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Foreword: Symposium--Ethics 2000 and Beyond: Reform or Professional Responsibility as Usual

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SYMPOSIUM—ETHICS 2000 AND BEYOND: REFORM OR PROFESSIONAL RESPONSIBILITY AS USUAL†

FOREWORD

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The topic of this Symposium—*Ethics 2000 and Beyond: Reform or Professional Responsibility as Usual?*—is one that likely does not immediately resonate with many other than professional responsibility teachers and scholars. It is, however, a subject of critical importance to all existing and future members of the legal profession. This was true at the time that the Symposium was conducted in the spring of 2002, and it is even truer today in light of ever-growing concerns with regard to the ethical duties of lawyers,[1] particularly those who represent corporate clients believed or known to be involved in unlawful activities.[2] Indeed,

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† *Editor's Note: The articles written in connection with this issue were largely prepared around the time of the actual Symposium in 2002. There has been a delay in publication, and consequently, the information and research contained herein may not be as current as when originally submitted.*

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I would like to thank Richard Painter, Dee Falls, and the Editors of the University of Illinois Law Review for their tireless efforts in connection with this Symposium, as well as the College of Law for its generous financial support. I also wish to express special thanks to Robyn Richmond, our student assistant, who very ably contributed to the preparation of various aspects of the Symposium. Last, but certainly not least, I want to thank our esteemed participants, without whom the Symposium would not have been possible.

1. *See, e.g.*, David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217; Nancy J. Moore, *"Who Should Regulate Class Action Lawyers?"*, 2003 U. ILL. L. REV. 1477; *see also* Adam Liptak, *Judges Seek to Ban Secret Settlements in South Carolina*, N.Y. TIMES, Sept. 2, 2002, at A1.

2. *See, e.g.*, Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 BUS. LAW. 143 (2002); Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 STAN. J.L. BUS. & FIN. 9 (2002); Brenda Sapino Jeffreys, *Corporate Responsibility Piling up on In-Housers—Lawmakers Look to Lawyers to Help Report Wrongdoing*, TEX. LAW., Sept. 2, 2002, at S1; Tamara Loomis, *New Disclosure Rule—An ABA Proposal Would Have Lawyers "Rat" on Clients*, N.Y. L.J., Sept. 26, 2002, at 5; Michael Orey, *Launching Broadsides at the Bar*, WALL ST. J., May 8, 2002, at B1; *see also* Naftali Bendavid, *Enron's Law Firm Begins to Draw Fire*, CHI. TRIB., Mar. 14, 2002, at 17; Julie Mason, *Legal Counsel Scrutinized—Partners from Vinson & Elkins Called to Answer*

current events suggest that a more appropriate question than that which we posed to our participants might have been: Can the revision of written ethical standards realistically reform or even meaningfully impact the legal profession?[3]

"Ethics 2000" is the common phrase that has been utilized to refer to the American Bar Association's (ABA's) most contemporary assessment of its Model Rules of Professional Conduct (Model Rules). As "model" rules, they of course have no binding effect on attorneys; however, they have always been the paradigm for most states' rules of professional responsibility.[4] Although various changes have been made to these rules since their inception in 1983,[5] Ethics 2000 represented the first attempt to evaluate the Model Rules in their entirety. The official name of the thirteen-member commission appointed to undertake this task in 1997[6] reflects this comprehensive objective—"Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct."

The work of the Ethics 2000 Commission was quite extensive. It included, among other things, fifty-one days of open meetings, numerous public hearings, the drafting and circulation of various versions of the proposed revisions for public scrutiny and comment, and the issuance of detailed interim and final reports.[7] These efforts culminated in two meetings of the ABA House of Delegates at which the recommended

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Questions on Enron Work, HOUS. CHRON., Mar. 8, 2002, at 22; *infra* text accompanying notes 14–20. *But see* Lawrence J. Fox, *The Fallout from Enron: Media Frenzy and Misguided Notions of Public Relations Are No Reason to Abandon Our Commitment to Our Clients*, 2003 U. ILL. L. REV. 1243.

3. It should go without saying that the mere codification of professional norms in the absence of other efforts can hardly purport to reform the legal profession as a whole. For a thoughtful examination of other essential components of reform, see DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000); *see also* John T. Noonan, Jr., *The Foxboro Referee, the Boston Judge, the County Juror, and the Conscience of the Court*, 2003 U. ILL. L. REV. 1403 (discussing the importance of "conscience" and interpersonal relationships with regard to professional responsibility).

4. At present, forty-five jurisdictions have adopted some version of the Model Rules. *See Tennessee Adopts ABA Model Rules, Making Numerous Changes to Models*, 18 LAW. MANUAL ON PROF. CONDUCT (ABA/BNA) No. 19, at 562 (Sept. 11, 2002) (observing that "Tennessee's shift to the Model Rules brings to 45 the tally of jurisdictions that pattern their lawyer disciplinary rules on the ABA Models, or at least have borrowed substantial amounts of text from them"). Although many deviate from the precise content of some of the Model Rules, for the most part, states are true to their form and general composition. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 1.15 (3d ed. 2001 & 2002 Supp.). Prior to the enactment of the Model Rules, virtually all jurisdictions followed the ABA's earlier regulatory effort—the Model Code of Professional Responsibility. *See* RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1-1.4 (2000); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6.3 (1986).

5. *See, e.g.*, James Podgers, *Model Rules Get the Once-Over—Ethics 2000 Project Launches Review of ABA Professionalism Standards*, A.B.A. J., Dec. 1997, at 90 (noting that as of 1997 there had been about thirty amendments to the rules or comments thereto, as well as the adoption of several new rules).

6. *See id.*

7. *See* Margaret Colgate Love, *The Revised ABA* Model Rules of Professional Conduct: *Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 443 (2002).

changes were debated and voted upon.[8] In the end, the overwhelming majority of the suggested revisions were accepted, with the most notable exception being the rejection of a portion of the Commission's proposed amendment to Model Rule 1.6, concerning the duty of confidentiality.[9] Specifically, the House voted against expanding the circumstances under which a lawyer is permitted to reveal a client's confidences to include disclosure to prevent, mitigate, or rectify substantial financial harm to a third party stemming from criminal or fraudulent activity of a client with regard to which the lawyer's services were utilized.[10]

I highlight the rejection of this amendment because the Enron scandal emerged virtually on its heels, rekindling the debate regarding this issue and generating widespread professional and public outcry for further reform.[11] In fact, the ABA formed a Task Force on Corporate Responsibility[12] to consider the need for further changes to the Model

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8. *See id.* at 443–44. The meetings included the ABA's August 2001 Annual Meeting and its February 2002 Midyear Meeting.

9. *See id.* at 451. It should also be noted that Model Rule 1.13 ("Organization as Client") was left relatively unchanged by Ethics 2000, notwithstanding diligent efforts on the part of the co-organizer of this Symposium, Professor Richard Painter, to convince the Commission of the necessity of revising that rule to *require* attorneys to inform corporate clients' boards of directors of internal wrongdoing, as an ultimate resort. *See* Cramton, *supra* note 2, at 179 n.147; Love, *supra* note 7, at 460. For a general overview of the work of the Ethics 2000 Commission and the changes that were adopted, see generally Love, *supra* note 7.

10. *See* Love, *supra* note 7, at 450–51. The pertinent sections of the proposed rule provided that:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
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> ....
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
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> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services ....

PROPOSED REVISION OF THE A.B.A. MODEL RULES FROM THE A.B.A. COMMISSION ON EVALUATION OF PROF'L STANDARDS (ETHICS 2000) R. 1.6(b)(2), (3) (Nov. 20, 2000), *reprinted in* THOMAS D. MORGAN & RONALD D. ROTUNDA, 2001 SELECTED STANDARDS OF PROFESSIONAL RESPONSIBILITY 327–28 (2001). Notwithstanding its somewhat narrow focus, it still appeared to represent a significant attempt to loosen the ethical restraints on confidentiality. *See, e.g.*, David W. Raack, *The Ethics 2000 Commission's Proposed Revision of the Model Rules: Substantive Change or Just a Makeover?*, 27 OHIO N.U. L. REV. 233, 239 (2001) (noting that "[i]n one respect the proposed version of (b)(2) appears narrower than the present Rule, because it limits disclosure to situations in which the client has used or is using the lawyer's services"; but is broader in several other important respects).

11. *See, e.g.*, *supra* note 2 and accompanying text.

12. This Task Force was appointed by then-ABA President Robert E. Hirshon in March 2002 for the express purpose of examining:

> systemic issues relating to corporate responsibility arising out of the unexpected and traumatic bankruptcy of Enron and other Enron-like situations which have shaken confidence in the effectiveness of the governance and disclosure systems applicable to public companies in the United States. The Task Force will examine the framework of laws and regulations and ethical principles governing the roles of lawyers, executive officers, directors, and other key participants. The issues will be studied in the context of the system of checks and balances designed to enhance the public trust in corporate integrity and responsibility. The Task Force will allow the ABA to contribute its perspectives to the dialogue now occurring among regulators, legislators, major financial markets and other organizations focusing on legislative and regulatory reform to improve corporate responsibility.

Rules, most notably to Model Rule 1.6,[13] changes that have now been formally adopted.[14]

Even more noteworthy, in 2002 Congress made a somewhat unprecedented foray into the bar's longstanding self-regulatory regime by passing legislation directing the Securities and Exchange Commission (SEC) to enact rules establishing minimum levels of professional conduct for lawyers appearing and practicing before that body with regard to the revelation of intended or ongoing unlawful activity by an "issuer" client.[15] Specifically, section 307 of the Sarbanes-Oxley Act mandated the creation of rules "requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof)."[16] In the event the aforementioned approach proves unsuccessful in eliciting an appropriate response, under the rules, the lawyer would then be required to "report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board . . . comprised solely of directors not employed directly or indirectly by the issuer, or to the board [itself]."[17] Consistent with this congressional directive, the SEC adopted a "final rule"[18] that took effect on August 5, 2003.[19]

It is also significant to note that prior to the enactment of Sarbanes-Oxley, Professor Richard W. Painter drafted and submitted a letter, signed by a number of leading legal ethics scholars, to SEC Chairman

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ABA TASK FORCE ON CORPORATE RESPONSIBILITY, MISSION STATEMENT, *at* http://www.abanet.org/buslaw/corporateresponsibility/home.html (last visited Mar. 3, 2003).

13. *See* ABA TASK FORCE ON CORPORATE RESPONSIBILITY, PRELIMINARY REPORT 45 (July 16, 2002), *available at* http://www.abanet.org/buslaw/corporateresponsibility/preliminary-report.pdf [hereinafter PRELIMINARY REPORT]; *see also Task Force Proposes Model Rule Changes for Lawyer Response to Corporate Wrongs*, 18 LAW. MANUAL ON PROF. CONDUCT (ABA/BNA) No. 16, at 458 (July 31, 2002). In addition, the Task Force also recommended changes to Model Rules 1.2, 1.13, and 4.1. The suggested revisions to Rule 1.6 mirrored those previously proposed by the Ethics 2000 Commission and rejected by the House of Delegates. *See* PRELIMINARY REPORT, *supra*, at 27–36; *see also supra* note 10.

14. *See infra* notes 23–24 and accompanying text.

15. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745 (2002).

16. *Id.*

17. *Id.*

18. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296 (Feb. 6, 2003) (to be codified at 17 C.F.R. pt. 205).

19. It should be noted that although the rule has been termed "final," the SEC's work in this regard is not complete. In particular, at the time that this Symposium issue went to print, the SEC was still considering whether to include a so-called noisy withdrawal provision, which, as originally recommended, would have, under certain circumstances, required or permitted a lawyer withdrawing from representation under the rule to inform the SEC of the fact of his or her withdrawal and disaffirm certain work performed on behalf of the client before the SEC. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6324 (Feb. 6, 2003) (to be codified at 17 C.F.R. pt. 205). The SEC has also proposed an alternative to this that would mandate withdrawal in specific situations, but would require the client, rather than the lawyer, to inform the SEC of the withdrawal. *See id.* The period for public comment on both the original and alternative proposals ended on April 7, 2003. *See ABA Panelists Assess How Sarbanes-Oxley, SEC Rules Will Change Practice and Ethics*, 19 LAW. MANUAL ON PROF. CONDUCT (ABA/BNA) No. 4, at 100 (Feb. 12, 2003).

Harvey L. Pitt calling for similar action in this context.[20] Professor Painter's letter suggested that the SEC should amend its Rule 102(e), or enact a new rule, that would "require a lawyer who represents a corporation in connection with its securities law compliance to inform the client's board of directors if the lawyer *knows* that the client is violating the securities laws and senior management does not promptly rectify the violation."[21]

These various efforts, among others, certainly supported the argument that the ABA House of Delegates may have gotten it at least partially wrong with regard to its initial rejection of Ethics 2000's proposed amendment to Model Rule 1.6 and its inaction concerning Model Rule 1.13 ("Organization as Client").[22] This point seems to have been validated by the ABA's recent reversal of course in approving the revised version of Rule 1.6 as recommended by the Task Force on Corporate Responsibility,[23] albeit by a very slim margin.[24] In addition, revisions to Rule 1.13 were also adopted, making it more consistent with the corporate reporting obligations created by the Sarbanes-Oxley Act and related SEC rule.[25]

While to many the ABA's change of heart on these subjects undoubtedly represents a positive development in terms of professional reform, others may view it as unnecessary or ill-advised capitulation to would-be outside regulators.[26] More ominously, however, Congress's injection of itself into the debate concerning the ethical responsibilities of

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20. *See* Letter from Richard W. Painter, Professor of Law, University of Illinois College of Law, et al., to Harvey L. Pitt, Chairman, Securities and Exchange Commission (Mar. 7, 2002), *available at* http://www.fed-soc.org/Publications/practicegroupnewsletters/PG%20Links/pittletter.htm (last visited Mar. 3, 2003). A copy of this letter, along with SEC General Counsel David Becker's response thereto and a subsequent reply from Professor Painter, can be viewed at the website for the ABA Task Force on Corporate Responsibility. Letter from David M. Becker, General Counsel, Securities and Exchange Commission, to Richard W. Painter, Professor of Law, University of Illinois College of Law (Mar. 28, 2002), *available at* http://abanet.org/buslaw/corporateresponsibility/becker.pdf (last visited Mar. 3, 2003); Letter from Richard W. Painter, Professor of Law, University of Illinois College of Law, to David M. Becker, General Counsel, Securities and Exchange Commission (Apr. 4, 2002), *available at* http://www.abanet.org/buslaw/corporateresponsibility/painter.pdf (last visited Mar. 3, 2003); *see also Questioning the Books: Proposal Requires Lawyers to Expose Financial Fraud*, WALL ST. J., Mar. 12, 2002, at A6.

21. Letter from Richard W. Painter, *supra* note 20; *see also supra* note 9 (discussing Professor Painter's efforts in seeking revision to Model Rule 1.13).

22. *See supra* notes 9, 10 and accompanying text; *see also supra* note 19.

23. At its 2003 Annual Meeting in August, the ABA House of Delegates approved revisions to Model Rule 1.6 that were essentially identical to those originally proposed by Ethics 2000 and rejected by the House. *See House of Delegates: ABA Amends Ethics Rules on Confidentiality, Corporate Clients to Allow More Disclosure*, 72 U.S.L. WK., Aug. 19, 2003, at 2091 [hereinafter *ABA Amends*]; *supra* note 13 and accompanying text; *see also supra* note 10 and accompanying text. A complete redlined version of new Model Rule 1.6 can be viewed *at* http://www.abanet.org/cpr/mrpc/red_rule1_6.pdf (last visited Sept. 24, 2003).

24. The actual vote was 218-201. *See ABA Amends*, *supra* note 23, at 2091.

25. *See ABA Amends*, *supra* note 23, at 2092–93. A complete redlined version of new Model Rule 1.13 can be viewed *at* http://www.abanet.org/cpr/mrpc/red_rule1_13.pdf (last visited Sept. 24, 2003).

26. *See, e.g.*, *ABA Amends*, *supra* note 23, at 2092–23; *see also* Fox, *supra* note 2.

corporate lawyers, irrespective of its ultimate impact on the actual regulatory process, intimates that perhaps there are certain areas with respect to which lawyers simply cannot be expected (or possibly trusted) to regulate themselves.[27]

Whatever the message, these recent developments raise legitimate questions about Ethics 2000, and broader concerns with regard to the legal profession's apparatus for addressing ethical transgressions in general. To what extent did Ethics 2000 effect meaningful change or reform,[28] and to what extent did these efforts merely represent changes in language (or decisions to leave existing rules intact), with little hope of significant professional impact[29]—or possibly something in between? Is merely sending the appropriate message to the public and the profession through the enactment and publication of well-intended ethical standards, without more, enough? If so, was this objective even accomplished? The articles that follow thoughtfully analyze and critique specific aspects of Ethics 2000, both with regard to what it did[30] and did

27. Indeed, SEC Chairman Pitt stated as much in a speech to the ABA's Section of Business Law during the ABA's 2002 Annual Meeting. In particular, Chairman Pitt proclaimed that "Sarbanes-Oxley reflects some skepticism about the degree to which the legal profession can police itself by making explicit the [SEC's] ability, and our obligation, to regulate how lawyers appear and practice before us, including minimum standards of professional conduct for corporate lawyers." James Podgers, *Seeking the Best Route—SEC and ABA Leaders Vow Cooperation on Corporate Responsibility Rules for Lawyers*, A.B.A. J., Oct. 2002, at 68; *see also* Fred C. Zacharias, *Reform or Professional Responsibility as Usual: Whither the Institutions of Regulation and Discipline?*, 2003 U. ILL. L. REV. 1505 (speculating that the legal profession's current system of state-centered regulation will, out of necessity, change in the future); *cf.* RHODE, *supra* note 3, at 208 (observing that "[r]egulation of the legal profession has been designed primarily by and for the profession, and too often protects its concerns at the public's expense"); Rhode & Paton, *supra* note 2, at 12 (observing that "[o]ne key question often overlooked is whether self-regulation by the legal profession is part of the problem"); Anthony E. Davis, *Who Should Regulate Lawyers?*, N.Y. L.J., Sept. 9, 2002, at 3 (discussing the paradox between federal authorities weighing in with respect to lawyers' most sacred duty of confidentiality and the ABA's virtually simultaneous reaffirmation of the concept of state regulation of the legal profession, expressly and through the adoption of the report of the Commission on Multijurisdictional Practice).

28. *See, e.g.*, George M. Cohen, *The Multilawyered Problems of Professional Responsibility*, 2003 U. ILL. L. REV. 1409; Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573; Susan P. Shapiro, *If It Ain't Broke . . . An Empirical Perspective on Ethics 2000, Screening, and the Conflict-of-Interest Rules*, 2003 U. ILL. L. REV. 1299. One could certainly quibble over the meaning of the word "reform," as well as whether effecting "reform" was even the charge or mission of Ethics 2000, or is even possible through the mere changing of ethical rules. *See, e.g.*, Zacharias, *supra* note 27; *see also supra* note 3 and accompanying text. Nevertheless, we deemed it to be a pertinent and worthwhile query.

29. *See, e.g.*, Steven C. Krane, *Ethics 2000: What Might Have Been*, 3 PROF. LAW. 2, 9 (1999) (maintaining that the Ethics 2000 Commission needed to construct a "new house," rather than simply "redecorating"); Raack, *supra* note 10, at 264 (criticizing the Ethics 2000 Commission for its failure to include aspirational principles "to urge lawyers to live up to the highest ideals and standards of the legal profession"); Christopher J. Piazzola, Comment, *Ethical Versus Procedural Approaches to Civility: Why Ethics 2000 Should Have Adopted a Civility Rule*, 74 U. COLO. L. REV. 1197, 1201 (2003) (suggesting that the Commission "missed an opportunity to express the bar's shared concerns [regarding civility] by adopting a Model Rule"). *But see* Patti Waldmeir, *Inside Track—A Failure to Squeal*, FIN. TIMES, Jan. 24, 2002, at 11 (questioning somewhat rhetorically whether "as law has evolved from a profession to a business, has competition eroded ethical standards beyond the power of the ABA to repair?").

30. *See, e.g.*, Lester Brickman, *The Continuing Assault on the Citadel of Fiduciary Protection: Ethics 2000's Revision of Model Rule 1.5*, 2003 U. ILL. L. REV. 1181; Robert P. Burns & Steven Lubet,

not do,[31] in an effort to answer, or at least deeply ponder, such questions—questions that perhaps now more than ever demand the collective attention of the legal profession.

Division of Authority Between Attorney and Client: The Case of the Benevolent Otolaryngologist, 2003 U. ILL. L. REV. 1275; Carol A. Needham, *Multijurisdictional Practice Regulations Governing Attorneys Conducting a Transactional Practice*, 2003 U. ILL. L. REV. 1331.

31. *See, e.g.*, Edward A. Bernstein, *Structural Conflicts of Interest: How a Law Firm's Compensation System Affects Its Ability to Serve Clients*, 2003 U. ILL. L. REV. 1261; Nathan M. Crystal, *False Testimony by Criminal Defendants: Still Unanswered Ethical and Constitutional Questions*, 2003 U. ILL. L. REV. 1529; Green, *supra* note 28; Moore, *supra* note 1; Burnele V. Powell, *Back to the Future Along the Hudson: Is the New York State of Mind Confused About MDPs?*, 2003 U. ILL. L. REV. 1377.