> Such cases provide little benefit to their clients and are detrimental to the subject business enterprises and, on a broader scale, society.<sup>145</sup> As another example, with respect to the good agent/bad citizen situation, the authors describe an attorney who renders legal advice to her client that, while law compliant, violates the spirit of the law—such as an attorney who counsels a client to benefit from a regulatory loophole that exists due to legislative or regulatory inadvertence or new developments that make the loophole attractive to the client.<sup>146</sup>

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136. *Id.* at 1628–29.

137. *See generally* Claire Hill et al., *Bad Agent, Good Citizen?*, 88 FORDHAM L. REV. 1631 (2020).

138. *Id.* at 1631–34.

139. *Id.* at 1631–32.

140. *Id.* at 1634.

141. *Id.* at 1633.

142. *Id.*

143. *Id.* at 1632–33.

144. *Id.* at 1634–38.

145. To the extent that these actions facilitate enhanced standards of corporate governance and improve the quality of disclosures made to investors, my view is that they are beneficial to the corporation, shareholders, and society. If these benefits eventuate, then it may be posited that the attorney is acting as a good agent as well as a good citizen.

146. Hill et al., *supra* note 137, at 1638–40.

Concerning the two remaining situations—bad agent/good citizen and good agent/good citizen—the authors provide the example of corporate directors and officers seeking to adhere to their obligations with respect to environmental law compliance.<sup>147</sup> Counseling compliance with best practices that exceed minimal regulatory mandates may not serve the subject company’s best interests of profit maximization but nonetheless may portray the attorney as a good citizen.<sup>148</sup> Moreover, if adherence to best practices indeed serves the company’s long-term best interests, such as by enhancing its reputation or deterring the promulgation of more onerous government regulation, the lawyer acts as both a good agent and a good citizen.<sup>149</sup>

*C. Cathy Hwang: “Value Creation by Transactional Associates”*

Professor Cathy Hwang’s article addresses a timely and thus far unexplored subject: how transactional law firm associates bring value to deals.<sup>150</sup> While a number of previous works have focused on the role of law firm partners in this context, there has not been examination of the value that transactional associates bring to the table. In her article, Professor Hwang discusses the value-added functions that law firm associates perform in the transactional setting.

As Professor Hwang discusses, functioning in their role as contract designers, law firm partners add value by enhancing the efficiency of the dealmaking process.<sup>151</sup> The various contracts integral to a deal have many working parts, which normally are unbundled into simpler parts to increase efficiency.<sup>152</sup> Transactional associates serve as conduits with respect to these unbundled moving parts.<sup>153</sup> As conduits to this process, for example, associates must communicate with specialists (such as tax attorneys) who provide input for a specified aspect of the transaction. Moreover, with many individuals simultaneously working on a subject transaction, different terminology and definitions in the drafting process are employed.<sup>154</sup> It is the associate’s function to harmonize the final documents in a uniform and cohesive manner. Hence, transactional associates act as conduits for multiple contract modules while also seeking to mitigate the limitations of modularity that arise. Professor Hwang accordingly posits that not only do transactional associates add value but that this value is particularly meaningful.<sup>155</sup>

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147. *Id.* at 1640–42.

148. *Id.* at 1641–42.

149. *Id.* at 1647–48.

150. See generally Cathy Hwang, *Value Creation by Transactional Associates*, 88 *FORDHAM L. REV.* 1649 (2020).

151. *Id.* at 1651.

152. For an earlier excellent article by Professor Hwang on this subject, see Cathy Hwang, *Unbundled Bargains: Multi-agreement Dealmaking in Complex Mergers and Acquisitions*, 164 *U. PA. L. REV.* 1403 (2016).

153. Hwang, *supra* note 150, at 1657.

154. *Id.* at 1659–61.

155. *Id.* at 1661.

Professor Hwang concludes her article by observing that, while concerns abound that automation will displace law firm associates, machines at this time cannot effectively replicate the associate's function as a conduit for the effectuation of successful transactions.<sup>156</sup> It is the transactional associates who can effectively reintegrate the many working parts of a deal into a cohesive framework.<sup>157</sup>

*D. Sung Hui Kim: "Economic Inequality, Access to Law, and Mandatory Arbitration Agreements: A Comment on the Standard Conception of the Lawyer's Role"*

In her article, Professor Sung Hui Kim argues that some of the leading defenses of the "standard conception of the lawyer's role," which combines the principles of partisanship and neutrality, cannot withstand the "economic inequality" objection—the objection that the moral praiseworthiness of the standard conception cannot be reconciled with a legal system that is so marred by gross economic inequality that only the wealthy have access to lawyers and the wealthy routinely use lawyers to undermine the public interest or to exploit others who cannot afford lawyers themselves.<sup>158</sup> She reviews some of the leading defenses of the standard conception and its principle of neutrality that are grounded in the value of autonomy.<sup>159</sup>

Although Professor Kim does not deny that some lawyers sometimes perform morally laudable work or that morally restricting the provision of legal services may impinge on the clients' autonomy (in one sense), she argues that these attempts to universally defend the standard conception on autonomy grounds miss the mark.<sup>160</sup> Their analyses lack appreciation for how the principle of neutrality all too often interacts with the reality of the disparate economic and bargaining strengths between the *haves* and the *have-nots* to further exacerbate economic inequality.<sup>161</sup> In particular, Professor Kim argues that the principle of neutrality, with its insistence on morally unrestricted lawyering, has operated in the employment context of large corporations to foreclose access to counsel for the *have-nots*.<sup>162</sup> Specifically, this harm occurs through the widespread promulgation of predispute mandatory arbitration agreements, which—as a condition of employment—compel employees to waive their entitlement to bring their employment-related claims in court.<sup>163</sup> Professor Kim argues that lawyers who adhere to the principle of neutrality and facilitate the imposition of these agreements on behalf of their employer-clients, are foreclosing employees' access to

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156. *Id.* at 1663.

157. *Id.*

158. See generally Sung Hui Kim, *Economic Inequality, Access to Law, and Mandatory Arbitration Agreements: A Comment on the Standard Conception of the Lawyer's Role*, 88 FORDHAM L. REV. 1665 (2020).

159. *Id.* at 1667.

160. *Id.* at 1669–74.

161. *Id.* at 1672–74.

162. *Id.*

163. *Id.* at 1674.



lawyers and the law and are undermining their autonomy.<sup>164</sup> Therefore, such adherence impinges on the very value that the defenders of the standard conception claim to embrace.<sup>165</sup>

*E. Donald C. Langevoort: “Gatekeepers, Cultural Captives, or Knaves?: Corporate Lawyers Through Different Lenses”*

Professor Donald C. Langevoort’s essay focuses on two interesting issues.<sup>166</sup> First, he addresses the process by which ethical apathy can overtake a corporate lawyer’s professional responsibilities.<sup>167</sup> This part of the essay focuses on a particular aspect of the cognitive science relevant to lawyers caught “doing bad things”: the element of consciousness being more of a continuum than either knowing or not having knowledge of the specific wrongdoing.<sup>168</sup> This concept implicates the “slippery slope” of awareness, whereby an actor engages in a relatively minor transgression which he finds ways to rationalize. Nonetheless, once this step is justified, it is now perceived as permissible and as constituting the new defined baseline.<sup>169</sup> Professor Langevoort posits that corporate attorneys are susceptible to the slippery slope.<sup>170</sup> Seeking to solve their clients’ legal problems, attorneys may be incentivized to rationalize their conduct, making the slope even more slippery.<sup>171</sup> Hence, the corporate lawyer may downplay the existence and significance of the ethical dilemmas presented until it is too late to extricate the client and himself from the situation.<sup>172</sup>

Second, Professor Langevoort discusses the possible diminished interest in ethical gatekeeping.<sup>173</sup> He explores how lucrative financial incentives may redirect a corporate counsel’s attention away from compliance to facilitating strategic business development.<sup>174</sup> The ascension of the general counsel in prestige and status may serve to counteract this situation.<sup>175</sup> With the backing of the company’s chief executive officer and board of directors that share this common objective, the general counsel may be poised to serve as an effective conduit to reawaken the lawyer-gatekeeper role for both in-house and law firm attorneys.<sup>176</sup>

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164. *Id.* at 1680–81.

165. *Id.* at 1680–82.

166. See generally Donald C. Langevoort, *Gatekeepers, Cultural Captives, or Knaves?: Corporate Lawyers Through Different Lenses*, 88 *FORDHAM L. REV.* 1683 (2020).

167. *Id.* at 1686–87.

168. *Id.* at 1687.

169. *Id.* at 1689.

170. *Id.* at 1692.

171. *Id.*

172. For an excellent article by Langevoort that applies social cognition research to corporate counsel’s professional responsibilities, see generally Donald C. Langevoort, *Where Were the Lawyers?: A Behavioral Inquiry into Lawyers’ Responsibility for Client Fraud*, 46 *VAND. L. REV.* 75 (1993).

173. Langevoort, *supra* note 166, at 1686.

174. *Id.* at 1695.

175. *Id.* at 1686.

176. *Id.* at 1696–97.

*F. Nancy J. Moore: "Forming Start-Up Companies: Who's My Client?"*

Professor Nancy J. Moore addresses the ethical concerns of client identification prior to the formation of a business entity and explores the concept of entity representation prior to enterprise formation.<sup>177</sup> In her article, Professor Moore analyzes the advantages and disadvantages of the competing approaches.<sup>178</sup> She concludes that the attorney should be held to represent one or more of the founders rather than the entity.<sup>179</sup> Of course, such representation is subject to the ethical rules relating to the attorney as intermediary.<sup>180</sup> And, in any event, it would be prudent for legal counsel to obtain an informed written agreement from the various constituents clearly identifying who the lawyer's clients are.<sup>181</sup>

As Professor Moore explains, when individuals approach an attorney to form a business entity, the question arises: who is or are the client(s)—namely, the individual founders, the nonexisting entity, or both the founders and the nonexisting entity?<sup>182</sup> Other issues also presented include, for example, whether the lawyer continues to represent the founders after entity formation and who the lawyer represents if the entity in fact is never formed.<sup>183</sup>

In her article, Professor Moore examines the retroactive and prospective theories of representation.<sup>184</sup> The retroactive approach posits that the lawyer is deemed retroactively to represent the entity once it is formed, with the founders being neither former nor current clients of the lawyer.<sup>185</sup> On the other hand, under the prospective approach, the attorney, with appropriate disclosures and consents, may represent solely the yet-to-be-formed enterprise.<sup>186</sup> Neither of these approaches adequately addresses who the attorney represents if the entity in fact is never formed. Rejecting both of these approaches, Professor Moore concludes that the lawyer should represent one or more of the founders.<sup>187</sup> In this setting, counsel should identify and address any conflicts among the founders, obtain informed consent from each affected founder, and explain the material issues that impact their relationships once the entity is formed.<sup>188</sup>

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177. See generally Nancy J. Moore, *Forming Start-Up Companies: Who's My Client?*, 88 FORDHAM L. REV. 1699 (2020).

178. *Id.* at 1700–01.

179. *Id.*

180. See MODEL RULES OF PROF'L CONDUCT r. 1.7 cmts. 28–33 (AM. BAR ASS'N 2018).

181. A clear written agreement, providing the founders with the opportunity to seek separate counsel to consult prior to the agreement's execution, is a prudent measure for the corporate lawyer to implement. Moreover, it may be beneficial for enterprise formation to occur prior to the rendering of meaningful legal advice with respect to the relations among the founders and between the founders and the subject entity. For further discussion, see MARC I. STEINBERG, *LAWYERING AND ETHICS FOR THE BUSINESS ATTORNEY* (5th ed. 2020).

182. Moore, *supra* note 177, at 1700–01.

183. *Id.* at 1710–11.

184. *Id.* at 1707, 1715.

185. *Id.* at 1707–11.

186. *Id.* at 1715–18.

187. *Id.* at 1723–25.

188. *Id.*

G. Nancy B. Rapoport: “Using General Counsel to Set the Tone for Work in Large Chapter 11 Cases”

Professor Nancy B. Rapoport’s article focuses on the role of a corporation’s general counsel in the Chapter 11 bankruptcy context—either the debtor’s general counsel or the general counsel of one of the creditors.<sup>189</sup> Bankruptcy is a complicated process involving many outside professionals. There is a disconnect between the objectives of a reorganizing business and those being paid, often lucratively, in their professional roles. Who is best suited to keep these costs reasonable? Professor Rapoport believes that a general counsel can encourage better behavior by stressing her billing values.<sup>190</sup>

As Professor Rapoport explains, the way fees are paid in the Chapter 11 context differs from other professional fees because they are paid either as a priority administrative expense (in other words, before general creditors get paid) or from a carve-out of a secured creditor’s collateral.<sup>191</sup> Although the court must approve these fees and expenses, Professor Rapoport observes that these requests are ordinarily accepted.<sup>192</sup> While some courts have become more proactive in overseeing this process, and although the larger cases often use fee examiners to assist the court’s review of fees, a company’s general counsel can also play a key role. By expressing her views and values about professionals’ billing behavior, the general counsel can set a clear benchmark for reasonable fees and expenses.<sup>193</sup> Although the Chapter 11 process likely is unfamiliar to the general counsel, as the company’s highest-ranking legal officer, she has a unique oversight opportunity to convey clear, values-based discussions with the outside professionals.<sup>194</sup> By engaging in such dialogue, Professor Rapoport reasons that a general counsel can establish the foundation for a more cost-effective bankruptcy process.<sup>195</sup>

H. Omari Scott Simmons: “Chief Legal Officer 5.0”

Professor Omari Scott Simmons’s essay focuses on the contemporary role of the chief legal officer (CLO) in value creation.<sup>196</sup> He focuses on three areas where the CLO creates value for the subject corporation: (1) through sophisticated purchasing competencies with respect to the retention of and negotiation with outside legal service providers, including outside law firms; (2) by placing greater demands on in-house lawyers and to articulate the legal department’s value to corporate managers; and (3) by engaging in astute

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189. See generally Nancy B. Rapoport, *Using General Counsel to Set the Tone for Work in Large Chapter 11 Cases*, 88 *FORDHAM L. REV.* 1727 (2020).

190. *Id.* at 1730.

191. *Id.* at 1727.

192. *Id.* at 1727–28.

193. *Id.* at 1737–39.

194. *Id.* at 1731–33.

195. *Id.* at 1739.

196. See generally Omari Scott Simmons, *Chief Legal Officer 5.0*, 88 *FORDHAM L. REV.* 1741 (2020).

global enterprise risk management and thereby having a positive impact on capturing and preserving economic value.<sup>197</sup>

For example, as Professor Simmons observes, it is frequently the CLO's responsibility to determine whether to purchase legal services from an outside legal service provider and to procure these services at the appropriate quality and cost. Ascertaining the quality and cost of legal services, however, may present challenges.<sup>198</sup> In this respect, the CLO provides value by taking measures such as mitigating the client's information gaps, playing a key role in developing appropriate strategies, and determining whether the client should bundle legal services.<sup>199</sup> With respect to outside legal service providers outside of the United States, Professor Simmons points to their increased use by general counsel when conducting business abroad due to their low-cost, high-volume work level.<sup>200</sup>

The CLO, as Professor Simmons explains, provides an enhanced financial focus. While some sources view legal departments as non-revenue generating, in actuality, the legal department generates revenue and the CLO should convey that reality to management.<sup>201</sup> After all, value is created by mitigating transactional and litigation costs. By wisely ascertaining which claims the corporation should pursue or by negotiating improved fee arrangements to better fit the company's needs, the CLO is a value creator for the corporate enterprise.<sup>202</sup>

Professor Simmons also focuses on the CLO's enterprise risk-management function. Understanding applicable law, business operations, and company culture, the CLO is well positioned to understand the risks that are presented.<sup>203</sup> This understanding ultimately adds value for the corporation, as astute risk-management practices significantly enhance the corporation's avoidance of liability exposure, government sanctions, and business disruptions.<sup>204</sup>

*I. Eli Wald: "Getting In and Out of the House: The Worlds of In-House Counsel, Big Law, and Emerging Career Trajectories of In-House Lawyers"*

Professor Eli Wald's article addresses the role and status of in-house lawyers over the past 150 years, the current symbiotic relationship between in-house counsel and Big Law, and the current career pathways both inside and outside the house.<sup>205</sup> The article thoroughly examines the ever-evolving

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197. *Id.* at 1743–44.

198. *Id.* at 1745–46.

199. *Id.* at 1745–48.

200. *Id.* at 1751–52.

201. *Id.* at 1753.

202. *Id.* at 1756–57.

203. *Id.* at 1757–58.

204. *Id.* at 1757–62.

205. See generally Eli Wald, *Getting In and Out of the House: The Worlds of In-House Counsel, Big Law, and Emerging Career Trajectories of In-House Lawyers*, 88 FORDHAM L. REV. 1765 (2020).

role and opportunities available to in-house counsel, dating from the post-Civil War era to the present. Indeed, as Professor Wald explains, after the Civil War, old-school, in-house counsel were among the most highly compensated corporate employees who often were destined to become chief executive officers.<sup>206</sup> This situation subsequently changed. From the 1940s to the 1970s, with the professionalization of corporate management, as well as the increased dominance of prestigious large law firms, in-house counsel no longer fit the new corporate culture.<sup>207</sup> The elite outside law firms assumed the new general counsel positions. During the 1970s through the 2000s, the pendulum swung back toward in-house counsel, who offered intimate inside knowledge of the corporation and its legal needs, as well as the promise of reduced legal costs.<sup>208</sup>

Unlike prior periods, these new in-house counsel attended elite law schools and were previously employed and socialized at prestigious, large law firms. With no differing professional values or animosity existing between in-house and Big Law, a beneficial symbiotic relationship emerged.<sup>209</sup> Professor Wald's symbiotic account of the relationship between in-house and outside counsel thus rejects the standard story, pursuant to which in-house counsel triumphed over Big Law lawyers in a zero-sum game and replaced them as the main providers of corporate legal services.<sup>210</sup>

Professor Wald's contribution, however, goes beyond correcting the historical record. Rather, his symbiotic model explains current, seemingly puzzling phenomena regarding corporate counsel, namely, the continued success of Big Law and the mixed record of in-house counsel exercising control over outside counsel.<sup>211</sup> Because in-house counsel and Big Law depend on each other and in some instances offer complementary services as opposed to substitutes, the success of in-house attorneys is consistent with the continued success of large law firms and with sharing some power and control over corporate legal services with Big Law.<sup>212</sup>

Perhaps of greatest interest to today's practicing lawyers and law students is Professor Wald's discussion of the dynamically changing career path opportunities that corporate lawyers now have available to them. The symbiotic model reveals that rather than a one-way street exodus from Big Law to in-house departments, these avenues include moves from law firms to corporations, corporations to law firms, and from one corporation to another. In this discussion, Professor Wald explains the varying challenges and opportunities available to inside counsel as well as the diversity and breadth of in-house practice.<sup>213</sup>

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206. *Id.* at 1767–68.

207. *Id.* at 1769–71.

208. *Id.* at 1771–75.

209. *Id.* at 1773–74.

210. *Id.* at 1782.

211. *Id.* at 1782–83.

212. *Id.* at 1785–86.

213. *Id.* at 1786–95.

Interestingly, Professor Wald describes the motivating factors as to why a Big Law attorney may elect to move “in-house.” The consequence is a commingling of the worlds of in-house and Big Law.<sup>214</sup> With the experience of working with prestigious law firms permeating the in-house counsel’s role, Professor Wald identifies the blurring of these conceptual lines. He concludes by discussing the possible adverse and positive impact that this development may have going forward on corporate law practice.<sup>215</sup>

*J. David Yosifon, “Corporate Law as an Existential Project”*

In this first piece of a larger project, Professor David Yosifon discusses the existential significance of corporate law.<sup>216</sup> The essay proposes corporate law as a model for personal ethics, thereby setting the foundation of corporate law as an existential project.<sup>217</sup> But why corporate law? Professor Yosifon reasons that humans yearn for meaning, but in modern society, the traditional suppliers of meaning are considered suspect. Corporations, however, are inescapably present in our civilization.<sup>218</sup>

In this essay, Professor Yosifon examines the law as a source of value and meaning, focusing on corporate law. He explains this approach by thinking about life in terms of what generates feelings of engagement, interest, energy, and enthusiasm. Through this lens, Professor Yosifon advances the idea that corporate law is a particularly powerful source of meaning to an existential project.<sup>219</sup>

Professor Yosifon posits that this approach is supported by the backdrop of the corporation, found intriguing by many sources due to its combination of power and mystery. These monolithic enterprises, and the corporate law that surrounds their existence, support his interpretation of that field in terms of its ability to move people toward a better life.<sup>220</sup> Professor Yosifon examines these concepts from a number of perspectives, including law as a source of connection and the application of legal ethical rules and duties, such as the duty of loyalty that agents owe as fiduciaries to their principals (as exists in the attorney-client relationship).<sup>221</sup> The essay encapsulates important yet challenging existential theories and applies them to attorneys seeking to find meaning in their practice of corporate law. Professor Yosifon finds ample support that there indeed is a great deal of value to be derived from the practice of law, especially in the corporate context.<sup>222</sup>

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214. *Id.*

215. *Id.* at 1797–1800.

216. *See generally* David Yosifon, *Corporate Law as an Existential Project*, 88 FORDHAM L. REV. 1801 (2020).

217. *Id.* at 1802–04.

218. *Id.* at 1803.

219. *Id.* at 1803–04.

220. *Id.* at 1804.

221. *Id.* at 1804–13.

222. *Id.* at 1813–14.

## CONCLUSION

This important Colloquium Issue highlights the multifaceted functions, roles, and obligations of the corporate lawyer. These insightful contributions should have a prominent stature in the scholarly literature focusing on this subject matter. While a number of the articles are addressed principally to other academicians, others should prove useful as well to the practicing corporate lawyer. This Issue accordingly has great breadth, encompassing both theoretical and practical topics, identifying important unresolved matters, and proffering concrete solutions to the dilemmas identified. I thank the *Fordham Law Review* for inviting me to author the introductory article to this superb Colloquium Issue.