

**COLUMBIA LAW REPORT****Symposium on*****Gatekeepers Today: The Professions After the Reforms, September 2008***

By Dana D. Burnell

“I don’t want to see Lawyers hanging from every tree, but enforcement is essential to ensure good conduct. . .and no one was watching the watchers.”

**Harvey J. Goldschmid**, the Dwight Professor of Law at Columbia, spoke to an audience assembled for the symposium *Gatekeepers Today: The Professions After the Reforms*. Professor Goldschmid’s lunch-time speech seemed to summarize the mood of “cautious optimism” following the massive changes wrought by the Sarbanes-Oxley Act of 2002, and highlighted the sense that the legal and financial world is “dealing with a young, vulnerable, and still new sense of accountability.”

The symposium took place at Jerome Greene Hall on September 29<sup>th</sup>, and was organized by Professor **John Coffee**, Chairman of Columbia Law School’s Center on Corporate Governance and author of *Gatekeepers: The Professions and Corporate Governance*. The symposium analyzed the effects of the Sarbanes-Oxley Act, and addressed the questions that have ricocheted throughout the financial and legal professions since the Enron scandal: How were the executives able to mislead their regulators and stockholders about the company’s finances? Why were the watchdogs silent?

Consisting of five panels, the symposium addressed the evolving roles of lawyers and General Counsel, how auditing has changed, whether securities analysts are better or worse off since Sarbanes-Oxley, and culminated in a discussion of the international effects of the Enron Scandal and what social control policy levers remain to be enforced.

The morning began with moderator Professor Coffee’s acknowledgement of the symposium’s difference from traditional academic conferences: This was intended as an “interaction of practitioners and academics” with a focus on gatekeepers as “reputational mediaries, though with practitioners I’ll say it in English—they serve the shareholders.” In other words, in a post Sarbanes-Oxley world, “No Board of Directors can outperform gatekeepers, and most Board of Directors are prisoners of gatekeepers”. But what have reforms done to the gatekeeping professions themselves?

Robert W. Gordon of the Yale Law School provided an historical perspective, noting that a lawyer's post-Sarbanes-Oxley role is more pro-active than it had been previously, and stating that what it asks lawyers to do is "fundamentally inconsistent to their traditional roles", but that there is now an incentive "for the lawyer to double check". Professor David Wilkins of the Harvard Law School confirmed, "There is a strong duty to investigate. But are they competent to do so?" Justice Jack B. Jacobs of the Delaware Supreme Court reiterated the need for organized investigation and offered several solutions, from ensuring that counsel certifies their responsibility, to creating a sub-category of platonic guardians by requiring lawyers to qualify as counselors and providing incentives for those lawyers functioning as gatekeepers. Professor **Elizabeth Nowicki '97**, of the University of Richmond, agreed that there must be a changed attitude in the post Sarbanes-Oxley world, and stated that despite the notorious difficulty of suing lawyers, "Our only hope is litigation."

The panel on The General Counsel as Gatekeeper addressed the roles of tax counsel and lawyers in large companies. Columbia Law School Dean **David Schizer** proposed two reforms: One unlikely but ideal solution would be for the government to invest more in the tax structure by hiring the best people from the private bar, which "would raise more revenue and even lower taxes". Another, multi-tiered solution would be to stop training tax lawyers to think of government as the "other side", to enforce client's penalties despite legal consultation, and consistently to look for examples where clients want to or can benefit from walking on the right side of the law. **Michael E. Patterson '67**, a former General Counsel and Vice Chairman of Morgan Chase, noted that "deep pockets make banks juicy targets" and consequently that "banks can be sued and therefore should function as gatekeepers" because "reputational risk is the biggest risk financial institutions run." **George W. Madison**, recently awarded the 2006 Paul Robeson Distinguished Alumni Award from Columbia Law School, added that the general counsel also must function as wise advisors to their clients as represented by the CEO and the board, stating that the relationship as gatekeeper and advisor must be balanced by a "willingness to walk out the door rather than compromise character or integrity."

In discussing how the post-Enron world has changed auditing, William Ezzell of Deloitte and Touche stated that Sarbanes-Oxley has created a "better, improved, more robust system. . . gone from form of the process in to the substance. It's a whole new day." Daniel Goelzer of the Public Company Accounting Oversight Board highlighted that since the PCAOB's inception they have been "able to go into firms with a good level of credibility" and that "an auditor has a real sense that the PCAOB might come in and look over his shoulder." John C. Coates of the Harvard Law School summarized by asserting "If there's anything that Sarbanes-Oxley will be remembered for 100 years from now, it will be for the creation of the PCAOB."

The gatekeeping duty for analysts seemed to have a more amorphous, and therefore greatly more problematic, role since passage of Sarbanes-Oxley. David Weild, the former Chief Officer of Nasdaq, noted that in “Wall Street fundamental research is losing lots of money,” while **Dan Reingold** of the Columbia Graduate School of Business, and author of *Confessions of a Wall Street Analyst*, pointed out that it is difficult for analysts to form truly independent opinions when they are under financial pressure from the company, and that further action needs to be taken to “scare the daylights out of Wall Street in regards to insider trading” which is suspected to have gone up “by 65% in 2005, and 25% in 2006.”

The international effects of Enron were addressed in the final panel of the day. Professor Paul Davies of the London School of Economics stated, “Enron was the first example of a foreign scandal having such impact. This discovery of gatekeepers errors could have taken place anywhere in Europe.” Christopher McKenna of the Said Business School at Oxford University agreed that the disclosure problems at Enron are part of international “systemic problems of gatekeeping that are yet to be solved.”

These problems, as Professor Coffee noted during the concluding panel, can only be resolved with a widespread recognition of the inherent flaw within the traditional concept of gatekeeper as protector of a CEO or board. The gatekeeper must be educated in how best to serve the investor rather than the corporate manager and to continually assist, whether as lawyer, analyst, accountant, or general counsel, in a re-imagining of that relationship.