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Federalism and the Regulation of Attorneys

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PANELISTS:

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PROFESSOR RICHARD PAINTER, Professor of Law, University of Illinois College of Law

PROFESSOR RONALD D. ROTUNDA, George Maason University School of Law (moderator)

PROFESSOR ROTUNDA: Thank you very much. I'm Ron Rotunda, the Chairman of the Professional Responsibility Practice Group. Judge Jones, because of a family emergency, could not come today to moderate, so I will be doing it.

We've divided up the panel. We've put the NATTY people to the right, with the bow-ties, and then the others are to the left. Let me quickly introduce the speakers in the order that they will speak.

First, there is Professor Tom Morgan, who will be talking about state regulation, federal regulation, the Sarbanes-Oxley Act, as well as some problems of multi-jurisdictional practices. Tom is the Oppenheim Professor of Antitrust and Trade Regulation at George Washington University. He's taught and written in the field of professional responsibility for over a quarter of a century. He's co-author of a widely used casebook called *Problems and Materials on Professional Responsibility*, now in the eighth edition. He was one of the reporters for the American Law Institution's *Restatement of the Law* governing lawyers, as well as the American Bar Association's *Ethics 2000* Commission.

Next is George Terwilliger who will speak on traditional attorney-client privilege; also, Sarbanes-Oxley, the DOJ rules on privilege waiver and so forth. He is a partner at White & Case. He's been a presidential appointee in two administrations over an eight-year period. He was Deputy Attorney General, the number two man in the Justice Department, from 1991 to '92. He was the leader of President Bush's legal team during the Florida election recount. He's been a federal prosecutor, a private practice trial lawyer, an appellate lawyer. It's a great honor and pleasure to have him here.

The third speaker will be Professor Richard Painter, who is the Raymond and Mildred Van Vorhees-Jones Professor of Law, University of Illinois. I have known Richard since he was literally a pup. How can that be? Well, I look younger than I am, or I try to tell myself that. He's going to discuss the need for a nationalized approach in some issues dealing with lawyer regulation, and why, to some extent, the state and ABA regulations have failed. He is the co-author with Judge Noonan of a prominent casebook in legal ethics. He teaches business organizations, market regulation, corporate finance, professional responsibility, and if I listed all his articles, we would be well into the luncheon debate. We don't want to do that.

Then, there's Larry Fox, the NATTY gentleman here, as usual, to my far right, and he is going to argue and talk about the need to protect and preserve the attorney-client privilege. He's a partner at Drinker Biddle & Reath in Philadelphia since 1972. He has been active in the legal profession, and he's been on the ABA Ethics Committee. He's the former chair of the ABA Section on Litigation, and former chair of the ABA Standing Committee on Ethics and Professional Responsibility. He's written extensively in many areas, including, of course, legal ethics and prfoessional responsibility.

And then, finally, Jerry Loeser, who will also be talking about Sarbanes-Oxley. Messrs. Sarbanes and Oxley must have their ears always ringing. They say that anything that pays well is usually risky, and we know that lawyers get paid well, and Sarbanes-Oxley has made this very risky, indeed. But he will be talking about Sarbanes-Oxley, some of the disclosure rules, and why his view is not as revolutionary as some of the people might thing. He's a native of Chicago, Illinois. In fact, most of us come from good mid-western stock. When he graduated law school, he joined the legal division of the Board of Governors of the Federal Reserve and eventually became the Board's senior counsel in the area of bank holding regulation and the Glass-Steagall Act. I'm one of the four people in the world that have written articles on Glass-Steagall, and even I forgot about what I said, it was so complex. He left the Federal Reserve in 1978, and in 1978 became associated with a firm in Denver, Colorado. He then moved to a Chicago firm, and then to a Los Angeles firm. He then got the Mayflower Moving Man Award for the most moves in such a short period of time. He is now the Senior Vice President and Deputy General Counsel of Comerica Bank.

We start first with Professor Tom Morgan.

PROFESSOR MORGAN: Thank you, Ron. Today's program is derived from the fact that the legal profession is probably one of the clearest examples of historically state-regulated, state-governed activities in the country. It has been state regulated from the beginning, and continues to be. That approach has seemed to a wide consensus of people to be the right approach for many years.

Yet, now we see significant inroads being made on that state regulation, and the question that the panel is going to be exploring today and that I'm going to be kicking off is the question of whether or not we ought to be concerned about the federalism implications of the move toward more federal regulation, or whether we ought to accept it as inevitable and perhaps even constructive.

I would suggest to you that there are at least three different kinds of questions that are worth keeping in mind in this: first is the move toward federalization, where people have been unhappy with the substantive decisions reached at the state level; second are situations involving the special needs of federal agencies; and third are questions that result from the increasing nationalization, and even internationalization, of law practice that perhaps made some of the assumptions underlying state regulation less relevant than they once were. I'll take those one by one.

First, the concern that the move that has been most prominent in recent years has been the move by people to say that they don't like the outcome of particular state regulations, and therefore, in an effort to try to get their preferred result, they'll go to Congress or they'll go elsewhere to try to get a federal regulation of the practice of law. The most prominent recently has been Sarbanes-Oxley. Richard Painter will talk about that, but Richard knows that he and I have disagreed for some time about the wisdom of saying that because you don't like the result the American Bar Association reached on particular technical but important issues in the area of professional responsibilities, therefore the answer is to run to Senator Edwards or to other members of Congress to get a particular federal regulation imposed into what we now call Section 307 of the Sarbanes-Oxley Act and the SEC's implementing regulations.

Second, though it preexisted that, was when Janet Reno, and actually before her Attorney General Thornburg, who decided they didn't like the rules the states had come up with on contact with represented criminal defendants. Therefore, they declared that federal prosecutors were simply not regulated by the state bars and that the attorney general could give them contrary orders. They were disabused of that notion by federal courts, and ultimately the Congress. But it was an earlier illustration of saying, “We don't like what the states have done, and therefore we're going to federalize it.”

Third, and we're seeing it now, is a position taken in a number of settings in which, if you find the attorney-client as it has grown up over the years, to be inconvenient, to not fit your view of law enforcement or whatever, you try to change the rules or you put pressure on people to waive their rights because you believe the outcome is more important than adhering to the rules that had been developed over the years by the states. That's the first set of issues, and you'll hear a good deal about those in various forms today.

The second, I think, is also worth our recognizing, and that is that there may be legitimate concerns of particular federal agencies that may make it appropriate to have special rules for practitioners in particular federal fields. One illustration that I've always liked is the Patent Office rule that says that a lawyer who knows of prior art that would tend to undercut the patent that the applicant is trying to get must disclose that prior art to the Patent Office and can't hope they won't find it. Now, that is a special federal rule for a special federal agency that has a particular challenge. It tends to be an ex parte proceeding so that the analogy to the state rules requiring you to be open and candid in ex parte is familiar and this isn't much of a breach of it. Furthermore, it's a little like you

have to disclose contrary legal authority in a brief that your opponent has not disclosed. But the point is that that is a special rule for a particular federal agency.

We're seeing now the Internal Revenue Service—we've seen it before—trying to impose rules on tax shelters, rules of disclosure, rules of candor, as to how likely it is that the tax shelter will be successful. We're now seeing a different set of issues; efforts to try to force lawyers who produce tax shelters, who counsel their clients to engage in and use tax shelters, to disclose the names of those clients so that at least the IRS knows who it is that they need to go back and audit to determine whether or not the tax shelter was legitimate.

In addition, I think we may well be able to say that the SEC needs special rules to deal with the problems of disclosure in public securities issues, where the securities are sold nationwide and worldwide. I would simply suggest to you that if we acknowledge that, and if we encouraged the SEC to do that, we would probably come out with significantly different rules than the Sarbanes-Oxley rules. That is, they would tend to focus on the kinds of inquiry necessary in due diligence, the kinds of obligations to disclose in those settings, as opposed to internal obligations of reporting up the ladder, which tends to look like more of a revision of state rules.

Finally, I'd like to put on the table at least the possibility that we may move to a more complete federalization of the regulation of lawyers than any of these rather limited suggestions might imply. One of the things we've acknowledged in recent years, primarily through the multi-jurisdictional practice issues that arose after the Bierbrauer case in California, and then the commission that the American Bar Association had, is that we've moved from an era in which most lawyers served clients who have local needs and local obligations to a world in which we represent clients who have national and international concerns. Lawyers have to move all over the country to represent those clients, and it has become problematic to try to do that consistent with a world of completely state regulation.

What we've tried to do to deal with that and preserve the concept of state regulation is to work through a system analogous to the system of uniform state laws. The whole point of the model rules of professional conduct is to try to say, “We're going to preserve state regulation and the federalist ideal, but we're going to do it with rules that, in essence, are the same in each jurisdiction.” That worked during the period of the Canons of Ethics up to 1970; it worked under the period of the Code of Professional Responsibility up until 1983. But since 1983, for reasons primarily resulting from the fact that people have actually started reading these documents and paying attention to them and asking what ought to be in them, we've moved to a world where the state regulations of lawyers often differ quite substantially on a number of significant issues. And the question of trying to achieve a kind of uniformity that will contribute to an appropriate level of uniform regulation is one that is seriously before us. The challenge is how you get from the present system to a system of uniform, whether it's federal or essential a multi-state compact type regulation, without totally throwing open a whole variety of issues on which there will be rent-seeking parties all up and down the line.

There was a recent article on who lawyers have contributed most to. And I think if you look at the groups of lawyers, the interest groups of lawyers who are contributing to presidential candidates in particular, you'll see that this is an area where, if we put this in

Congress, if we subject this to the congressional approach, we're going to find that we none of us may like the results.

So, I leave you with a problem. It is, I think, a serious challenge to the concerns of federalism, but it's a problem that we may need to address as we acknowledge that the world has simply become sufficiently complex that traditional state concerns may no longer be the dominant set of issues.

Thank you.

HON. TERWILLIGER: Well, I think I've done the most difficult thing I need to do today, and that's get out of my chair without falling off the platform; I'm kind of perched on the edge over there.

Good morning. I think this is wonderful that all of you turned out on a Saturday morning to listen, and hopefully discuss, this subject a little bit, which Tom has done a great job of putting in perspective. Let me say at the outset, as I listened to him, I found it necessary to put my comments in a context, although you will have to decide whether I've really done that or not. I really want to focus on at least my part of this topic, not so much from the question of what is good for the profession, or even what is most pure from a federalist perspective, but really what is good for the clients. And I think, at least for me, happily the latter two can be reconciled.

Let me just, if I might, mention three decisions of the Supreme Court, or quotes from three decisions of the Supreme Court, which I think are important for putting this into context. Justice Powell has written that the states enjoy broad power to regulate the practice of professions generally, and the interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice. In *Upjohn*, of course, the Court articulated the rationale and the reasons for the attorney-client privilege, including full and frank communication between attorneys and their clients and the recognition that sound legal advice is dependent on having attorneys that are fully informed—at least in part dependent on that.

And then, Chief Justice Berger wrote in *In re Snyder* made note of the complex code of behavior to which attorneys are subject, and I think anyone could agree with that. But he also noted that inherent in the attorney's role are dual obligations to both the client and to the system of justice. And he quoted from a New York appellate decision, saying that "an attorney is received into that ancient fellowship for something more than private gain. He becomes an officer of the court, and like the court itself, an instrument or agency to advance the ends of justice." I think we all intuitively know that that dual role runs through our obligations as lawyers. But somehow, I think that the duty to the client part of that is beginning to get lost, particularly with some of the federal initiatives that Professor Morgan was talking about.

But I think it's without dispute, the traditional relationship between attorney and client has been one that has been defined and regulated by the states, and in fact was recognized as such before the Constitution was even written. I would like to suggest that that relationship and the state's role in that relationship is now threatened and encroached by some of these federal mandates, which arise not just from law but from policy and practices.

Because there are many people here who will touch on Sarbanes-Oxley, I am going to leave that aside and talk a little bit about what the Justice Department is doing

today. My good friend Larry Thompson—and he is my good friend—in January of this year issued a memorandum, which has now become, as the lexicon of justice demands, known as the Thompson Memo, a direction to prosecutors about the prosecution of business entities, corporations, in particular. This memo reinforces the importance of corporate cooperation and voluntary disclosure to the prosecutor's consideration of whether or not a corporation should be prosecuted, and if so, what for and to what degree. The Memo encourages business organizations to seek to avoid prosecution, or to mitigate the effects of prosecution, by engaging in what the Memo describes as "authentic cooperation." And it suggests that such cooperation may include the necessity to waive the attorney-client privilege, at least to some degree.

Now, I can tell you as a practical matter, from my own day-to-day experience, that whatever was intended by the language and the terms of the Memorandum, in the hands of prosecutors around the country, authentic prosecution equals waiver of attorney-client privilege, particularly for the results of internal investigations that companies conduct. Now, internal investigations are not always done for purposes of engaging in voluntary disclosure with the government. As the Supreme Court decisions that I mentioned recognize, internal investigations are done so the lawyer can give informed legal advice. The government would like the results of those investigations because it saves them time and expense and trouble, and basically assists in their very worthy goals of ferreting out fraud and corruption that corrupt free markets. But that's not the job of the lawyer assisting the corporation. So, lawyers and their clients are faced with a dilemma in this situation. Well, what do I do when I'm called upon to waive privilege? The biggest problem with that is if you waive privilege under the law of most federal circuits in this country—under all, really, to one degree or another—you cannot selectively waive privilege. If you waive, as you know, as to a subject matter, you waive completely as to that subject matter. And this creates a real dilemma, particularly when there is a plaintiff's bar usually sitting out there hungrily awaiting facts upon which they can base a prosecution for an antitrust violation or some other corporate misdeed. The net result of this is that companies become very leery of waiving any privilege if they're uncertain as to exactly what and how much and to whom they are waiving.

This raises the question of, is there a fix for this situation? I would dutifully note, as Tom pointed out, that the most convenient way to approach this might be for some kind of a "federal fix." If you don't like the result that arises under state privilege waiver analysis, as interpreted by the federal courts, then get a federal fix that has nationwide application on this. I've actually done a little bit of work with people from this Society and others on just such a fix. But I would suggest to you that this raises some real federalism concerns as to whether that fix ought to be had at the federal level.

There are practical ways that one can deal with this. Something that we sometimes do is take a two-law firm approach to the internal investigation—have one law firm gather the facts, another do the legal analysis, and it at least gives you a basis to argue that those are two separate matters and makes a clear distinction between fact work product and an opinion work product.

I think the bottom line is that in addressing this and the myriad of other problems that arise in connection with the regulation of attorney conduct, we need to keep two things in mind. The reason the states regulate attorney behavior is a venerable federalist

interest, and we ought not to just quickly brush that aside. And secondly, we ought to do what is best for the clients' interests here because they are the beneficiaries of privilege.

I think that what we cannot do is allow the drift of federal mandates to undermine the very purposes that the states have recognized and, indeed, enacted protections for privilege and let the decision be made for us by default. Thank you.

PROFESSOR PAINTER: Well, I am going to start out with a brief discussion of what happened with Section 307 of Sarbanes-Oxley Act and then move into discussion of other areas in which I believe the state regulation of the legal profession may very well be in danger, and I think regrettably so. If there's an overall theme to what I am going to say, it is that I believe that in certain key areas, at least, state regulation of the legal profession has not worked. And in large part, it hasn't worked because state courts have been deferring way too much to the American Bar Association and other elements of the organized bar in designing and enforcing rules of professional responsibility for lawyers. And I think we have to recognize—it may be an unpleasant fact to recognize, but the American Bar Association is a trade organization like any other, and they're more than happy to tell the Attorney General of the United States how to do his job; the President and the Senate, who to put on the courts; talk about what our abortion laws ought to look like; and so forth. But when it comes to the regulation of lawyers, at least in some very critical areas, the Model Rules of Professional Responsibility of the ABA interpretation of those model rules has fallen short.

Let's start with the role of lawyers in representing corporations. My interest in this started with the savings and loan debacle, in which I saw lawyers in very large law firms settling out cases brought by the Office of Thrift Supervision and for $30 and $40 million. These are cases involving lawyers aiding and abetting bank fraud, in violation of the federal banking regulations. Not a single lawyer I know of was disciplined by a state bar for that conduct that their firms were settling out for $30 or $40 million. Either the rules are wrong, or we aren't enforcing the rules we have. I think it was a combination of the two.

Two distinct issues, I think, deserve focus. One is reporting up and the other is reporting out. Reporting up is the question of, does the lawyer have the duty to tell their own clients, senior management, first, about known law violations, but if senior management won't do anything about it, to go to the full board of directors? Well, the directors run a corporation, and if senior management won't fix a problem and it is a violation of law likely to lead to substantial injury to the corporate organization, it seems to me basic principle-agent law that you must go to the full board of directors of your own client and tell them that the senior officers are violating the law. Not in the opinion of the American Bar Association.

After the Kaye Schuller debacle in 1992, they put out a working group saying precisely the opposite. Well, it should be within the discretion of the lawyer who can tell. If the lawyer just wants to tell the person who pays the lawyer's bill, I guess that's okay. Well, I don't think that's okay.

So, I went to the ABA and I suggested they amend Model Rule 1.13 and make this very clear: go first to senior management, but then you have to go to the full board if they won't fix the known violation of law. The proposal was ignored. I did it again—proposal ignored. Meanwhile, I wrote an article back in 1996 saying, “Well, maybe we're

going to have to do this through an amendment to the 1934 Securities and Exchange Act and simply have Congress do it." That was ignored, too. It was just a law review article.

Meanwhile, there was another debate over the issue of reporting out. I have never suggested a lawyer ought to be required to report out on their client, to tell on their client. But a lawyer ought to have that option, and that has been the common law for many years. Indeed, in this area at least, the vast majority of states have had a reasonable approach.

The American Bar Association took the position for twenty years that a lawyer shall be prohibited from disclosing out unless the client's conduct is going to cause death, grievous bodily harm, or something perhaps even more serious—a dispute with a lawyer if the lawyer didn't get paid for assisting in the fraud. That would be serious enough. That's the old 1.6 that, fortunately for the ABA, Sarbanes-Oxley 307 finally went back to the rule of reason.

Well, what happened is, finally, I did write the Securities and Exchange Commission Chairman in 1992 and said, "You ought to have an SEC rule requiring reporting up." I did not want to get into the reporting out issue. I got the letter back from the SEC general counsel saying they didn't want to do it. They were getting a lot of heat from the ABA on this. And by the way, I had suggested in a law review article back in 1996 that Congress ought to do it. Well, that made its way up to the Hill. Senator Enzi is the only senator I spoke to. He's a Republican from Wyoming who was the only accountant in the Senate. He took a look at Sarbanes-Oxley and said, "Why are we getting all this regulation; what about the lawyers?" Two little paragraphs for the lawyers, and in it went the requirement that the SEC promulgate rules of professional responsibility for lawyers who represent issuers before the Commission, including the mandatory reporting up rule. There was nothing on reporting out. Now, the SEC has taken its authority on Section 307 and gone beyond this whole issue of noisy withdrawal. That was not my proposal; I don't like getting blamed for it. But that's a whole different issue, and I don't think the SEC's necessarily going to follow through with that, now that the ABA has finally come around to a rule of reason on some of these issues.

Let's move beyond Section 307 and look at two other areas in which I think there is a threat of federal regulation. One is Model Rule 3.1, I believe, Meritorious Claims in Contention: a lawyer should not be filing frivolous pleadings with a court. The problem is that courts and disciplinary committees have been very lax in enforcing those, particularly with respect to the plaintiff's bar.

And so we have legislation up on the Hill that's going to take a substantial number of cases that were previously brought to the state court; class actions with defendants from out of state, and plaintiff nationwide classes and so forth, and put them in federal court. This is going to be a very significant federalization of the law, at least procedurally, and to some extent substantively. And I think it's because of a failure of state courts to police frivolous claims by, in many cases, plaintiff's lawyers—but there are frivolous contentions by defense lawyers, as well. There was a failure to take the rules of ethics seriously on this. I've seen very little leadership, quite frankly, from the American Bar Association on that one.

And then, another area is lawyer's fees; contingent fees in particular. A lawyer's fee must be reasonable (Model Rule 1.5). I would suggest that some of the fees being sought by the plaintiff's lawyers in these tobacco cases that they've brought on behalf of

various states are not reasonable. Fees running in the tens of thousands of dollars an hour are excessive. And they say, “Well, we had a contract with the state.” Yes. But the Rules of Professional Responsibility should be an implied-in-fact covenant in any contract a lawyer has with a client, including, for example, the Commonwealth of Massachusetts in a recent case. And I would suggest that reasonableness is, therefore, an implied-in-fact covenant there, and that means limited by a rule of reason. This is something that the state courts need to start taking seriously. If not, perhaps on the federal level. One idea I was thinking about was to require lawyers to keep timesheets, and any fee over $2,500, just impose an 80-percent excise tax. And say you're going to use the money for legal services. I'd like to see Senator Dick Durbin vote against that one. That's not necessarily where we want to go. I've never been a fan of extended federal regulation in many areas. I've testified against a proposal to federalize and preempt state securities fraud class actions back in 1998. I've got to say, though, if the state courts don't get serious in these key areas—now I think it's regulation of the plaintiff's bar that we need to focus on—the federal government is going to be called to step in.

We do not need as a profession to be supporting what appear to me to be efforts by the American Bar Association and other trade organizations to water down the rules of ethics of our profession. All we're going to end up with there, if we keep on with that path, is a broader federal role. And I would say, regrettably so.

MR. FOX: Good morning. It's so good to see so many of you. George thinks you're here because you have great interest in this topic. I know you're here because you all need an ethics hour. But nonetheless, we're flattered by your presence. I've been the house liberal who's been invited to I don't know how many Federalist Society events to defend, among other things, contingent fees. But today, I'm happy to stand before you and say fellow Federalists, I am happy to be here.

My friend Richard Painter and I have had many opportunities to discuss these issues, and we desperately need each other. And I thank him once again for not stepping on any of my lines. But I must say, he's added a new one that I hadn't heard before, which is that if your law firm pays a lot of money to settle a terrible law suit that exposes your law firm to untold liability, you also should turn yourself in to the bar for obviously having committed a disciplinary violation. I submit, that's not equivalent, and not even close.

I would have thought that I was an agnostic, actually, on the issue of federal versus state regulation of lawyers, until I started thinking about it a little more in preparation for this program. What I think we have is a bedrock principle of federalism which says that you should start off with regulation of lawyers in the states. And what we've had is an undermining of that principle in a number of different situations at the federal level. And if you look at them, you will see inherent in each of them the danger of letting the federal government swashbuckle around in this area because the federal government has demonstrated to all of us that it is incapable, irresponsible, in this area.

To what do I refer? Well, let's look at where the federal government has gone. In the area of lawyer regulation, we have at the state level courts doing it. On the federal level, we've had three different incursions. None by the courts, mind you; one has been by the legislature. We've got Sarbanes-Oxley, a demonstration that any time the Senate passes anything unanimously other than Groundhog Day resolutions, we are all in

trouble. Then we have the SEC entering this fray. And finally, we have the Justice Department. Not the courts.

At the state level, except for the great State of California, the courts are the ones who regulate lawyers. And I submit, that is the principle that we ought to be upholding, that the courts regulate the lawyers. Why? Because in any other case, we are in real danger. And as soon as we get regulation of lawyers at the federal level, we don't get it from the courts. The courts by and large have adopted the state rules in the jurisdictions in which they sit. But we get these very mischievous incursions into lawyer regulation.

Let's see. We had Sarbanes-Oxley Section 307—Richard's wonderful idea grown large. Since this is an ethics credit hour, old Rule 1.13, the rule Richard wanted us to change, was a rule about being a lawyer. It talked about what a lawyer should do. It reminded lawyers that their clients were the enterprise. Not anybody for the enterprise, the entity. The lawyer was obliged to deal with the person the organization designated, and when certain designations took place, we said the lawyer had to take effective action. And then we gave some examples. But we left it to the judgment of lawyers.

Richard wasn't ignored. We wrestled with his proposal. We wrestled with it conscientiously. We simply rejected it. We rejected it unanimously. Why did we reject it? Because we thought that it was the beginning of turning lawyers into regulators. It was just one example of that, and it was also an example of what might become lawyer's regulation looking like the Internal Revenue Code.

When something happens, we now no longer leave it to the lawyer's judgment. We now require certain action. We require certain action in one specific area with respect to one particular client. And why do we do that? Because we want to turn the lawyer into a mini-regulator. That's the whole purpose of this. The whole purpose of it is to turn us into mini-regulators and then give us this wonderful gift: the freedom to disclose. We're not mandating disclosure; we're still entitled to maintain confidentiality, except the world in which we live, as soon as we're permitted to disclose, all that stands between lawyers and liability is some lawyer, expert, academic, or somebody like me, getting up in front of a jury saying the standard of care in this situation was to disclose because the lawyer was free to disclose.

But what's worse, of course, is when we have regulation by the SEC. The legislature, well, they're another branch of government. What is the SEC? Well, it claims it is a tribunal, and it wants to cloak itself in all the attributes of a tribunal. But in fact, the SEC is just another litigant. And all these rules they are adopting are intended to deal with a situation where they're on the other side. They're just somebody who comes along and enforces some law. The idea of having another litigant, as opposed to the courts, establishing our rules of professional conduct is positively scary.

Of course, the purest example of this is the Justice Department, and we've seen the Justice Department enter the area of lawyer regulations. Now, the Justice Department doesn't even claim to be a tribunal. It is clearly just the other side. They are, in most cases, the enemy. They're the adverse lawyer representing the adverse party, the people of the United States. And they come to us with regulations that they think are perfectly wonderful. Why are they wonderful? Because, as George correctly points out, they assist them in their enforcement function. They have turned us into mini-regulators. The SEC does it; the Justice Department does it. Is that where we want to be? I submit, not.

I submit, we actually had it right before all of this officious inter-meddling. We had it right because we gave lawyers a role. And that's what state regulation of lawyers has always done. It gave lawyers a role. It's a clear role, and every time we compromise that role and say, “Instead of representing clients, lawyer, you have to worry about your own liability and you have to worry about your own ability to appear before the SEC, and you have to worry about whether the result of your advice is misused.” We have changed the world upside-down.

If clients make mistakes, if clients violate the law, let them be liable. Let them go to jail. But as long as lawyers do not aid and abet, it seems to me that every other interference between the lawyer and the client is an unwarranted and intrusive one. That's what we're seeing, and that's what we get when we ask the federal government to step in or we let them step in. We've never had this problem at the state level, and so that's why I tell you I am a fellow Federalist today.

MOR LOESER: Thank you. I'd like to begin by quoting someone who's not very often quoted in Federalist circles, former U.S. District Court Judge Dan Sporkin, former head of enforcement at the SEC. Judge Sporkin, retired now, spoke about a year ago at a symposium at American University Law School on the same subject. Richard was there, I believe. He started with a story about a potential client looking to hire a lawyer, and interviewing the lawyer, and telling the lawyer, "I need an attorney to represent me effectively and honestly." And the lawyer looked at him and said, "Make up your mind."

The other quote was the famous one, "Where were the lawyers?" And the exact quote reads, "Where were the outside accountants and attorneys when all these transactions were effectuated? With all the professional talent involved, both accounting and legal, why didn't at least one professional act to stop the overreaching that took place?" That was in the *Lincoln Savings & Loan* case in 1990. I was surprised when I saw that was thirteen years ago, long before Enron and WorldCom. And I guess I would join Professor Painter in asking how effective has state bar regulation been after Judge Sporkin asked where were the lawyers. And if there was wrong doing, if you accept that, it seems that the state bar regime has not been effective to prevent it.

As a federalist, I guess I'm disappointed in that, and I wonder why would that be. Richard was talking about court deference to ABA rules. That may be. I'm a even little more cynical in my world. I think about who are the perpetrators of this alleged wrongdoing. Well, it's really pillars of the bar: Vinson & Elkins, Kaye Schuller back in *Lincoln Savings*. I'd mention Jones Day, but they're a sponsor of the program today.

But on the one hand, you have these firms, which are obviously top law firms in the country, and on the other hand the enforcement agencies are what? State bar associations—understaffed, underpaid—they're supposed to somehow regulate the conduct of the most powerful, best paid—somebody would argue the best and the brightest—law firms in the country in the case of very sophisticated commercial transactions that most of us don't understand. It just doesn't seem to have worked.

As a Federalist, I would also say, what about the free market? That ought to be working here to stop this misconduct, if it has occurred. And what comes to my mind is—think about it—there are insurance companies that issue malpractice policies. They have financial stakes in regulating the conduct of the firms they insure. That apparently has not been sufficient. Malpractice premiums haven't been sufficient to prevent this kind

of thing from happening. These law firms are subject to further disincentives, direct lawsuits for negligence and malpractice by the corporate client that they have let down supposedly. Or they could be sued by the receiver of the firm when it closes. The firms are subject to potential derivative suits. That free market has no disincentive—wrongdoing, if indeed wrongdoing has occurred.

So, with that, apparently Congress did see fit to act. And some people have argued, well, the SEC rules—nobody's argued it here, so maybe I shouldn't even talk about it—but the SEC rules can't preempt state laws in this regard. I guess I'm not even going to talk about that because I don't know that that's anything worth debating.

I do have to say, I agree with Professor Painter on the reporting up rules. I work for a corporation. Fundamental corporate law is that responsibility for running the corporation is in the board of directors. They could do it alone. They don't need to hire officers like me or employees like me to do it, but they do. So, any authority I have, any right I have to information, devolves from that board of directors. And to say that there's something improper or wrong in my reporting it up, or even a suggestion that I don't have a duty to report up wrongdoing that I find, is anomalous. I can't understand that in the world of real corporations.

Richard talked about the voluntary reporting aspect of the SEC's rule which, by the way, is 17 CFR 205.3(d)(2), where a lawyer may voluntarily reveal to the Commission, without client permission, and indeed without telling the client, confidential information about the client. That is the rule, I'm told, in at least 37 states—including my state, Michigan. It's required in some states like New Jersey, Wisconsin, and Florida. And somehow, the relationship between attorneys and clients has not collapsed in those states.

Ironically, California, Washington, the District of Columbia and 12 other jurisdictions prohibit that kind of reporting. I lived in California for 14 years and worked there as a lawyer before coming to Michigan, and I don't notice any strong difference between the attorney-client relationship in either of those states. So, I'm not sure what the SEC has done is that shocking or horrifying.

Some people have argued, “Well, gosh, this is usurping the states' rights. The federal government's regulating the legal profession here.” Well, this is one isolated instance, as in the case of the SEC rules. The full panoply of state regulation of lawyers is still untouched. Admission, conflicts of interest, advertising, zealous advocacy, unauthorized practice, pro bono, and I could name a dozen other areas, are still obviously unscathed at the state level.

Another point in defense of the SEC's rule I would make is that this is not just some isolated duty that they're imposing upon attorneys. It's part of a very comprehensive—and I hate to give Congress credit for thinking anything through—a very carefully thought out, comprehensive scheme of enhancing the internal controls of publicly traded corporations. Remember, this part of the regime here is enhanced duties on accountants, enhanced duties on audit committees, and a duty on a CEO every quarter to certify the accuracy of the financial statements. So, to have a reporting up requirement that ultimately leads to a report up to the CEO, which enables him to sign accurate certifications, sort of fits with the whole goal of Sarbanes-Oxley. It's not just some isolated duty where lawyers are targeted in this thing.

Let me throw out a couple of provocative thoughts, and I apologize. No one's going to agree with these. But I was thinking about Papal indulgences from the Middle

Ages in the Catholic Church. I'm going to show relevance here. Lawyers have an extraordinary power. I may be wrong on this, but I think I'm right.

Lawyers have the ability to grant absolution from sins—*i.e.,* absolution from criminal law liability—because if I'm a wrongdoer and I want to protect myself from criminal liability, don't I just have to go to a lawyer, get an opinion letter from a lawyer that it's a gray area, it could be argued. And don't say, "Oh, you're not going to find a lawyer who will do that." An old CFO at a bank I used to work at in California said, "I'll find a 95-year-old lawyer dying of cancer who wants to leave a big fee to his 23-year-old wife; he'll give me an opinion." And once I get that opinion, the willful scienter, the intent element, is gone, I think, in the minds of a lot of people, and therefore absolution from criminal law can be given. So, is it that shocking that maybe the SEC should be able to come down in this area and regulate?

I'll throw out another provocative thought. The SEC rule makes an interesting distinction between subordinate attorneys and supervisory attorneys. It imposes a duty on the subordinate attorneys to report up to the supervisory attorneys. And if the supervisory attorney does not report on up, then the subordinate attorney has to do so. When you think about the real world—and I think I'm right on this—at a law firm, you have these young, idealistic associates fresh out of law school, untainted by the cynicism of us old folks. They're going to be the subordinate attorneys. They're going to see material violations that maybe wouldn't appear to be a material violation in the eyes of an old, more cynical lawyer. They're going to report it up, the subordinate attorney has a duty to do so under the rule, if I'm right, which means that the SEC is harnessing the idealism of youth, which is a classic theme in literature.

I have one more minute. Great. I will say, I'm not an absolute cheerleader of this regime. There are some really troublesome aspects of this SEC rule. I think George or Larry might have touched on it, but the very concept that an agency whose job it is to enforce the laws and has an army of prosecutors to come after targets also has the ability to censure, debar, fine attorneys defending the targets of those actions, is really of troublesome. And it's scary; you're the one who said it's scary. And it is a little scary. That is really subject to abuse.

If I'm going to be representing clients on a regular basis in front of the SEC, I am probably going to be chilled a little bit in my zealous advocacy. And while that may not be a deprivation of right to counsel, it sure sounds like it could be a diminution of the right to counsel.

And if I have anymore time left, I'll throw out one last observation—ten seconds. This rule makes sense if it was limited to breaches of the securities law, but it is not. What has to be reported includes breaches of fiduciary duty and something called similar violations of state or federal law. That means in my bank in the Trust Department, where some beneficiary is arguing that, you've invested in the wrong stock or you're not paying me enough every month, well, you've breached your fiduciary duty. You know, some conservative outside counsel is going to be reporting us up and we're going to be dealing with that. Or if we have Reg Z violations in Truth in Lending, someone's going to say, "Oh, that's a similar violation." Somebody's going to report that up; and we're going to have to deal with that.

Time's up.

PROFESSOR ROTUNDA: Thank you. We'd like time now for questions and comments. We can go to the microphone. Try to limit your questions or comments to about a minute or so. And identify yourself.

AUDIENCE PARTICIPANT: Bob Barker from Atlanta. I would like to pick up on the point that was just raised on fiduciary duty. I take the position that that means the fiduciary duty to my client and my client's shareholders because, in an LBO context or, for example, where you're representing a company and it is buying another company, particularly if it has a majority interest in that company, it cannot be that you have a responsibility to both the target shareholders and your client's shareholders. And so, in light of the overall Sarbanes-Oxley Act and the purposes of the Act and everything else, I would suggest that that is the way to interpret it to the lawyers in the room. And if there's anybody here from the SEC, it would be great if the SEC would put out an announcement that that's the way the SEC interprets. I have been on the phone with an SEC staffer on this point at least one time, where he sort of made it clear he wanted me to say who my client was, and so I did.

But it goes to two problems that I have with all these rulesI guess I'm agnostic on regulation as long as there are two things: that it's clear, and that it's uniform. And, 307, I don't think, is clear yet. The prior regime and, to some extent, the reporting out obligations are not uniform, and that means that the clients that I compete for are going to be more likely to hire a lawyer who is not a goody two-shoes, but is a lawyer that will hide and help them defraud.

PROFESSOR ROTUNDA: You mean, the more ethical lawyers are at a competitive disadvantage in getting clients. Anyone want to make any comment?

PROFESSOR PAINTER: With respect to who the fiduciary duty is to, the directors have fiduciary duty to their shareholders. But your client is the corporation; it's run by its directors, and your duty to communicate is first with senior management, and then to the directors. I don't think you have a duty to inform the shareholders of a public corporation; you might as well inform the New York Times about everything going on, including known law violations. That's a duty to communicate to the directors, if necessary, and that's the point the ABA didn't get. It's a fairly simple point, and they could have dealt with it in 1.13—they have now, actually. They amended 1.13. So, if 1.13 was so good, then why do we have the new one?

But of course, it's too late. Section 307, you're right, is confusing. It's much broader than anything I had proposed. It involves breaches of fiduciary duty, other similar violations, reporting evidence, knowledge. That throws a whole monkey wrench into things. And I think the SEC rules are confusing; 87 single-spaced pages. And it's a situation that could have been avoided.

PROFESSOR ROTUNDA: It's hard to contain myself, but Tom?

PROFESSOR MORGAN: Just for the record, even before Sarbanes-Oxley, state law certainly permitted and, I think most of us believe, required reports to the board of directors under situations serious enough to be of the sort that most of us are talking

about. What got Richard the cold shoulder over many years was his position, up until these most recent discussions, that you had to report to the board of directors every violation of every law. And there are something like 3,000 federal laws that corporations are subject to.

It is important to remember what Larry was talking about, that the difference between the pre-Sarbanes position and the current position was one of whether or not you relied, for the most part, on lawyer judgment as to what was necessary to meet the needs of the corporation and correct the situation, and if you believe you had an obligation to do what was necessary. And if you didn't, you were in violation of law before, as now. What's changed is it's now a federal regime. It's a regime subject to all the pressures the SEC's under, all the press pressure, just a whole variety of issues that didn't work before.

I'd like to add one other point. The fact is, even before Sarbanes-Oxley, we had independent agencies regulating lawyers in most states. We haven't had bar discipline for at least 30 years in most states, and probably more than that. The agencies exercising discipline in most of the states in the country are agencies in the state supreme courts. They have been underfunded; they have been unsuccessful in a lot of the litigation. The discipline authorities that I've talked to say they have investigated most of the cases about which Richard was concerned and had simply concluded that they couldn't find individual lawyers who they could point to. That has led some to suggest that we ought to have discipline of firms. Maybe that's a direction to go. But I think we ought not assume that it's simply lawyers regulating lawyers.

MR. FOX: The gentleman's comment about whether you hold yourself out as an ethical lawyer or not an ethical lawyer and have some competitive advantage raises an interesting issue. I would have thought that the ethical side was the lawyer who said I'm going to maintain confidentiality. We could debate that. But the question is now that the SEC has given us permission under certain circumstances to disclose and said that's the rule that trumps the state rule, can Drinker Biddle & Reath, my law firm, now run an ad that says no matter what you read in the newspapers about the SEC's opportunity for you to disclose, our firm doesn't disclose? And you could have an interesting debate about whether you are permitted when a rule grants you permission to do something to take yourself out of that, or whether you are supposed to be exercising real discretion each time the opportunity to disclose arises. Can I give a prospective blanket absolution, we won't disclose. It's just an interesting way of looking at these issues.

PROFESSOR ROTUNDA: There's also a tort question. You know, sometimes "may" can mean "must" because you're sued in tort for civil aiding and abetting and you say, wait a second, I have attorney-client privilege. And they would say, but the rule says you could disclose, but I have discretion. And the answer would be, but you did not disclose; you could have, but you just chose not to. And we do have analogies in the tort area, not involving lawyers but the psychotherapists, where the California court said in *Terzoff* you're liable because you could have, and you just chose not to.

PROFESSOR PAINTER: Ron, I just want to clarify. My position on reporting up is if it would cause substantial harm to the organization, to the corporation; not every single minor violation, and this arose in the context of the Kaye Schuller matter and the savings

and loans. If it's going to cause substantial harm to the organization, the board of directors ought to know. There's not a single director I've talked to who disagrees with that position. It was the ABA, and the ABA has changed the rule. The new 1.13, I think, clarifies that point very well.

AUDIENCE PARTICIPANT: Harry Lewis. I'm from New York City. I just wanted to compliment the panel on the discussion. I think it's been excellent. Several years ago, I had occasion in the Association of the Bar of the City of New York's very fine library to look at the briefs in the seminal *Cardozo* opinion back in the 1920s, in which the bar was first regulated. And in my view, the regulation of lawyers in general is scandal-driven. That is, scandals in the past, big historical scandals, have caused the courts to intervene.

As history has progressed, and most recently Sarbanes-Oxley, it's that scandal, the Enron scandals and the failure of the regulatory system today, that forces the federal regulators to come in and impose further and more restrictive and more onerous burdens on us as a profession.

The original *Cardozo* opinion that first justified regulation by the courts to which Mr. Fox had adverted was caused because of a huge ambulance-chasing scandal in the City Bar in New York, in which the lawyers were literally going through the halls of the hospitals handing out their cards and signing people up right there in the hospital corridors, who were medicated and who weren't totally conscious in many cases. This was widespread. It was clearly scandalous. It hit the papers. It was front-page news all over the City of New York in the '20s. And in response, the city bar came in and went to the courts on petition and asked the courts to intervene and to begin disciplining the responsible attorneys, which occurred, thank God.

My point is that it seems to me that regulation of law has been scandal-driven historically every time we slip and fall, as a profession—and Sarbanes-Oxley is a slip for the profession—we've slipped as a profession, they come in and they hate us.

MR. FOX: Well, I think the one response I have is I don't think we know enough about each of these scandals yet to know whether we've made the right public policy choices. I think the public policy choices came way before the level-headed analysis. I don't know whether we needed Section 307 to cure what happened in Enron. We just don't know that. Nobody has come up with a case.

So, I think you're right. The problem is that when we have a scandal, the public reacts instantly. And your politicians who took lots of money from Enron and are so embarrassed about it, they say we've got to do something. We've got to do something, and guess what. We need a paragraph about the lawyers, so we'll stick one in there. And nobody made the connection. They just did it.

AUDIENCE PARTICIPANT: That's reasonable, but let me ask a follow-up question, then. And that's very simply, my perception of the scandals, the Enron scandals, is that the three layers of regulation failed. The board of directors failed the shareholders and the public, because these are public companies, let's face it. The accountants failed. And ultimately, the attorneys failed.

MR. FOX: But my question is whether the right people will end up being liable. There were lots of laws on the books that I think people violated. Do we need more, is the question. Because I think if the lawyers did something wrong we've got plenty basis for finding them liable and disciplining. Similarly for the officers and directors, and the accountants.

AUDIENCE PARTICIPANT: So, you agree with Professor Painter that it should be an enforcement issue, then, rather than more regulation on the boards?

MR. FOX: There will be plenty of enforcement in *Enron*.

AUDIENCE PARTICIPANT: Thank you.

PROFESSOR ROTUNDA: It is a nice question. We have laws against murder; there's still murder. That doesn't mean that we need another law. It just means that no matter what happens, you'll have people that violate the law, and then will punished if we can catch them.

AUDIENCE PARTICIPANT: I want to get your thoughts on the lack of comity between the jurisdictions. It seems to me that perhaps the strongest federalism issue is almost a free commerce clause issue. Not just between the states but between the federal districts, there are tremendous variation in standards in who can practice before a certain court. It's cartel behavior to protect the local bar from outside attorneys. Is that perhaps the strongest basis for some kind of federal intervention, to say there are limits to how much you can discriminate against outside attorneys?

PROFESSOR MORGAN: I agree. That's an issue that I tried to put on the table early on. I think that is an area that we need to be concerned about, and even people who are concerned about federal need to acknowledge that that may come. The question is how you get from where we are to there without running through Congress or somewhere where, as happens almost all the time, what you submit isn't what comes out. And I'm afraid what comes out of that process may be something a lot worse than we might think was appropriate in protection of clients or whoever.

PROFESSOR ROTUNDA: I think there's an international aspect, as well. NAFTA gets involved because we've got agreements on the free movement not just of capital but labor. And there've been some lower court cases on an attorney admitted in Canada and Mexico, and wanting to practice in Nebraska, of all places.

HON. TERWILLIGER: Ron, if I may, just an observation about the role of Congress, and in particular the Senate, the world's greatest deliberative body, and its work on Sarbanes-Oxley. I actually think Richard was there with me, along with some other people and some people from the Justice Department. It was a mark-up in the Senate Judiciary Committee of part of the bill, which was interrupted so that the senators could go to the floor and vote the final passage of the bill, an amendment to which we were supposedly testifying about in mark-up. It was breath-taking.

PROFESSOR ROTUNDA: What did they say, laws are like sausage. We don't want to see them made. And I once worked in a sausage plant, and I can tell you stories later—but after lunch.

AUDIENCE PARTICIPANT: Professor Rotunda and Larry Fox have addressed the dreaded words "aiding and abetting." The conversation so far has been focusing on past misdeeds and reporting up. There is another area, ongoing misdeeds. We've also talked about noisy withdrawals, and I guess the opposite of that is silent withdrawal. And the third area is no withdrawal. How do you integrate aiding and abetting with no withdrawal or silent withdrawal?

PROFESSOR ROTUNDA: Don't answer that question. I mean, past versus future and ongoing, I think, is easy. Lawyers, when they're told of past crimes, keep their mouths shut. That's, yes, I did commit the murder and try to get me off on a technicality. That's what lawyers do; I think that's easy. With respect to future crimes and continuing crimes, which are also future, that's where the problem comes in. I don't think lawyers can keep their mouth shut. Aiding and abetting requires scienter, a willfulness. And so, if you know what's going on, you've got to do something to stop it.

I thought, actually, Rule 1.13 of the ABA is not a rule about reporting out at all. It is a rule of trying to find out what your client really wants. If you represent a human being, you just ask him. But if you represent an entity or an organization or an aggregate, whether it's a partnership, a labor union, or a corporation, you have to do various things to try to find out what this thing really wants. We don't care whether it's entity or an aggregate under state law; it's all treated the same, I think, under 1.13.

And, you don't always go up the ladder. It is realistically the associate. The young associate tells the partner, here's this problem and I think it's really serious. And the partner says, I've looked at it; you don't know everything I know; and it's not that serious; and your view of the law is not as clear as you think it is. Now, what if that's all very reasonable? We're not talking about the good soldier, the good Nazi who follows orders no matter what, but the associate that says, well, you know, that sounds reasonable to me.

The ABA rule says you don't go up, you take into account things. Not just the seriousness, but whether the person talking to you is self-interested or not. It's not the head of the division saying, “Take my word for it, I didn't steal when you saw me taking the money out of the till;” or, “That conversation you heard in which I talked about cheating and lying and killing, I was just mouthing a play that I might decide to write later.” You know, at some point, you can't close your eyes.

But if the person you're talking to is objective and not exactly involved, if his or her resolution of the law is reasonable, you don't have the obligation to tell the partner if you're an outside firm, or the assistant counsel to tell the general counsel, well, I'm going to ask for a meeting of the board of directors myself. That's not a burden we put on people because it's not fair to do so. And so, I think the ABA rule 1.13, not as clear as we like, was a fairly nice resolution of trying to find out what your client wants going up the ladder. Once you find out what your client really wants—your client really wants to have the offering memorandum go forward, and there's nothing but water in the tanks and maybe only an inch of salad oil on top—then 1.13 doesn't tell you what to do. Rule 1.6

tells you what to do, and it says that you may, and in some cases I think must, then go outside.

I disagree with Larry on this. I'm not sure he would fully accept the changes that the ABA made in 2002 and 2003. But I think that's a fair accommodation of the different interest.

PROFESSOR PAINTER: Ron.

PROFESSOR ROTUNDA: Yes, sir.

PROFESSOR PAINTER: 1.13 is, of course, different now, as you recognize. And the new 1.13, where you know of an illegal violation pretty clearly requires the reporting up if you think it'll cause substantial harm.

PROFESSOR ROTUNDA: Yeah, and that's there for P.R. because that was already the case with 1.6. If you had human being, rather than an entity, and you really know they're going to commit fraud, substantial and so on, then 1.6 after the 2002 amendment said you've got to do something. They cleared up a lot of the ambiguity.

The old rule said if you knew about imminent death, you had to report. And so, if you had slow, lingering death, that was okay.

PROFESSOR PAINTER: Now they've talked about inevitable death, so they've cleaned up some of the language.

MR. FOX: One, I think it's clear, I don't think it's so hard to decide that we're going to withdraw from aiding and abetting, and if we have in any way aided and abetted already, then we've got to protect ourselves. I think the much more interesting question is when we changed 1.6 recently, we didn't change it like 33 jurisdictions have; we changed it like maybe 12 jurisdictions have because the jurisdictions are all over the place.

The one thing the ABA has in its new rule is you may disclose not only to prevent a fraud but to rectify a fraud, which means the fraud has already occurred.

I think the extremely difficult situation for lawyers who are presented with a client who has already completed the fraud is the extent to which it will be said that the lawyer's services in defending that client is somehow either aiding and abetting or otherwise triggers this permission, which Ron says might become an obligation, to disclose to rectify, even though what the person has come to you with is a completed fraud because rectification can happen at any time. The proceeds are still in the bank. If the salad oil is still missing and we can still find it, there's lots of different things you can do. I think that's the hard thing for the lawyer to know: what is the responsibility on the disclosure defense side in a rectification world?

PROFESSOR ROTUNDA: Well, a quick hypo. You go to the client and say, “I just talked to these people who are going to have the public offering tomorrow, and we find out that there's nothing but an inch of salad oil on the top of these barrels.” And the client says, “That's okay, you're let go. You're fired. I don't need you anymore.” The new rule says your services were used by that client—unknowingly to you. But they used your

services, and it's not enough to be like Pontius Pilate to say, “I wash my hands.” You're going to have to do a little more than that.

MR. FOX: But the point hasn't occurred in that hypo yet because we haven't done the IPO. That's tomorrow. I'm clear with that. The question is, what happens if two days later the client comes to you and says, “Guess what, we have water there and I want you to defend me in this because I made a terrible mistake; I got an IPO.” Now the proceeds are in the bank. What am I doing now?

PROFESSOR ROTUNDA: I think you should be saying you're going to be a witness.

PROFESSOR PAINTER: If you use my services to do that, I know who's going to get sued. I'm going to disclose now because I don't appreciate being used by a client to commit fraud and then I get sued.

MR. FOX: No. He just wants a defense. He just wants a defense. He doesn't say, “I'm using your services,” but you're going to argue he's using my services. Simply getting a defense, which I submit is the problem with the rectification provision because it goes to the very heart of whether anybody can get a defense in a fraud case when somebody can come along and say some step could have been taken to rectify the effect of that fraud, whether it took place last week, last month, or last year.

PROFESSOR ROTUNDA: Well, it's a different lawyer, the one who didn't draw up the papers, who I think is going to be a witness. But it does illustrate the prime rule of legal ethics that we all should know. And I told this to my students. If the choice is whether the client goes to jail or you, make sure it's the client.

AUDIENCE PARTICIPANT: I just wanted to move it away from the corporate context for a second to another federalism aspect with professional responsibility, and that is FEC and political regulation. You just had a scenario that I wanted to comment to the panel on.

A lawyer represents a citizen who challenges the residency of a candidate for Congress. He takes that case all the way up through the appellate court system. The FEC opens an investigation of the opposing campaign for an in-kind contribution committed by the client and subpoenas all the records, all the communications between the lawyer and his client, to try to demonstrate that that in-kind contribution challenging the residency of the opponent has taken place. The supreme court of the state in which the lawyer practices has pretty clearly opined that this would violate the rules of professional ethics. What does the lawyer do?

PROFESSOR ROTUNDA: Normally, you follow the state rule. Raise your claim in the —what is it? —the federal administrative proceeding, or you raise your defense of the state rule. I think it's different than the preemption argument that Washington State has because if the federal regulation is constitutional, that overrides state law. That's always been the normal rule. Here, your hypothetical doesn't have a federal regulation that says you must turn over something. It's simply the agency says we'd like you to turn it over,

and you plead the attorney-client privilege like you do in any other case, and you just follow what the court rules on that.

AUDIENCE PARTICIPANT: Does the situation change if the attorney is doing it pro bono and the attorney is then providing the in-kind contribution?

PROFESSOR ROTUNDA: Well, you know, you're always allowed to work for free. And if you charge a salary or fee, you're not required to sue to collect it. If the FEC says you cannot give an in-kind contribution, then I guess you have to try to collect it from your client. What do you do? I don't like it when lawyers get stiffed by the clients but we have to realize that you can't hang them by their toenails. But I think that's ultimately a question of FEC law or substantive election law, whether attorneys are allowed to work for free. And actually, I'm told that a lot of the attorneys, not knowing it at the time, worked for free in Florida when they worked for Al Gore because I'm told that he stiffed a lot of his attorneys.

We shall adjourn and we shall see you all at the luncheon.