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Judge Bell and Professional Courage

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By Larry D. Thompson *

I was preparing a speech dealing with, among other topics, the role of lawyers who represent public companies in the post Sarbanes-Oxley[1] world. I wanted to point out that what we lawyers needed to properly and effectively represent public companies was professional courage. Further reflection on the topic almost immediately took me to a memorable moment in my practice experience involving Judge Griffin B. Bell. The relevant portion of my speech is as follows:

> *Regarding the corporate scandals of 2002, as Linda Thomsen, head of the SEC's Enforcement Division, has noted, "[m]uch of the conduct [of lawyers surrounding the 2002 spate of corporate scandals] was not actionable; but it wasn't admirable either."*
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> *The corporate scandals of 2002 were devastating. Billions of investor dollars were lost — almost overnight. Confidence in our financial markets was completely shaken. The blunt question asked by Judge Stanley Sporkin in connection with the savings and loan scandals of the 80's is still relevant, "Where are the lawyers?"*
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> *So, on this point let me turn to the Report of the Task Force on the Lawyer's Role in Corporate Governance issued in November 2006 by the New York City Bar Association.[2] The Report cites the work of Neal Batson of Alston & Bird in the Enron bankruptcy proceedings. Neal found with respect to Enron that we lawyers did a number of things. We correctly identified problematic conduct by company officers, we indicated*

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* Senior Vice President, Government Affairs, General Counsel and Secretary, Pepsico. Larry D. Thompson formerly practiced with Judge Bell, served as the United States Attorney for the Northern District of Georgia, and also served as United States Deputy Attorney General, the second-highest ranking office in the George W. Bush Justice Department.

our concerns about potential unlawful conduct, but we then did not follow through with forthright advice to the Board or other senior lawyers. For whatever reasons, some economic, some associated with professional pressures, lawyers wavered or equivocated when faced with giving unwelcome advice to powerful corporate officers.

So what does the Report recommend? Well, the Report's central recommendation is remarkably brief. In fact, it's just two words: "professional courage." For the Report's drafters, professional courage is the "indispensable element" needed for U.S. lawyers to avoid the problems leading up to the scandals that occurred in several large public companies.

All of this reminds me of a time in the mid-1980s after I returned to King & Spalding as a partner. Judge Bell had just established the white collar and government investigations practice he called special matters. We were ready for business, especially the myriad investigations into procurement fraud aimed at almost every large and mid-sized defense contractor. Well, we soon got a call to represent a large defense contractor located outside of Atlanta. Judge Bell and I flew to meet the General Counsel and other prominent lawyers from around the country the company had already retained. In the ensuing discussion about the case, Judge Bell and I became very concerned about how things were being discussed. Judge Bell mentioned his concerns to the General Counsel, but the same discussions continued. I then looked over and saw Judge Bell putting his papers in his briefcase and then saying to me, "Come on Larry, we need to go." The General Counsel was shocked but was eventually able to persuade Judge Bell to stay. However, the uncomfortable and inappropriate discussion ceased.

That, to me, was a vivid example, early in my career, of professional courage — the ability to walk away from questionable conduct or even fire a client.

ENDNOTES

1. The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

2. New York City Bar Association, Report of the Task Force on the Lawyer's Role in Corporate Governance (Nov. 2006), *available at* http://www.abcny.org/pdf/report/CORPORATE_GOVERNANCE06.pdf (last visited Feb. 16, 2010).