ACCOUNTABILITY

BY EDWARD J. CLEARY

Accountable: *adj. 1: Subject to giving an account:* ANSWERABLE. *2: Capable of being accounted for:* EXPLAINABLE.

We are all accountable. We are accountable to a Supreme Being (if we are believers), to our families, and to our employers (or clients, as the case may be). We are accountable to our government (and reminded of that every April 15), to the electorate (if we are elected public officials) and to each other (civilly and criminally). This accountability may be based on oath (marriage vows, the lawyer's oath) or status (employee, citizens). We are taught early on that with privilege comes responsibility; with conduct (or misconduct), comes consequences.

Nationwide, a number of our institutions are under fire for their lack of accountability and their failure to self-regulate. From the accounting industry, to the large brokerage firms, to the Catholic Church, and yes, to the legal community, we have seen a mindset that leaves many of us shocked and disheartened. The troubles in the business community are "the result of two decades of erosion of business ethics."[1] Fraud, greed, and malfeasance have always been with us but seldom on this scale, or so it seems. When the aim of the accounting profession has been, in the words of a former SEC chairman, "to weaken federal oversight, block proposed reform, and overpower the federal regulators who stood in their way" and when Congress is complicit with those aims due in part to "enormous" campaign contributions, what is the public to think? "It used to be that if industries had a problem they would try to work it out with the regulatory authorities . . . now they bypass the regulators completely and go right to Congress."[2] Some would suggest that the accounting firms were merely serving clients "who became much more aggressive, demanding that accountants sign off on results that supported frothy stock prices."[3] Yet as the accountants attested to those audits, they apparently did not consider who would be held accountable for the mess once it was uncovered.

Speaking of frothy stock prices, what is the public to think when major Wall Street firms appear to have "purposely misled small investors with overly optimistic research in companies that were also clients of their investment banking departments"?[4] One can almost hear the firms blaming overly aggressive clients and, after all, the firms wanted to keep the investment banking business, and in order to do that they may have exaggerated a bit. Hubris and greed were allowed to flourish, conflicts of interest were ignored, and little thought was given to the likelihood that those in charge would one day be held accountable.

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Were lawyers involved in the accounting scandals? We know they were. Were lawyers involved in the Wall Street firms' investment banking/research conflicts? Most likely. Did the Catholic Church receive advice from lawyers concerning coverups of abuse? Again, somewhere, at some time, almost certainly.

ACCOUNTABILITY FOR LAWYERS

How should a lawyer respond when she uncovers evidence of fraud or wrongdoing by an organization as client? Are we in the legal community any better at accountability than other institutions now under fire? In times past, a number of major law firms paid out huge sums of money to the federal government for, in the government's eyes, helping "further fraudulent conduct by savings and loans." The result was that some lawyers believed the government was "requiring attorneys to serve as client watchdogs and even, at times, as corporate snitches."[5] There have been other instances as well when lawyers would argue that they were merely avoiding whistleblowing on their client, rather than engaging in a conspiracy to commit fraud.

Some observers have used recent events (the failure of lawyers to pursue red flags during the Enron collapse) to suggest the framework of Rule 1.13, the rule governing the organization as client, should be amended. Currently the rule suggests that a lawyer representing an organization who uncovers apparent wrongdoing should "proceed as is reasonably necessary in the best interest of the organization." One observer believes the rule should more specifically require, rather than suggest, that the lawyer has an obligation to pursue the matter all the way to the top of the organization.[6] Without a clear directive, it seems likely that some will not act when they should (undoubtedly, some will not act even with a clear directive, out of fear). A partner in a major firm, when confronted with a memo issued by her firm related to the Enron mess, which warned the client that what they were doing was illegal, but which was not followed up by the firm, later suggested "'good lawyers' tell their clients about vulnerabilities" and let the clients "incorporate the risk into their decision making."[7] Since when is breaking the law a mere "vulnerability"? See no evil, hear no evil . . . .

I would suggest a good lawyer would wait for a response to her memo and, failing to receive one, pursue the matter as far in the organization as necessary, resigning in accordance with Rule 1.16 if, despite her efforts, a continuing violation of the law appears likely. In recommending this course of action, I do not underestimate the amount of courage required to raise the issue and follow through to

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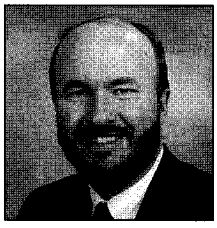

the point of resignation. A lawyer in this situation must consider the long-term consequences of failing to act. Remaining quiet may be attractive short-term, but devastating long-term, both to the organization and to the career of the attorney. If and when the matter comes to light, the lawyer will be held accountable.

In the end I suppose it depends on how you define a "good" lawyer. The partners' assessment of what constitutes a good lawyer sounds suspiciously similar to what constitutes a coconspirator, at least in the eyes of some prosecutors. Perhaps the problem is, as another observer has noted, that lawyers reviewing corporate transactions "rationalize ways to not 'know' that something runs afoul of the law. Their mindset . . . is, 'Can I think of a way a court might not find it illegal?'"[8] Character seldom collapses overnight; it erodes over time as the compromising of principles becomes easier and easier.

CONCLUSION

The public expects and deserves accountability from the businesses, professions, and other institutions that govern American life. We in the legal profession are not immune from this expectation. As the definition that began this article suggests, we as lawyers are *answerable*, both to our clients in the regular course of business, and to the public when our services are used in furtherance of a fraud. We also should be prepared to *explain* our behavior, whether to our coworkers, our families, or a grand jury. Too often, those in power behave arrogantly and take the path of least resistance, only to create conditions that make inevitable a horrendous day of reckoning. The legal profession, never tremendously popular with the public in the best of times, shares in this erosion of credibility that is undermining the public's faith in those forces that influence their daily lives. Each business, profession, and institution must have effective leadership who ensure that their members are held accountable and who respond to public concerns with action. In the meantime, each of us as lawyers should consider what it means to be a "good" — and accountable — lawyer. □

NOTES

1. *Jane Mayer, "The Accountants' War,"* The New Yorker, *4/22/02, p. 64.*

2. *Mayer,* ibid., *quoting Arthur Levitt, Jr., chairman of the Securities and Exchange Commission in the Clinton Administration.*

3. *Jonathan D. Glater, "Lone Ranger of Auditors Fell Slowly Out of Saddle,"* The New York Times, *4/20/02, p. B1.*

4. *Charles Gasparino and Randall Smith, "Merrill Lynch Is Proposing a Framework for Settlement,"* The Wall Street Journal, *5/1/02, p. C1.*

5. *Michael Orey and Richard B. Schmitt, "Enron Entangles Lawyers,"* The Wall Street Journal, *5/8/02, p. B1.*

6. *Orey and Schmitt,* ibid., *quoting Professor Richard Painter from the University of Illinois Law School.*

7. *Orey and Schmitt,* ibid., *quoting a partner from Brobeck, Phleger & Harrison, a San Francisco law firm.*

8. *Michael Orey, "Launching Broadsides at the Bar,"* The Wall Street Journal, *5/8/02, p. B1, quoting Professor Susan Koniak from Boston University Law School.*