THE COLUMN OF THE LEGAL EDUCATION AND PROFESSIONAL STANDARDS COMMITTEE

By Diane M. Soubly

Profiles in Courage?: After Enron and Sarbanes-Oxley

Scenario A: Angered by advice from Corporate Legal, the executive vice president hastily convened senior officers in the board room. A senior legal officer had advised that federal law required advance layoff notices to affected employees and state and local governmental units. Eager to enlarge his "turf" by annexing the legal department, the EVP had staffed his department with attorneys, none of whom were admitted to the state bar where the corporation was headquartered, and some of whom had not even taken a bar exam. He seized upon the opportunity: his lawyers provided the legal opinion that the vice chairman really wanted, i.e., no such notices were necessary. The legal officer was warned never to raise any supposed violation of law to any executive unless criminal penalties were probable.

Scenario B: A manager who had given less than forthright testimony in his deposition had just learned that a former employee whom he fired would be subpoenaed as a witness. The in-house lawyer complained to outside counsel: "The manager says he did a great job in his deposition, but that woman he fired will contradict his testimony. She is a foreign national here on a work visa. Our immigration counsel has been working on the paperwork to transfer sponsorship to her new employer, and I want you to tell her that paperwork will be delayed unless her testimony is favorable!" When the outside counsel sought advice from a partner, he deprecated her concerns: "Is that really an ethical violation? Just do what she wants."

All too often, lawyers complain that law schools and law firms do not adequately prepare them for the ethical issues they confront in practice. Certainly, the scenarios just described raise ethical concerns. Without question, the practice of law has changed for corporate legal departments and outside firms. Unlike lawyers who graduated when law school cost less, new lawyers often face substantial debt upon graduation, and many feel enormous economic pressure to conform to what senior partners or clients demand. Client loyalty has substantially eroded, as corporate officers obsessed with P/E ratios prefer lawyers who give them the advice they want and fire lawyers who don't. Senior partners fearful of losing billings may even imply to attorneys employed by their firms that fees matter more than ethics.

Legislation like the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) and revised professional codes of conduct seem designed to police professions that have failed to police themselves. As the preamble to the proposed new Michigan Rules of Professional Conduct recognizes, the lawyer is "a public citizen having special responsibility for the quality of justice." In fulfilling that special responsibility, the lawyer operates within a series of ethical constraints and according to an internal moral compass.

Sarbanes-Oxley has its detractors, who claim that a national ethical standard may conflict with local/state ethical rules. It may be more difficult, however, to make a case for regional variations in *ethics* than for regional variations in, for example, ceremonial court *customs.* Section 307 of the act mandates that the SEC issue a rule requiring attorneys practicing before the commission to report evidence of a material violation of securities law or a breach of fiduciary duty or similar violation by the company or its agent(s) to the chief legal officer or the chief executive officer. Should the CLO or the CEO fail to respond appropriately, Section 307 mandates that attorneys must report the violation or breach to the audit committee of the board of directors of a publicly traded company, or to a committee comprised solely of outside directors, or to the board of directors itself. To the extent that Section 307 adopts a national standard for securities lawyers, that standard is arguably consistent with the Michigan Rules of Professional Conduct.

Not only does a lawyer have an ethical duty not to assist a client in illegal or fraudulent conduct under MRPC 1.2, but MRPC 1.6(c) also expressly permits a lawyer, as an exception to attorney-client privilege, to reveal "confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used" (sub-part 3); to reveal "the intention of a client to commit a crime and the information necessary to prevent the crime" (sub-part 4); and to reveal "confidences or secrets when permitted or required by these rules, or when required by law [such as Sarbanes-Oxley] or by court order" (subpart 1). Moreover, where the client whom the lawyer advises is a fiduciary (such as a corporate officer who stands in a fiduciary relationship to shareholders), the comment to MRPC 1.2(c) cautions that "the lawyer may be charged with special obligations in dealing with a beneficiary."

Sarbanes-Oxley also shields whistleblowers from retaliation when they provide information that they reasonably believe to be a violation of federal securities law, SEC rules, or "any Federal law relating to fraud against shareholders." Section 806 of the act creates a new civil cause of action for whistleblower employees of public companies. Employees may file a complaint with the Department of Labor, but must make a prima facie showing that their protected conduct contributed to

All columns are the opinion of the writer and do not represent the position of the Legal Education and Professional Standards Committee or the State Bar of Michigan.

an adverse employment action. The DOL may still decline to investigate if the employer demonstrates that the adverse action would have occurred even in the absence of protected conduct. If the DOL fails to resolve the employee's complaint within 180 days from its filing through no fault of the whistleblower, the employee may file an action in federal court. If either side appeals the DOL resolution, the employee is entitled to a trial de novo in federal court.

Section 1107 protects employees of both public and private companies who make disclosures relating to the possible commission of a federal offense to a "law enforcement officer." While no court has yet construed the statute, Section 1107 (broadly read) may subsume a report of violation of any federal law, not just commission of fraud against shareholders.

Even in-house attorneys who report violations of federal or state law, whether under Sarbanes-Oxley or the Michigan Whistleblowers' Protection Act, should be entitled to protections against retaliation if they report or are about to report wrongdoing to a public body. The ethical rules also contemplate that in-house lawyers must recognize that their real clients are the business entities, and not the corporate officers who work to oust lawyers who give objective, rather than politically correct, legal advice: MRPC 1.13(b) requires in-house lawyers to seek reconsideration of wrongdoing or contemplated violations of the law, to advise the securing of a separate legal opinion, and to refer the wrongdoing to the highest authority within the entity in extreme situations. Should such a course of action fail to stem the wrongful conduct, the lawyer is then authorized "to take further remedial action that the lawyer reasonably believes to be in the best interest of the organization," including but not limited to revelation of confidences and secrets in the manner described in MRPC 1.6.

In a post-Enron world, law schools, practitioners, jurists, and the State Bar should all assist lawyers in identifying ethical issues and resources for their resolution. Beyond the State Bar Ethics Hotline, a far greater panoply of support options for all legal professionals should be available to resolve ethical or professional dilemmas. Broad calls to action such as the Indiana State Bar Legal Conclave can foster a "trialogue" among bench, bar, and academia about the resources available to the lawyer as "public citizen" who seeks, with courage, to "do the right thing." ✦

Diane M. Soubly is a shareholder in the employment law and litigation firm of Vercruysse Murray & Calzone, P.C., in Bingham Farms, Michigan. From 1997 to 2000, Ms. Soubly served as Senior Vice President and Deputy General Counsel, Litigation of Comerica Incorporated, and was responsible for all Comerica litigation, domestic and international, with particular attention to high-profile and/or high-exposure cases.