(NOT) ADVISING CORPORATE OFFICERS ABOUT FIDUCIARY DUTIES

*Lyman P.Q. Johnson**
*Robert V. Ricca***

I was not aware that it was a breach of the duty of loyalty to place one's own interests ahead of the interests of shareholders.[1]

I. INTRODUCTION

This Article explores the intersection of an important, unresolved corporate law issue and an overlooked professional responsibility issue persistently arising in the corporate milieu. The corporate law question—currently unaddressed in Delaware law—is whether the fiduciary duties of corporate officers, as agents, are the same as, or different from, the fiduciary duties of corporate directors. A related question is whether, in reviewing officer conduct, courts will apply the business judgment rule in the same broad (and protective) manner in which it is applied to assessing director behavior.

The professional responsibility issue concerns whether, and how well, lawyers are advising corporate officers about their fiduciary duties. In recent years, much attention has been given to the professional obligations of a corporate lawyer upon learning, ex post, of corporate wrongdoing, including director and officer breaches of fiduciary duty.[2] Virtually no attention has been paid to whether, ex

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* Robert O. Bentley Professor of Law, Washington and Lee University School of Law.

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1. Rita K. Farrell, *Walt Disney Directors on Trial for a Payout*, N.Y. TIMES, Oct. 21, 2004, at C10 (quoting the deposition testimony of Stephen Bollenbach, Chief Financial Officer and Director of the Walt Disney Company).

2. *See* Sarbanes-Oxley Act § 307, Pub. L. No. 107-204, 116 Stat. 745, 784 (2002) (codified as amended at 15 U.S.C. § 7245); Standards of Professional

ante, lawyers are adequately helping to prevent such misconduct by fully and properly advising corporate officers as to the scope and thrust of their fiduciary duties.[3] Fiduciary duties, as one element for shaping officer conduct to promote healthy corporate governance, are of little preventive value if not properly transmitted to officers, given that officers are unlikely on their own to understand those duties.[4] As is the case with directors, lawyers are the obvious means by which such communications to officers would be expected to occur. How well are they fulfilling this vital role?

We seek, in exploring the convergence of these two topics, to contribute as well to the growing interest in gaining firsthand knowledge about how key corporate actors actually interact and communicate with one another "inside" the corporation.[5] Moreover, in taking this more empirical and contextual approach, we wish to redirect the governance spotlight away from the customary focus on directors, however important directors are to corporate well-being. We examine, therefore, not the director-lawyer relationship, but the dynamics of the neglected officer-lawyer interaction. We believe this relationship is, or can be, a chief component of effective corporate governance.

We obtained information on this subject in two ways. First, we sent a survey questionnaire to approximately one hundred corporate lawyers serving primarily as outside legal counsel in major U.S.

Conduct for Attorneys Appearing and Practicing Before the Commission in Representation of an Issuer, 17 C.F.R. § 205.4–.7 (2003) (creating a duty to report "up" an officer's, director's, or agent's violation of securities law or breach of fiduciary duty) [hereinafter Standards of Professional Conduct].

3. In recent years, attention has been given to the role of the lawyer as "gatekeeper." *See, e.g.*, Coffee, *infra* note 76. Also, commentators have begun to focus on ways in which lawyers can contribute to preventing corporate misconduct. *See* Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097, 1097 (2003); Steven L. Schwarcz, *Financial Information Failure and Lawyer Responsibility,* 31 J. CORP. L. 1097, 1103–04 (2006) (collecting and assessing commentary on lawyer responsibility for preventing financial information failure). Our point is that a lawyer's advice on officer fiduciary duties, specifically, can be a vital component of a larger, preventive role for lawyers.

4. *See supra* note 1 and accompanying text.

5. *See, e.g.*, RICHARD LEBLANC & JAMES GILLIES, INSIDE THE BOARDROOM 3 (2005) (creating a methodology that makes it "possible to study the manner in which boards function in real time"); Deborah A. DeMott, *Inside the Corporate Veil: The Character and Consequences of Executives Duties*, 19 AUSTL. J. CORP. L. 251, 252–54 (2006); David O'Donnell & Phillip O'Regan, *Exploring Critical Dialogue in the Boardroom: Getting Inside the Empirical Black Box of Board Dynamics* (March 2006) (unpublished manuscript, on file with the Intellectual Capital Research Institute of Ireland), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=900967.

metropolitan areas. We received eighteen responses, seventeen of which were from lawyers practicing corporate law.[6] We hoped for a higher response rate but believe we gained useful information from this pilot study. Second, we examined the websites of fifteen major law firms to learn what they say about themselves on the topic of advising corporate officers as to fiduciary duties. Overall, the results from our survey and website research suggest that many lawyers do not provide full-bodied fiduciary duty advice to officers in their capacity as officers at all, much less advise them as to the possibility that their duties might be stricter than those of directors or caution that the business judgment rule may not apply to officer conduct in the same way it applies to director conduct.

Part I briefly describes the current, unsettled state of the law with respect to officer fiduciary duties and the availability of the business judgment rule when officer conduct is judicially reviewed. Part II describes the methodology and results of our empirical research. Part III offers several reasons why corporate lawyers should advise corporate officers as to their fiduciary duties and describes a proposed procedure for assuring directors that legal counsel is regularly providing such advice.

II. THE UNSETTLED STATE OF THE LAW ON OFFICER FIDUCIARY DUTIES

Corporate officers play a critical role in corporate governance. They also have played a central role in numerous corporate scandals,[7] and for the most part they do not enjoy broad public trust.[8] Both fraud prevention and the encouragement of more laudable corporate conduct, therefore, must focus on corporate officers, not just directors. The imposition of fiduciary duties on corporate decision makers—including officers—is widely thought to be one way to achieve better corporate governance.[9] Yet, there is remarkably little law on the basic substantive question of what the

6. One respondent answered the survey questions but noted that he or she primarily practiced tax law. We disregarded this response for consistency. As noted in Part III *infra*, we intend to separately survey in-house legal counsel, most likely through questionnaires directed to the Association of Corporate Counsel, an organization of in-house legal counsel. One of the respondents in our initial survey is an in-house lawyer.

7. Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1599 (2005).

8. Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1317 (2006) (citing results of a recent poll on lack of public confidence in corporate managers).

9. *See* Lyman P.Q. Johnson, *Faith and Faithfulness in Corporate Theory*, 56 CATH. U. L. REV. 1, 21–25 (2006).

fiduciary duties of corporate officers really are[10] and virtually no theoretical attention to the issue of what those duties should be and why.[11]

Delaware law contains abundant dicta on, but has never squarely addressed, the issue of whether officers are subject to the same fiduciary duties as directors.[12] Nor has Delaware addressed the related and pivotal question of whether officer conduct should be judicially reviewed under the deferential business judgment rule standard.[13] Factually, this issue was nicely presented in the protracted Disney litigation because two of the defendants—i.e., General Counsel Sanford Litvack and CEO Michael Eisner—although also directors, had each acted and were sued in their capacities as officers.[14] As noted by Chancellor William Chandler in his trial court opinion,[15] however, at trial the legal nature of the fiduciary duty claims made by the plaintiffs against Litvack and Eisner as officers was essentially the same as that of the claims made against them (and other defendants) as directors.

On appeal, the plaintiffs abruptly changed course and argued for a stricter review of officer conduct—i.e., that of Litvack, Eisner, and Russell—essentially by contending, for the first time, that the business judgment rule was unavailable to officers.[16] The Delaware Supreme Court ruled that the argument had not been timely made

10. *See* Johnson & Millon, *supra* note 7, at 1600–01.

11. *Id.*; *see also* Z. Jill Barclift, *Senior Corporate Officers and the Duty of Candor: Do the CEO and CFO Have a Duty to Inform?*, 41 VAL. U. L. REV. 269, 270 (2006); DeMott, *supra* note 5.

12. Johnson & Millon, *supra* note 7, at 1600 n.10; Aaron D. Jones, *Corporate Officer Wrongdoing and the Fiduciary Duties of Corporate Officers Under Delaware Law*, 44 AM. BUS. L.J. 475 (2007).

13. Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439, 443 (2005).

14. *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 771–72 (Del. Ch. 2005). Bollenbach, although an officer because he served as CFO, did not act on the Ovitz employment matter as an officer, instead acting only in his capacity as a director. *Id.* at 771 n.560. Litvack and Eisner, although also directors, acted on the Ovitz matter in their officer capacity as well. *Id.*

15. *Id.* at 777 n.588 ("The parties essentially treat both officers and directors as comparable fiduciaries, that is, subject to the same fiduciary duties and standards of substantive review. Thus, for purposes of this case, theories of liability against corporate directors apply equally to corporate officers, making further distinctions unnecessary.").

16. *See* Appellants' Opening Brief at 36, *In re* Walt Disney Co. Derivative Litig. 906 A.2d 27 (Del. 2006), *available at* http://entrepreneur.typepad.com/conglomerate/disney/Appellants1.pdf ("[T]he business judgment rule does not apply to Eisner or Litvack acting as officers or to Russell acting as Eisner's personal 'gratuitous agent.'").

at trial and therefore sidestepped the issue.[17] Consequently, these critical issues remain unresolved, but undoubtedly in future cases they will be vigorously pressed by plaintiffs' lawyers well aware that in Delaware (like most states), officers, unlike directors, may not be exculpated from personal liability for damages.[18] In addition, officers may be held to a standard of ordinary, not gross, negligence,[19] the standard often applied to directors. Moreover, the key question of whether officers are subject to an emergent duty of good faith likewise remains unresolved, though to be sure, both the Chancery Court and Supreme Court opinions assessed the good faith of Eisner and Litvack acting as Disney officers.[20] Neither tribunal, however, squarely ruled that officers as such are subject to such a duty or whether the contours of any such duty would be the same as those for directors.[21]

Greater conversance with the rationales, theory, and scope of officer fiduciary duties can sharpen legal analysis once a dispute is in litigation and can also guide lawyers in counseling officers in an effort to avoid litigation.[22] A recent, high-profile case involving former New York Attorney General Eliot Spitzer's lawsuit against

17. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 46 n.38 (Del. 2006).

18. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2001) (directors but not officers may be exculpated from personal liability for breaching the duty of due care).

19. Johnson & Millon, *supra* note 7, at 1600.

20. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 72 (Del. 2006); *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 763 (Del. Ch. 2005).

21. In November 2006, the Delaware Supreme Court clarified that good faith is not an independent fiduciary duty, but is a subsidiary element of the duty of loyalty. Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006). The court also stated that the fiduciary duty of loyalty is not limited to cases involving conflicts of interest, *Id.*, a position advocated by Professor Johnson several years ago. *See* Lyman P.Q. Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27, 27 (2003) (arguing that loyalty includes a "nonbetrayal" dimension addressing conflicts of interest and also a more affirmative "devotion" dimension). For an insightful assessment of *Stone* and what it means for the meaning of good faith, see Sarah Helene Duggin & Stephen M. Goldman, *Restoring Trust in Corporate Directors: The* Disney *Standard and the "New" Good Faith,* 56 AM. U. L. REV. 211 (2006). These developments on good faith in the director context sharpen the point addressed in this Article: what does all this mean for the fiduciary duties of corporate officers?

22. Another current setting where this arises is when senior officers use their knowledge and influence to work with private equity firms to formulate buyout proposals. *See In re* SS & C Techs., Inc. S'holders Litig., 911 A.2d 816, 817, 820 (Del. Ch. 2006) (disapproving a proposed settlement and raising questions about the CEO's conduct in litigation growing out of management-led buyout).

former New York Stock Exchange (NYSE) CEO Richard Grasso highlights this point.[23] In granting Spitzer's motion for partial summary judgment on a claim that Grasso breached his fiduciary duty to the NYSE by not making certain disclosures about his retirement package to the board, Judge Charles Ramos easily could have relied on clear and settled agency law principles applicable to Grasso as CEO in dealing with his principal, the NYSE.[24] These principles, well articulated in the Restatement (Third) of Agency, require that Grasso comply with duties of competence, diligence, and loyalty, as well as adhere to a duty to provide information and a duty of good conduct.[25] An agent dealing with his principal must both disclose material facts to the principal, unless the principal has manifested that such facts are already known or are not desired, and deal "fairly" even after disclosure.[26]

Judge Ramos instead cited a statutory care standard applicable in New York, which had relatively little bearing on a self-dealing transaction, and general fiduciary principles applicable in a conflict setting.[27] He even, on one occasion, discussed the fiduciary duty of a board member,[28] even though Grasso was clearly acting in his capacity as CEO in the matter, not as a director.

Even more interesting for our project—but unknown—is the question of whether Grasso was ever specifically advised by a lawyer concerning his fiduciary duties as CEO in dealing with the board on this significant matter. Whether the advice, if given or sought, would have been followed also is, of course, unknown. Frequently, there is tension between what should be disclosed to a board of directors and what management wants disclosed. It is possible, however, that a bit of preventive legal medicine by a knowledgeable, proactive lawyer could have avoided this litigation altogether by firmly recommending that Grasso make full and timely disclosure of all pertinent details. As noted in Comment 2 to Model Rule 1.6, "lawyers know that almost all clients follow the advice given."[29] We believe that this is one of potentially numerous instances where, if

23. Spitzer v. Grasso, No. 401620/04, 2006 WL 3016952, at *1 (N.Y. Sup. Ct. Oct. 18, 2006).

24. *Id.* at *31.

25. RESTATEMENT (THIRD) OF AGENCY §§ 8.06, 8.08, 8.10, 8.11 (2006).

26. *Id.* § 8.06 (2006). Recent revisions to the Model Business Corporation Act affirmatively require all officers to inform a superior officer or the board of directors, or a committee thereof, of information known to the officer to be material to the superior officer, board, or committee. MODEL BUS. CORP. ACT § 8.42(b)(1) (2005).

27. *Spitzer*, 2006 WL 3016952, at *28–29.

28. *Id.* at *31.

29. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2003).

officers were clearly advised as to their fiduciary duties, greater certainty and propriety could be brought to corporate dealings. We further believe this practice bears on officer conduct over a wide range of matters, not simply where they are proposing to "deal" with the company.

Scholars and lawyers vehemently disagree, to be sure, as to whether officers should be held to duties that are the same as, or stricter than, those of directors, and as to whether the business judgment rule should apply to officers with the same full force with which it applies to directors.[30] What apparently is not controversial, however, is that officers owe fiduciary duties of *some* sort, at least equivalent to those owed by directors, if not the stricter duties owed under agency law. Consequently, we set out to ascertain what, if anything, experienced lawyers were saying to officers about fiduciary duties.

III. EMPIRICAL RESEARCH ON LAWYERS ADVISING OFFICERS

A. Survey Methodology and Research

The primary sources of information for this Article are lawyers. Information was derived from lawyer responses to a questionnaire asking several questions about how they give fiduciary duty advice. A copy of the questionnaire is attached as Appendix A. In the interest of protecting confidentiality, lawyers were promised complete anonymity in the reporting of findings. Follow-up phone interviews were conducted in two instances, at the suggestion of the respondents. Information also was derived from research on how several law firms use their websites to describe the sorts of fiduciary duty advice they provide in the corporate setting. We do identify the law firms from which website information was gathered.

Fiduciary duty advice surveys were sent to corporate lawyers in major metropolitan areas throughout the United States. The lawyers to whom we sent the survey included corporate partners at various U.S. law firms, in-house counsel for U.S. corporations, and

30. *Compare* Johnson & Millon, *supra* note 7, at 1642–43 (arguing against the business judgment rule applying to officer conduct), *and* Johnson, *supra* note 13, at 440 (same), *with* Lawrence A. Hamermesh & A. Gilchrist Sparks III, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson*, 60 BUS. LAW. 865, 868 (2005) (arguing business judgment rule should apply to corporate officers). *See also* Answering Brief of non-Ovitz Defendants-Below, Appellees, *In re* Walt Disney Co. Derivative Litig. at 55–56, 906 A.2d 27 (Del. 2005), *available at* http://entrepreneur.typepad.com/conglomerate/disney/NonOvitz.pdf (arguing that both numerous dicta and strong policy considerations suggest that the business judgment rule should apply to both officers and directors).

other lawyers active in the corporate law community. We sent the survey to slightly over one hundred lawyers. Responses from seventeen of those lawyers are analyzed in this Article. Sixteen of the respondents practice in law firms, and one respondent practices as in-house general counsel for a corporation. Of the sixteen respondents practicing at law firms, five practice at firms with fewer than two hundred and fifty lawyers, three practice at firms with two hundred and fifty to five hundred lawyers, five practice at firms with five hundred to one thousand lawyers, and three practice at firms with over one thousand lawyers. The responding lawyers practice in the following cities: Palo Alto, California; Washington, D.C.; Wilmington, Delaware; Miami, Florida; Minneapolis, Minnesota; New York, New York; and Richmond, Virginia. We recognize the risk of "nonresponse bias," but we regard the survey study as more in the nature of an informative pilot project than as an exhaustive and definitive study. Moreover, the website research described below serves as a check on the possibility of nonresponse bias, as well as being informative in its own right.

This Article also analyzes how law firms use their websites to describe the nature of fiduciary duty advice they offer in the corporate setting. Fifteen law firm websites were analyzed. The firms all practice corporate law and represent clients in cities throughout the United States and abroad. We conducted research on the websites of the following law firms: Akin, Gump, Strauss, Hauer & Feld LLP; Cadwalader, Wickersham & Taft LLP; Cleary, Gottlieb, Steen & Hamilton LLP; Fenwick & West LLP; Fulbright & Jaworski LLP; Gibson, Dunn & Crutcher LLP; Goodwin Procter LLP; Howard, Rice, Nemerovski, Canady, Falk & Rabkin PC; Hunton & Williams LLP; Jones Day; Morrison & Foerster LLP; Perkins Coie LLP; Potter, Anderson & Corroon LLP; Simpson, Thacher & Bartlett LLP; and Weil, Gotshal, & Manges LLP.

B. Findings and Analysis

Results from the survey and website research suggest that many corporate lawyers do not regularly provide fiduciary duty advice to officers in their capacity as officers. The results also reveal that if fiduciary duty advice is provided to officers, it is usually very similar to, or the same as, advice provided to directors. While lawyers often advise officers who also serve as directors, the advice provided in these situations is based on the officer's status as a director.

One of the questions from our fiduciary duty survey asked the lawyers whether or not they advise officers as to their fiduciary duties in their capacity as officers. Only two of the seventeen respondents indicated that they provide officer-specific fiduciary duty advice to officers in all relevant settings. Another six respondents indicated that they provide officer-specific fiduciary duty advice in various settings. Two respondents were on the opposite end of the spectrum, indicating that they never advise officers as to their fiduciary duties.[31] Another four respondents only advise those officers who also serve on the board, and they apparently advise them in their capacity as directors. One lawyer responded that whether he or she advises officers "depends on the circumstances," with no further elaboration, although a follow-up phone interview revealed that such advice has been infrequently given. Another lawyer replied that it is not typical to advise officers who are not also directors, but that it varies from case to case. One respondent indicated that officers have been advised in some transactional settings and are also advised as to corporate opportunities and the process relating to the dismissal of officers.

Overall, then, eleven of the respondents advise officers as to their fiduciary duties at least occasionally, though several do so less regularly than they advise directors as to their duties. Setting aside the two respondents who never advise officers and the four respondents who advise only those officers who are also directors (and who apparently advise them in their capacity as directors), we also found that among the eleven respondents who, at least in some circumstances, advise officers, most offer advice to the effect that officer fiduciary duties are the same as director duties.[32] Therefore, even though this issue remains unsettled under Delaware law—as noted in Part I—lawyers are providing advice as if the issue has been resolved.

There is some variation in this pattern, however. One respondent stated that it is not clear that the business judgment rule applies to officers and also stated that the duties "probably play out differently (i.e., tougher liability triggers)" for those who run the business day-to-day and have full access to corporate information. Another stated, without elaboration, that the duty of care is not an issue for officers, although it is an issue for directors. Another respondent added that officers have a duty to keep directors and superior officers informed. Another respondent indicated that the little case law on the subject indicated that officer and director duties are "similar," but that there is little law as to where those

31. One of the negative respondents, although giving a detailed response on how he or she advises directors, said advising officers "doesn't really come up;" the other said that while he or she "does not give separate advice to officers outside of board counseling," he or she believes others in his or her firm do.

32. One of the lawyers, for example, simply did a cut and paste of his or her responses to the same questions regarding directors.

duties might differ. The same respondent reported that he or she specifically advised that section 102(b)(7) of the Delaware General Corporate Law offered no exculpatory protection to officers acting as officers. One respondent, who invited a telephone interview to follow up, indicated that although officers as agents might face a tougher liability standard, that possibility does not alter how officers are counseled and does not affect how lawyerly advice as to the business judgment rule's applicability is phrased. This respondent also stated that fiduciary duties are not as meaningful to officers as they are to directors, given that officers have more ongoing connections to the company. We find, overall, that those lawyers who do offer fiduciary duty advice to officers do not offer significantly different advice to officers, as compared to the advice given to directors.

A theoretically correct approach to the rationale for, and scope of, officer fiduciary duties may be to ground officer duties in agency law principles.[33] Only one lawyer out of the seventeen corporate lawyers responding to the survey mentioned that officers should receive different fiduciary duty advice because "as the officers are delegated their authority by the board there is also more agency theory applicable to their duties and accountability." Even this respondent hedged his or her response by saying that the "basic" fiduciary responsibilities remain the same. Until courts announce clearer standards for analyzing officer-specific fiduciary duties, lawyers apparently will advise officers as to how they think courts currently are treating them, even if the case law is sparse, and even if lawyers believe the law should be analyzed differently.

For the most part, of those lawyers responding that they did provide different advice for officers than directors, the advice was not substantially different. One lawyer responded that the bigger issue with officers is the duty of loyalty and good faith, not the duty of care, giving examples such as misappropriation of corporate information and the taking of corporate opportunities. This response is probably more an observation on the settings where actual officer fiduciary duty problems arise, rather than truly differentiating officer duties from those of directors. Another lawyer stated that officers "have the further duty to understand what tasks have been delegated to them and to keep the board or a superior officer informed as to matters which they believe such superiors have a need to know in order to do their jobs." This response also shows how the lawyer thinks officers should conduct themselves in complying with their fiduciary duties, and while it does not necessarily indicate a belief that officer duties are different than

33. *See* Johnson & Millon, *supra* note 7, at 1601.

those of directors, it does highlight both the subordinate position of officers in relation to the board and their duty to disclose key information. Finally, one lawyer responded that officers are "trustees of the corporation," and as such, officers should "disclose all relationships" and "do what they believe is right."

As for the results of our study into how law firms use their websites to describe how (or to whom) they provide fiduciary duty advice, results similarly show that law firms, at least based on what they say they do, are not frequently advising officers as to their fiduciary duties in their capacity as officers. Law firm web publications regarding fiduciary duties are almost exclusively geared toward advising directors. A search for "fiduciary duties" on the Weil, Gotshal, and Manges LLP website, for example, resulted in one hundred and twenty-one publication hits.[34] While at least seventeen of the publications are designed to advise directors as to their fiduciary duties, and one to advise controlling shareholders, only one publication is designed to advise officers as to their fiduciary duties.[35] The lone publication warns management teams to remember their fiduciary duties in going private transactions.[36] A search for keywords "fiduciary duties" on the "Legal Updates & News" section of the Morrison & Foerster LLP website resulted in forty-two hits.[37] While a handful of the legal updates provide fiduciary duty advice for directors, none advise officers as to their fiduciary duties. Similar results occur in a search of the Fulbright & Jaworski LLP website.[38] Apparently these firms either do not advise officers as part of their practice or they believe the risk of a court finding an officer liable for breach of his or her fiduciary duties is so remote compared to the risk of a director being held liable that officer-specific fiduciary duties are not mentioned in written materials.

Besides not gearing fiduciary duty advice toward officers in the publications, news releases, and client alerts or memos posted on

34. *See* Weil, Gotshal, & Manges LLP website search results for "fiduciary duties," www.weil.com/wgm/pages/Controller.jsp?z=s&sz=ss&f=fiduciary%20and%20duties&db=wgm/cwgmpubs.nsf (last visited Jul. 13, 2007).

35. *Id.*

36. Christopher Machera, *Warning Shots*, PRIVATE EQUITY ALERT (Weil, Gotshal & Manges LLP), Dec. 2006, at 6, http://www.weil.com/wgm/cwgmhomep.nsf/Files/PEADec06/$file/PEADec06.pdf.

37. *See* Morrison & Foerster LLP website search results for "fiduciary duties," http://search.atomz.com/search/?sp-q=fiduciary+duties&sp-k=Legal+Updates+and+News&sp-a=sp10038afa&sp-p=all&sp-f=ISO-8859-1 (last visited Jul. 13, 2007).

38. *See* Fulbright & Jaworski LLP, http://www.fulbright.com/index.cfm?fuseaction=search.results (last visited Jul. 13, 2007).

law firm websites, the actual content of the postings addressing fiduciary duties lacks any reference to officer-specific fiduciary duties. Akin, Gump, Strauss, Hauer & Feld LLP ("Akin Gump") put out a "Corporate Governance Alert" in response to the *Disney* decision in August of 2005.[39] The publication does not mention that Chancellor Chandler analyzed the fiduciary duties of Disney officers.[40] Akin Gump only mentions officers once, and that instance is to advise directors to make sure the officers keep them "fully informed on a timely basis of significant corporate developments."[41] A Hunton & Williams LLP "Client Alert" in response to the *Disney* decision similarly fails to address officer issues.[42] The fact that Akin Gump and Hunton & Williams apparently are not thinking of officers in the context of fiduciary duty advice is seen by reading the titles of the client alerts regarding the *Disney* decision. The Akin Gump alert states "Directors Did Not Breach,"[43] and the Hunton & Williams alert says "Delaware Chancery Addresses Directors' Fiduciary Duties."[44] On the other hand, the title of a Simpson, Thacher & Bartlett LLP client release looked more promising for finding officer-specific fiduciary duty information or advice. The February 2006 piece is titled "Directors' and Officers' Liability."[45] Despite including officers in the title, however, the release provides no officer-specific fiduciary duty advice.[46] The law firm of Jones Day does provide some officer-specific fiduciary duty advice. One of the publications posted on the Jones Day website addresses how the duty of good faith may affect both directors and officers.[47] In one section, the authors warn that "although the cases discussed below have addressed good faith in the context of directors' conduct, it

39. AKIN, GUMP, STRAUSS, HAUER & FELD LLP, CORPORATE GOVERNANCE ALERT: THE *DISNEY* DECISION: DELAWARE CHANCERY COURT FINDS DIRECTORS DID NOT BREACH FIDUCIARY DUTIES IN CONNECTION WITH HIRING AND FIRING OF MICHAEL OVITZ (2005), http://www.akingump.com/docs/publication/795.pdf.

40. *Id.*

41. *Id.* at 3–4.

42. HUNTON & WILLIAMS LLP, CLIENT ALERT: DELAWARE CHANCERY ADDRESSES DIRECTORS' FIDUCIARY DUTIES IN *WALT DISNEY* CASE (2005), http://www.hunton.com/files/tbl_s10News/FileUpload44/12093/DisneyClientAlert.pdf.

43. *See* AKIN, GUMP, STRAUSS, HAUER & FELD LLP, *supra* note 39, at 1.

44. *See* HUNTON & WILLIAMS LLP, *supra* note 42, at 1.

45. Joseph M. McLaughlin, *Directors' and Officers' Liability: Good Faith: A New Sheriff in Town?*, SIMPSON, THACHER, & BARTLETT LLP, Feb. 9, 2006, http://www.stblaw.com/content/publications/pub537.pdf.

46. *See id.*

47. Mark E. Betzen & Jeffrey D. Litle, *Good Faith Issues Present New Risks for Directors and Officers*, JONES DAY COMMENTARIES, February 2005, www.jonesday.com/pubs/pubs_detail.aspx?pubID=S1129.

would be prudent to assume that the conduct of officers would be subject to similar legal analyses."[48] This seems to be appropriate advice, at least until case law rules otherwise.

A few observations about how lawyers advise as to the duty of good faith are in order, given that that duty has attracted great attention in recent years,[49] and even though the Delaware Supreme Court recently subsumed good faith within the duty of loyalty in *Stone*.[50] Although the survey—sent after the Chancery Court opinion in *Disney*, but before the Supreme Court opinions in *Disney* and *Stone*—did not specifically ask lawyers whether they advise officers about the emergent duty of good faith, their responses to that issue in the director context are revealing.

No common method appears to exist among lawyers for advising directors (and perhaps officers as well) as to what the duty of good faith means. This is no doubt related to the current lack of clear guidance from case law as to the reach and contours of that duty. While courts consistently speak about the duties of care and loyalty, occasionally finding directors liable for breaching the latter duty, courts offer no clear or succinct definition of the duty of good faith and, so far, almost never hold directors liable solely on the basis of a breach of the duty of good faith.[51] One view of the duty of good faith among lawyers is that it is subsumed within the duties of care and loyalty, precisely as the Delaware Supreme Court recently ruled in *Stone*.[52] This point of view may reflect what lawyers are taking from recent case law, such as the recent *Disney* opinions, which recognizes the duty of good faith, but does not clearly address its relationship to the duty of loyalty.[53] Not surprisingly, six of the lawyers responding to our survey believe that the duty of good faith is somehow subsumed within or made irrelevant by the duties of care and loyalty. This view apparently is based on the opinion that acting in good faith is a necessary prerequisite for complying with,

48. *Id.* at 2.

49. *See In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 63–64 n.99 (Del. 2006) (listing scholarly articles devoted to the concept of good faith).

50. *See supra* note 21.

51. *But see* ATR-Kim Eng Fin. Corp. v. Araneta, No. CIV.A. 489-N, 2006 WL 3783520, at *23 (Del. Ch. Dec. 21, 2006) (holding directors liable for breach of fiduciary duty); *In re* Emerging Commc'ns, Inc. S'holders Litig., No. Civ.A. 16415, 2004 WL 1305745, at *39 (Del. Ch. June 4, 2004) (holding a director liable to the corporation's shareholders for breach of his fiduciary duty of loyalty and good faith). *See generally In re* Walt Disney Co. Derivative Litig. 907 A.2d 693, 753–56 (discussing case law regarding the duty of good faith).

52. *See supra* note 21.

53. *See In re Walt Disney Co.*, 907 A.2d at 753; *In re Walt Disney Co.,* 906 A.2d at 67 n.112.

or is a component of, those duties. As stated in *Disney*, the failure to act in good faith would mean a failure to comply with the duty of loyalty and could lead to liability.[54] Several law firms, along this line, advise directors that the duty of good faith is subsumed under the duties of care and loyalty. A legal update on the Fulbright & Jaworski LLP website[55] and a "Clients and Friends Memo" from Cadwalader[56] both tie the duty of good faith to the duties of care and loyalty. The Cadwalader piece cites the 2005 *Disney* Chancery Court opinion, stating that the duty of good faith is not an independent duty, "but rather that the obligation to act in good faith overarches all fiduciary duties and 'is inseparably and necessarily intertwined with the duties of care and loyalty.'"[57]

A more traditional view of the duty of good faith is that it requires directors to act honestly,[58] in the best interest of the corporation,[59] and in a manner that is not knowingly unlawful or contrary to public policy.[60] Three lawyers, along this line, stated simply that they believe meeting the duty of good faith requires directors to "act in the best interests of the corporation." Acting in the corporation's best interests is a proper and useful statement, and while it is important advice that should be given to all directors (and officers, we believe), simply telling a director to act in the best interests of the corporation may not be enough to avoid liability in this current corporate climate. Under Chancellor Chandler's standard in *Disney* for complying with the duty of good faith, consciously disregarding directorial responsibilities would also constitute a breach of the duty of good faith and could lead to personal liability.[61] Therefore, if a director consciously disregards some responsibilities, he or she may think, subjectively, that he or she is still acting "in the best interests of the corporation," but could nonetheless be liable for breaching the duty of good faith.

54. *In re Walt Disney Co.*, 907 A.2d at 753 n.447.

55. CARL E. KAPLAN & BETH MAZZOGETTI, FULBRIGHT & JAWORSKI LLP, LEGAL UPDATE: DUTY OF CARE: DELAWARE DIRECTORS BE CAREFUL (2004), www.fulbright.com/images/publications/ACF1194.pdf.

56. CADWALADER, WICKERSHAM & TAFT LLP, CLIENTS & FRIENDS MEMO: THE *DISNEY* DECISION 1, 5–6 (2005), http://www.cadwalader.com/assets/client_friend/081605DisneyDecision.pdf.

57. *Id.* at 2.

58. *In re Walt Disney Co.*, 907 A.2d at 753 (citing E. Norman Veasey, *Reflections on Key Issues of the Responsibilities of Corporate Lawyers in the 21st Century*, 12 WASH. U. J.L. & POL'Y 1, 9 (2003)).

59. *Id.* at 754 (citing *In re* RJR Nabisco, Inc. S'holder Litig., CIV. A. No. 10389, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989)).

60. *Id.* at 755 (citing Gagliardi v. TriFoods Int'l Inc., 683 A.2d 1049, 1051 n.2 (Del. Ch. 1996)).

61. *Id.* at 755.

Four lawyers mentioned that recent Delaware court decisions suggest that the duty of good faith may be analyzed as a stand-alone duty. Given that our survey was sent during the fall of 2005, these lawyers may be taking a cue from Chandler's *Disney* opinion where the Chancellor notes that the conduct in the case occurred before Enron and the spate of corporate scandals, so fiduciary duties may be viewed differently in future cases.[62] The *Emerging Communications* case also suggests that Delaware courts may be leaning toward using the duty of good faith as a doctrinal basis for imposing liability on directors.[63] Some lawyers apparently are responding to these cases by warning their clients of heightened risks. Three of the lawyers responding to the survey advise clients that breaches of the duty of good faith are significant given that Delaware law does not protect directors from personal liability for such breaches.[64] A posting on the Jones Day website cautions directors and officers that courts may consider the duty of good faith as a stand-alone duty.[65] The commentary reasons that courts may use the duty of good faith to impose liability on directors and officers since indemnification and insurance protections usually do not apply for non-good faith breaches.[66] Similar cautionary advice about good faith is provided by Gibson, Dunn, & Crutcher LLP and by Morrison & Foerster LLP.[67] A November 2004 "Corporate and Securities Law Update" from Fenwick & West LLP warned that the *Emerging*

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62. *Id.* at 697.

63. *See In re* Emerging Commc'ns, Inc. S'holders Litig., No. Civ.A. 16415, 2004 WL 1305745, at *43 (Del. Ch. 2004). In holding directors liable for breach of loyalty and good faith, Vice Chancellor, now Justice, Jacobs stated that:

> Although the Supreme Court has yet to define the precise conduct that would actionably violate [the duty of good faith], this Court has recently held that directors can be found to have violated their duty of good faith if they 'consciously and intentionally disregard[] their responsibilities,' adopting a 'we don't care about the risks' attitude concerning a material corporate decision.

Id. (citing *In re* Walt Disney Co. Derivative Litig., 825 A.2d 275, 289 (Del. Ch. 2003)).

64. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2001).

65. Mark E. Betzen & Jeffrey D. Litle, *Good Faith Issues Present New Risks for Directors and Officers*, JONES DAY COMMENTARIES, February 2005, http://www.jonesday.com/files/Publication/e029f0a1-80f8-4df8-ab8e-7193dafc977c/Presentation/PublicationAttachment/e7d2af65-19b0-4dc4-ba2d-6754ee945d6d/Good%20Faith%20Issues.pdf.

66. *Id.*

67. *See* GIBSON DUNN & CRUTCHER LLP, THE DIRECTOR SETTLEMENTS AT ENRON AND WORLDCOM; LESSONS FOR DIRECTORS (2005), http://www.gibsondunn.com/practices/publications/detail/id/766/?pubItemId=7701; MORRISON FOERSTER LLP, BOARDROOM "BEST" PRACTICES ARE CHANGING: THE NEED TO DEMONSTRATE "GOOD" FAITH (2003), http://www.mofo.com/news/updates/files/update1078.html.

Communications case "raised the bar for a showing of good faith director conduct that will be sufficient to avoid director liability."[68] Postings on the Potter Anderson & Corroon LLP website warn that plaintiffs may be encouraged to bring more suits against directors for breaches of the duty of good faith.[69] One of the postings concludes that the duty of good faith "functions as a 'safety valve' to capture conduct by disinterested directors that is aberrational or that amounts to an abdication of their duty to oversee the business affairs of the corporation."[70] On June 9, 2006, one day after the Delaware Supreme Court decided the *Disney* case, Potter, Anderson & Corroon LLP posted an article stating that the Court's opinion "clarifies the duty of directors to act in good faith."[71] These firms all seem concerned that although recent trends in the Delaware courts are providing useful clarity to corporate decision makers, this trend is also giving plaintiffs clearer standards for bringing claims against corporate directors (and possibly officers) for breaching the duty of good faith.

IV. REASONS FOR ADVISING OFFICERS ABOUT FIDUCIARY DUTIES

We do not know why more lawyers do not routinely advise senior corporate officers as to their fiduciary duties. Failure to do so may be an example of "omission bias." Actors may be less likely to be held responsible for failures to act than for affirmative acts,[72] and they may experience less regret from adverse consequences flowing from inaction.[73] But the key issue is *why* lawyers do not act on this matter. One possible explanation is that outside legal counsel,

68. FENWICK & WEST LLP, CORPORATE & SECURITIES LAW UPDATE: M&A DEVELOPMENT: COURT FINDS FINANCIALLY SOPHISTICATED DIRECTOR PERSONALLY LIABLE FOR $77 MILLION (2004), http://www.fenwick.com/docstore/publications/Corporate/sec/Corp_Sec_11-09-04.pdf.

69. John F. Grossbauer & Nancy M. Waterman, *The (No Longer) Overlooked Duty of Good Faith Under Delaware Law*, DEAL POINTS (Potter, Anderson & Corroon LLP), Summer 2003, http://www.potteranderson.com/news-publications-40-48.html.

70. MICHAEL B. TUMAS, MARK A. MORTON & DAVID S. PHILLIPS, POTTER ANDERSON & CORROON LLP, THE OMNIPRESENT SPECTER OF THE DUTY OF GOOD FAITH: DO DIRECTORS HAVE REASON TO WORRY (2005), http://www.potteranderson.com/news-publications-40-32.html.

71. Potter, Anderson & Corroon LLP, *Disney* Affirmed: The Delaware Supreme Court Clarifies the Duty of Directors to Act in Good Faith (June 9, 2006), http://www.potteranderson.com/news-firm-42.html.

72. *See* Johnson & Millon, *supra* note 7; Arthur B. Laby, *Resolving Conflicts of Duty in Fiduciary Relationships*, 54 AM. U. L. REV. 75, 130–31 (2004).

73. Vincent Di Lorenzo, *Does the Law Encourage Unethical Conduct in the Securities Industry?*, 11 FORDHAM J. CORP. & FIN. L. 765, 789 (2006).

representing the corporation itself, may believe they are to advise only directors, not officers. If that is so—and we do not accept the propriety of that position—the obvious question is who, if anyone, is or should be advising officers? Possibly, in-house legal counsel is doing so,[74] although they too represent the company itself, not the officers, notwithstanding the fact that they work closely with senior officers and are themselves business advisors in many respects.[75] The question as to what in-house lawyers do on this subject certainly warrants further empirical research. One reason why in-house counsel might be well suited for advising officers about their duties is the fact that they do work closely with officers. In addition, as Professor John Coffee has noted in advocating that lawyers serve as "gatekeepers," in-house counsel are often more "knowledgeable" about company affairs (past and present), information networks, and mores than outside counsel, and are "uniquely positioned to specialize in preventive law."[76] A corollary to this is that outside counsel, although more independent, frequently serve as more narrowly focused "transactional engineers" than "wise counselors."[77] Furthermore, as pointed out by Professor Robert Gordon,[78] a large corporation may employ many outside law firms (Enron used more than one hundred), thereby making it very difficult for any one lawyer (or law firm) to have a complete understanding of a client's

74. In a September 29, 2006, conversation with TIAA-CREF General Counsel, George W. Madison, at a Columbia Law School Conference on Gate Keepers, Mr. Madison told one of the authors that he believed in-house counsel typically would advise corporate officers as to their fiduciary duties. One of our respondents, however, who is an in-house general counsel, reported that he or she only advised officers as to their duties if they also were directors. *See also* E. Norman Veasey & Christine T. Di Guglielmo, *The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation*, 62 BUS. LAW. 1, 5–8 (2006) (describing the multiple roles played by—and multiple demands placed on—general counsel).

75. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2003) ("A lawyer employed or retained by an organization represents the *organization* acting through its duly authorized constituents.") (emphasis added).

76. JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 195 (2006). *But see* Arthur B. Laby, *Differentiating Gatekeepers*, 1 BROOK. J. CORP., FIN. & COM. L. 119 (2006) (arguing that lawyers as "dependent" gatekeepers are less prone than "independent" gatekeepers to offer robust monitoring due to unconscious accountability and commitment biases). These biases, creating allegiance to client interests in dealing with third parties, do not explain why lawyers acting loyally would not tell officers *that* they have fiduciary duties, nor do they explain why, as developed below, lawyers may be shirking their responsibilities to their own clients.

77. COFFEE, *supra* note 76.

78. Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185 (2003).

present affairs or its upcoming plans. Gordon goes on to argue that Enron's reputable outside counsel did not seriously challenge Enron officers on dubious transactions.[79]

On the other hand, in-house counsel face challenges in this role as well. A key challenge is the simple fact that in-house legal counsel are financially dependent on the corporate client for their livelihoods. Moreover, as Gordon notes, general counsel may be in somewhat the same position as outside counsel if a corporation employs many lawyers in-house, especially if various operating divisions or areas have their own lawyers providing legal services.[80] Still, general counsel could pointedly direct such subordinate counsel to offer fiduciary duty advice to those managers with whom they work closely. Another impediment for in-house counsel is that, as Coffee points out, they themselves are business managers.[81] Furthermore, almost forty percent of general counsel do not report to the CEO and therefore may not have frequent, ongoing access to the CEO.[82] Their dealings with senior officers simply may not be as "regularized" as dealings with directors, but may instead be more transaction- or situation-dependent.[83] Those in-house counsel who do work closely with senior officers, Professor William Simon argues, often wrongly equate the interests of management with those of the company, perhaps in part because they also serve as business advisors, not just as legal counsel.[84] Serving in both a "business" and "legal" capacity can create a sense of role conflict wherein counsel is, in part, both lawyer and client.[85] Finally,

79. *Id.* at 1193, 1202. *See* DANIEL YANKELOVICH, PROFIT WITH HONOR 142 (2006) (quoting from the American Academy of Arts and Sciences Corporate Responsibility Steering Committee report that "the failure of . . . gatekeepers was a recurrent theme in the business scandals.").

80. *See* Gordon*, supra* note 78, at 1202–03 (describing the increasing fragmentation of in-house counsel).

81. COFFEE, *supra* note 76, at 225.

82. *Id.*

83. E-mail from William Goodell, Attorney, (Oct. 30, 2006) (on file with author). Mr. Goodell did not participate in the survey of attorneys; *see also* Carl D. Liggio, *The Changing Role of Corporate Counsel*, 46 EMORY L. J. 1201, 1208 (1997).

84. William H. Simon, *Whom (Or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57, 64 (2003).

85. *Id.* at 60, 64–65, 76–77; *see also* Stephen M. Bainbridge & Christina J. Johnson, *Managerialism, Legal Ethics and Sarbanes-Oxley Section 307*, 2004 MICH. ST. L. REV. 299, 307 (2004) (arguing that the need of in-house counsel to please management will lead them to avoid pursuing management wrongdoing). The desire to please management can, of course, apply to outside counsel as well. *See supra* note 78 and accompanying text; Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 241–42 (2006) (noting Enron's lawyers were uncritical adopters of managerial perspective).

although large public companies often have in-house lawyers,[86] the vast majority of corporations do not. Consequently, in light of these concerns about in-house counsel, outside counsel must play an important, if not exclusive, role in providing fiduciary advice to officers or suggest that officers employ their own lawyers to do so, or such advice simply may not be given.

A strong argument can be made that legal counsel for the corporation should, as part of that representation, advise corporate officers as to the scope and upshot of their fiduciary duties. The board of directors is, statutorily,[87] ultimately responsible for directing the business and affairs of the corporation. In addition, in order to fulfill its own fiduciary duty of care, the board must discharge its duty of oversight.[88] Although typically associated with ensuring the implementation and healthy functioning of an internal information and financial reporting system, proper oversight also entails ensuring corporate compliance with applicable laws.[89] One aspect of discharging that responsibility, especially given that vast authority typically is delegated by the board to senior officers,[90] should include taking appropriate measures to fully advise senior officers both as to their fiduciary status in relation to the corporation and as to the broad nature and scope of the fiduciary duties that flow out of that status. In other words, to truly discharge their own statutory and fiduciary responsibilities to the corporation and its stockholders, directors must see to it that senior officers fully understand their own fiduciary duties. Doing so is no less important, in our view, than advising officers about their need to comply with, for example, insider trading prohibitions and other specific statutory regimes such as the antitrust laws or environmental regulations.

The obvious candidate for fulfilling this gatekeeping, or more

86. *See* COFFEE, *supra* note 76, at 223.

87. *See* DEL. CODE ANN. tit. 8, § 141(a) (2001); MODEL BUS. CORP. ACT § 8.01(c)(3) (2005) (specifying that board of director oversight responsibilities include attention to "the performance and compensation of senior officers").

88. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968–69 (Del. Ch. 1996).

89. MODEL BUS. CORP. ACT § 8.01(c)(4) (2005) (specifying that board of director oversight responsibility extends to "policies and practices to foster the corporation's compliance with law and ethical conduct"); *see also* Lyman Johnson, *Misunderstanding Director Duties: The Strange Case of Virginia*, 56 WASH. & LEE L. REV. 1127, 1138–40 (1999) (arguing that lawyers should "strongly urge client boards to study and implement measures to monitor and report on their corporations' compliance with applicable legal regimes and other governing standards of sound business performance").

90. 1 PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 3.02 at 89 (Am. Law Inst. 1994).

broadly, "counseling" function is legal counsel,[91] whether in-house or outside. Counsel must initiate this process because, first of all, directors themselves most likely will not attend to it on their own. Moreover, doing so may be imperative if lawyers are to fulfill their own fiduciary and professional responsibilities to the organizational client. Put another way, not advising senior officers as to the fiduciary duties they owe to the corporation may represent professional negligence in representing the interests of the corporation. A lawyer, of course, has a duty to represent a client with ordinary care and prudence,[92] and a lawyer with special skill or expertise must bring that expertise and skill to bear in the representation.[93] Also, although not always sharply distinguishable from a legal malpractice theory,[94] lawyers owe clients a fiduciary duty that, if breached, may result in liability.[95]

Imagine, for example, that a corporate officer breaches his or her fiduciary duty in a way that causes damage to the company. The board of directors may choose to have the company absorb the loss and elect to sanction the officer in some other fashion, perhaps by demotion or termination. The board, or investors by means of a derivative suit, could, however, initiate an action against the officer for breach of fiduciary duty. If the officer is found liable, the usual unavailability of statutory exculpation for corporate officers means there is no statutory shield to protect the officer.[96] But does the officer, through personal assets or liability insurance, have the financial means to fully compensate the company for the damages

91. Professor Coffee refers to the lawyerly function of helping clients comply with law as a "modest form of gate keeping." COFFEE, *supra* note 76, at 193. We are uncertain why he describes it as "modest."

92. MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3; RESTATEMENT (THIRD) OF AGENCY § 8.02 (2006); RESTATEMENT OF THE LAW GOVERNING LAWYERS §§ 16(2), 48, 52 (2000).

93. RESTATEMENT (THIRD) OF AGENCY § 8.08 (2006).

94. Charles W. Wolfram, *A Cautionary Tale: Fiduciary Duty Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 691 (2006).

95. *Id.*; Rhode, *supra* note 8, at 1319 ("[L]awyers, as fiduciaries for clients, have a moral obligation to provide informed, independent, and disinterested legal advice. Although this obligation is widely accepted in theory, it is too seldom realized in practice."); *see also* Huber v. Taylor, 469 F.3d 67, 82 (3d Cir. 2006) (finding it elementary that every lawyer owes each client a duty of loyalty). The requirement of lawyer independence was recently discussed by former Chief Justice of the Delaware Supreme Court E. Norman Veasey and Christine Di Guglielmo. *See* Veasey & Di Guglielmo *supra* note 74, at 8–11.

96. *See supra* note 18 and accompanying text. Moreover, in order to be eligible for indemnification from the corporation, an officer must act in good faith. DEL. CODE ANN. tit. 8, § 145 (2001). It is in the interests of officers, therefore, that they understand what "good faith" means.

caused? If not, then the corporation—even apart from any duty to indemnify the officer—will ultimately foot the bill for the officer's wrongdoing. The corporation obviously has been damaged, perhaps because the officer simply did not know[97]—because he or she was never advised—that officers must fulfill certain fiduciary duties. Lawyers must not simply assume either that officers understand these duties or that it is someone else's responsibility to advise them concerning those duties.

Lawyers not only must comply with the applicable tort law standards of professional care, they must, to fulfill their ethical duties to the corporate client, *competently and diligently* represent the client.[98] When representing an organizational client, moreover, the lawyer must be aware that this client can only act through others. They are the "duly authorized constituents" through which the organization acts.[99] It is especially critical, therefore, that the lawyer advise those senior officers whose conduct is most vital to the organization's well being that they are fiduciaries owing robust fiduciary duties. Along this line, Model Rule 1.2 specifically states that a "lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation."[100] In addition, sounding an obligatory note, Model Rule 1.4(a)(2) states that a "lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished."[101] In light of the fact that one of the board's responsibilities—both by statute and in furtherance of its own fiduciary duty—is to oversee and monitor officer conduct, counsel to the board should suggest, toward that end, that he or she periodically explain fiduciary duties to the officers. Furthermore, a free flow of information between the lawyer and officers of the client is essential for allowing the lawyer to "render candid advice,"[102] and to fulfill the duty to "advise the client to refrain from wrongful conduct."[103] Finally, as agents acting on

97. *See supra* note 1 and accompanying text.

98. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.2. (2003); *see also In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 963 (Del. Ch. 1996).

99. MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2003).

100. *Id.* R. 1.2.

101. *Id.* R. 1.4(a)(2).

102. *Id.* R. 2.1.

103. *Id.* R. 1.6 cmt. 2. The Comment, in a predecessor version of Model Rule 1.6, put the matter more straightforwardly: "One of the lawyer's functions is to advise clients so that they avoid any violation of the law . . . ." *Id.* R. 1.6 cmt. (1983); *see also* Gordon, *supra* note 78, at 1196 (noting this comment is one of the few recognizing a lawyer's duty to advise compliance with laws). In the extreme, a lawyer who wrongly fails to prevent officer wrongdoing could face criminal liability, as seen recently in the convictions of former counsel for Hollinger International, Inc. *See* Paul D. Paton, *Suddenly, They're Holding*

behalf of the corporation in their own dealings with corporate officers,[104] lawyers themselves owe an agent's customary fiduciary duty of care and skill.[105] These considerations reinforce the advisability and desirability of corporate counsel routinely advising senior officers as to the existence and scope of their fiduciary duties.

Under section 307 of the Sarbanes-Oxley Act,[106] and SEC Rule 205 thereunder,[107] legal counsel who appear and practice before the SEC must appropriately "report up" not only securities law violations but also breaches of "fiduciary duty" by corporate officers and agents.[108] Accordingly, officer breaches of duty must be reported

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Corporate Counsel to a Higher Standard, GLOBE & MAIL (Toronto), July 19, 2007, at A17. Professor Paton notes, and comments on, the convictions of Mark Kipnis and Peter Atkinson, former lawyers who were found guilty, along with Conrad Black, in connection with the Hollinger Scandal. *Id.*

104. Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 970–74 (2005) (elaborating on general counsel's position as an agent of the corporation); Sung Hui Kim, *The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1009 (2005) (noting the mismatch between a lawyer's fiduciary duty as an agent of the corporation and the need to report to managers who themselves are co-agents of the company); *see also* Z. Jill Barclift, *Corporate Responsibility: Ensuring Independent Judgment of the General Counsel—A Look at Stock Options*, 81 N.D. L. REV. 1, 3–4 (2005) (exploring the effects of granting stock options to general counsel).

105. RESTATEMENT (THIRD) OF AGENCY §8.08 (2006). Recent revisions to § 8.42(b) of the Model Business Corporation Act provide as follows:

> b) The duty of an officer includes the obligation: . . .
> (1) to inform the superior officer to whom, or the board of directors or the committee thereof to which, the officer reports of information about the affairs of the corporation known to the officer, within the scope of the officer's functions, and known to the officer to be material to such superior officer, board or committee; and
> (2) to inform his or her superior officer, or another appropriate person within the corporation, or the board of directors, or a committee thereof, of any actual or probable material violation of law involving the corporation or material breach of duty to the corporation by an officer, employee, or agent of the corporation, that the officer believes has occurred or is likely to occur.

MODEL BUS. CORP. ACT. § 8.42(b) (2005). Section 8.42(b)(2) imposes on *all* officers a duty to report an actual or probable material breach of fiduciary duty, whether past or imminent. As an officer, general counsel would be within the coverage of this provision and, consequently, must "report up." Moreover, section 8.42(b)(1) requires an officer to appropriately report material information that is within the scope of the officer's functions. For any legal counsel within the company, that provision mandates "reporting up" any breach of fiduciary duty or other violation of law because such matters would be "within the scope of the officer's functions." *Id.*

106. *See* Standards of Professional Conduct, *supra* note 2.

107. *Id.*

108. *Id.*

by corporate counsel. In light of this, it seems prudent and only fair for legal counsel, ex ante, not only to inform officers that any breaches of duty on their part must be reported, but also to go further and actually advise officers that they have fiduciary duties and tell them what they need to do to fulfill those duties. This seems a prudent practice with respect to both reporting and nonreporting companies. Such a preventive, gatekeeping approach to the subject of fiduciary duties seems at least as important as, if not more important than, imposing an ex post reporting duty on lawyers. In fact, Model Rule 1.13(b) can be read to the same effect. It states that

> [if a] lawyer for an organization knows that an officer . . . is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization . . . then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.[109]

If a lawyer must act once an officer actually breaches a "legal obligation to the corporation"[110]—e.g., a fiduciary duty—prudence and competence would suggest the wisdom of a lawyer advising officers, ex ante, that they have fiduciary obligations and what they entail.[111] Since the passage of the Sarbanes-Oxley Act in 2002, corporate lawyers have been working with both directors and officers to implement its directives, many of which are designed to head off corporate wrongdoing before it happens.[112] Consequently, consistent with that preventive approach to complying with statutory mandates, lawyers should routinely advise officers as to

109. MODEL RULES OF PROF'L CONDUCT R. 1.13(b). For an argument that Model Rule 1.13 is designed to protect the organization as client, while SEC Rule 205 is aimed at protecting investors, see William Matthews, Robert Hoffman, & Daniel Scott, *Conflicting Loyalties Facing In-House Counsel: Ethical Care and Feeding of the Ravenous Multi-Headed Client,* 37 ST. MARY'S L.J. 901, 922 (2006). SEC Rule 205.3, however, states that the corporation is the client. Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. § 205.3 (2003). Model Rule 1.6 also permits a lawyer to "report out" in certain situations. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2)–(3) (2003).

110. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2003).

111. *See also*, MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to the client.").

112. *See* Lyman P.Q. Johnson & Mark A. Sides, *The Sarbanes-Oxley Act and Fiduciary Duties*, 30 WM. MITCHELL L. REV. 1149, 1202 (2004) (exploring Sarbanes-Oxley's implications and how lawyers will communicate this information to clients).

statutory and judge-made mandates in the fiduciary duty area when representing both public and private companies. That many recent governance reforms are structural in nature is no reason to neglect the more traditional and all-encompassing role of fiduciary duties as a preventive mechanism.

We acknowledge that the Model Rules, the Sarbanes-Oxley Act, and other rules governing the professional responsibility of lawyers in the area of corporate representation largely depend on governance relationships and legal duties designed by corporate law. The legal responsibilities of corporate officers are, we also acknowledge, not currently well defined in legal doctrine. Consequently, continuing failure within corporate law to clarify the fiduciary position of officers—who are, after all, "duly authorized constituents" in the words of Model Rule 1.13[113]—within the governance web means lawyers may not be giving the quality of advice they should because they simply do not know what to say. This, ultimately, is a professional failure, but it is perhaps an understandable one that stems from misunderstandings or incompleteness within corporate law itself, as was described in Part I.

Another reason for lawyers to fully advise corporate officers about their fiduciary status is to alter officer self-concept and sense of role within the company. We believe that persons who, in strong language, are told by a respected figure, such as legal counsel, that they owe a special responsibility to protect and advance the interests of others are more likely to refrain from negative conduct and engage in positive conduct than are people who believe they can solely advance their own interest.[114] To advise someone that they have been "entrusted" with responsibility for others' money and that they must be "loyal" to those persons' interests and those of the larger enterprise in carefully discharging "stewardship" duties is likely, we believe, to lead the listener both to consciously desire to act at a higher level and, possibly, actually to perform at a higher level. By agreeing to serve in that fiduciary position, the person is saying—both to the employer and herself—that she understands her position in just those terms and assents to those terms. As described by Stephen Young:

> Fiduciary obligations flow from a principle within the moral sense that sensitizes us to the use of power when others come into view. Fiduciary thinking gives us a morality for decision making, an ethics of character, and wisdom. Fiduciary thinking makes us trustworthy, enhancing thereby the moral

113. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13(a).
114. *See supra* note 29 and accompanying text.

quality of that society in which we live and work.[115]

The absence of such moral-sounding language, by way of contrast, may lead an actor (such as an officer) to believe that he or she largely may (and perhaps should) act out of self-interested motives. The inaction of lawyers on this matter may itself be sending a negative signal to officers and thereby reinforcing an unhealthy norm.

Moreover, by advising officers of their fiduciary duties, the lawyer is not telling the officer what to do. Rather, given that fiduciary duties are phrased as broad, open-ended concepts,[116] providing fiduciary duty advice offers an approach to shaping corporate behavior that was nicely described by Professor Simon as specifying "substantive norms that are deliberately under-specified coupled with duties on the part of the regulated party to themselves identify and clarify the ambiguities in the norms."[117] When lawyers clearly and regularly impart to officers that they owe duties of care and loyalty, these social-legal norms will help officers reflectively assess, and possibly alter, their own conduct. This is not a substitute for the lawyer, in appropriate settings, bringing to bear his or her own judgment as to the propriety of a transaction or course of conduct. Rather, it supplements the view of the lawyer and avoids unhealthy client efforts to wholly shift responsibility to the lawyer to legally "pass" on or "bless" the matter. Officers are made aware that with respect to any and all aspects of their conduct they must always satisfy themselves that they have fully discharged their fiduciary duties to the company.[118] This is not "moral counseling" as such, but it is legal counseling to the effect that officers themselves have duties with moral content.[119]

When self-interest and organizational well-being are aligned, the actor advances both. Many devices, especially in the executive compensation area, therefore seek to align officer and company welfare. The problem with this approach is that it assumes the usual arm's length, commercial setting wherein the norm and

115. STEPHEN YOUNG, MORAL CAPITALISM: RECONCILING PRIVATE INTEREST WITH THE PUBLIC GOOD 59 (2003).

116. *See* Johnson & Sides, *supra* note 112, at 1194.

117. William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1462 (2006).

118. Thus, even if the law has significantly proceduralized the duty of loyalty, we think, unlike Professor Donald C. Langevoort, that corporate law still has "moral force" in being imparted to officers in a way that shapes their conduct ex ante. *See* Donald C. Langevoort, *Someplace Between Philosophy and Economics: Legitimacy and Good Corporate Lawyering*, 75 FORDHAM L. REV. 1615, 1624 (2006).

119. Rhode, *supra* note 8, at 1329.

practice is to advance self-interest. In a relationship known by the actor—because he or she was clearly told—to be a fiduciary relationship, we believe many persons will behave differently than they would in a nontrust relationship. This position, of course, could probably be tested empirically in a properly designed experiment.[120] We believe for now that altering self-awareness of corporate officers by strongly advising them of their fiduciary status can pervasively alter how they perceive their roles, and in a way that may upgrade corporate conduct. And, conversely, we believe efforts aimed solely to align officer and corporate interests, thought inevitably to be at odds with each other, may actually build on and strengthen an underlying assumption of unalloyed self-interest that should be countered, not reinforced.

We believe our views are, in principle if not current practice, consistent with the views of many in the corporate bar. For example, in 2003 the American Bar Association Task Force on Corporate Responsibility highlighted the pivotal role played by lawyers in assuring that corporations comply with law: "The Task Force believes that a prudent corporate governance program should call upon lawyers—notably the corporation's general counsel—to assist in the design and maintenance of the corporation's procedures for promoting legal compliance."[121] The Report for the ABA House of Delegates specifically highlighted the role lawyers play in advising, among others, corporate officers: "Legal counsel who provide advice to public corporations, through their directors, officers and employees, on compliance with the corporation's legal obligations" are an important component of good corporate governance.[122] We

120. *See* Lynn A. Stout, Taking Conscience Seriously 7 (2007) (unpublished manuscript, on file with Gruter Inst. Project on Values & Free Enterprise) ("Laboratory experiments confirm that altruistic behavior . . . is in fact extremely common. This is most clearly demonstrated by the results of such well-known experimental treatments as the Ultimatum Game, the Dictator Game, the Trust Game, and the Social Dilemma, experiments designed to test what real people do when placed in positions where their self-interest conflicts with the interests of others."). We suspect that people who are explicitly told they have a "trust" or "fiduciary" responsibility for the well-being of others would show an even more marked tendency to quell self-interest.

121. *Report of the American Bar Association Task Force on Corporate Responsibility*, 59 BUS. LAW. 145, 166 (2003), *available at* http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf [hereinafter Task Force Report].

122. AM. BAR. ASSOC., TASK FORCE REPORT SUBMITTED BY THE ABA HOUSE OF DELEGATES IN SUPPORT OF THE GOVERNANCE POLICY RESOLUTIONS 7 (2003), http://www.abanet.org/legaled/accreditation/foreignprogramtf/finalreport.doc; *see also* N.Y. CITY BAR, REPORT OF THE TASK FORCE ON THE LAWYER'S ROLE IN CORPORATE GOVERNANCE 29–30 (2006), *available at* http://www.abcny.org/pdf/report/CORPORATE_GOVERNANCE06.pdf.

believe that lawyers should advise officers not only to ensure that corporations comply with applicable laws but also to bolster the likelihood that the officers themselves comply with their obligations *to* the company. We think this sensibly follows from one of the Task Force's recommendations:

> Public corporations should adopt practices in which . . . (c) [a]ll reporting relationships of internal and outside counsel for a public corporation establish at the outset a direct line of communication with general counsel through which these lawyers are to inform the general counsel of material potential or ongoing violations of law by, *and breaches of fiduciary duty to*, the corporation.[123]

If lawyers are to report "potential" or "ongoing" breaches of fiduciary duty, a sensible preventive law approach to governance reform demands that lawyers first advise officers as to the existence and scope of those fiduciary duties.

It appears also that in-house legal counsel, in principle, would support our views. A large-scale 2002 survey of in-house counsel revealed that fifty-seven percent of in-house lawyers said they should play as important a role as the CEO, COO, or CFO in preventing fraud, and an additional twelve percent said that in-house counsel should take the leading role within the company.[124] Interestingly, although the survey asked in-house lawyers which of several options would best assist them in preventing fraud, the menu of possibilities included the Model Rules of Professional Conduct, Sarbanes-Oxley, and new SEC disclosure requirements, but did not include advising officers as to, and urging officers to comply with, state-law-imposed fiduciary duties. Fiduciary duties of officers should be, but apparently are not, on the minds of those who constructed the survey.

One possible technique for efficiently conveying information about fiduciary duties to senior officers, besides regular, in-person advising sessions scheduled by counsel, is through a corporation's code of conduct. Section 406 of the Sarbanes-Oxley Act requires companies to disclose whether they have such a code,[125] and virtually all public companies do have such codes. Designing such codes is an appropriate function for general counsel. These codes of conduct can be provided to every employee,[126] and, in addition, a separate code

123. Task Force Report, *supra* note 121, at 177 (emphasis added).

124. Press Release, Am. Corp. Counsel Assoc., Summary of Findings, In-House Counsel Poll on Corporate Scandals (Oct. 21, 2002), http://www.acca.com/about/press/item.php?key=20021021_15263.

125. *See* Johnson & Sides, *supra* note 112, at 1185.

126. *See, e.g.*, Medtronic, Inc., Code of Conduct, http://www.medtronic.com/

can be specifically designed for and distributed to senior officers, as is done, for example, at Medtronic, Inc.[127] The code for senior officers should include, we believe, a section succinctly describing fiduciary duties owed by officers to the company. Legal counsel should also regularly review and explain those responsibilities with senior officers, thereby avoiding the excuse of counsel simply not having occasion to give such advice; such occasion should be affirmatively created by legal counsel. Each year, moreover, senior officers could be required to affirm in writing that they understand and agree to comply with the code of conduct (which includes a description of fiduciary duties). In fact, as at Medtronic,[128] all key managers could be required not only to personally so affirm, but also to affirm that they have given the code to all of their direct reports and that they are not aware of any unreported violations of the code. These certifications ultimately would be routed to the Audit Committee and reported on by that committee to the full board of directors as part of its regular internal control and risk management report.

Separately, general counsel—whose hiring and compensation should be approved by the board[129]—could be required by the board to annually certify to it that general counsel (i) has provided senior officers with a code of conduct specifically describing, among other matters, fiduciary duties; (ii) has reviewed those duties (and other responsibilities) with senior officers within the last twelve months; and (iii) is not aware of any evidence that would be a reportable securities law violation or fiduciary duty breach under SEC Rule 205 or under any other provision of the code.[130] Knowledge that general counsel will regularly report directly to the board on these matters, not simply meet with the board or its independent directors,[131] will bolster counsel's position in relation to the CEO,

corporate_governance/downloads/code82005.pdf.

127. *See, e.g.*, Medtronic, Inc., Code of Ethics for Senior Financial Officers, http://www.medtronic.com/corporate_governance/code_ethics.html.

128. The authors gratefully acknowledge the assistance and views of Tom Holloran, former President and General Counsel of Medtronic, Inc., for bringing this information to our attention. Mr. Holloran did not participate in our survey.

129. *See* Task Force Report, *supra* note 121, at 177 ("[S]election, retention, and compensation of the corporation's general counsel . . . [should be] approved by the board of directors.").

130. *See supra* note 2. This certification also could be done by counsel with respect to nonreporting companies by slight modification to the wording of our proposal to capture the essential thrust of what Rule 205 addresses.

131. We support the view of the ABA Task Force that general counsel should meet regularly with the board of directors and its independent directors, but we would go beyond the Task Force recommendations to require that in those meetings, general counsel should simply "communicate concerns" and require

given that counsel, as an officer, generally reports to the CEO.[132] Moreover, by certifying the matters described above, general counsel is serving a useful "internal" gatekeeping function on behalf of the board itself, in relation to officer conduct which the board is legally required to monitor.[133] Communicating this enhanced governance check to investors can bolster their confidence in both directors and officers. The reputational gains, moreover, may extend beyond the investment community into customer and employee relationships as well.

V. CONCLUSION

The law of officer fiduciary duties remains surprisingly unsettled. Officers ultimately may be held to stricter, or the same, standards of conduct and judicial review as those governing directors. In either event, officers, unlike directors, typically are not exculpated from damages for duty of care breaches. Moreover, to be indemnified by the corporation, officers must act in good faith. Thus, it is in their own self-interest for officers to know about and comply with their fiduciary duties.[134]

Officer conduct also greatly affects the company itself and its investors, probably more so than the activities of directors. Consequently, it is in the company's best interests that officers faithfully fulfill their legal duties. There are several reasons why

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the affirmative certification outlined in the text. Task Force Report, *supra* note 121, at 32.

132. *See* Fisch & Rosen, *supra* note 3, at 1136 (noting that "[s]tructures in which lawyers regularly report directly to the board . . . allow lawyers to bypass managers without creating the risk of retaliation that might result from sporadic reporting up").

133. This "internal" certification differs, of course, from the two different kinds of "external" certifications advocated by Professor Coffee and Professor Laby. *See* COFFEE, *supra* note 76; Laby, *supra* note 76; *see also supra* note 76 and accompanying text.

134. Corporate officers, of course, are not the clients of legal counsel to the company. *See supra* note 75. Counsel, when advising officers, are offering advice to them in their capacity as representatives of the *company*. Thus, lawyers must make it very clear to officers that no lawyer-client relationship exists between them. This may be challenging in those instances where officers seek guidance from counsel as to whether certain conduct or proposed action is, in counsel's view, consistent with the officer's fiduciary duties. Advice in that context is appropriate but it must be made clear—notwithstanding evident awkwardness—that the officer is being advised as a representative of the company, not personally. We also note that officers, unlike directors, may not have a statutory right to rely on legal counsel or other persons. *See* DEL. CODE ANN. tit. 8, § 141(e) (2001). *But see* MODEL BUS. CORP. ACT §§ 8.30, 8.42 (2005). The authors thank Justice Randy Holland and Professor David Hoffman for highlighting these points.

legal counsel for the corporation should fully and regularly explain fiduciary duties to officers. By doing so, lawyers can help instill healthier norms of corporate conduct under the auspices of open-ended legal duties to which officers and managers must conform their behavior. Under an optimistic scenario, we may then continue to see a dearth of case law addressing officer duties, not, however, due to legal uncertainty as to their scope, but because officers, with lawyerly help, are doing better at what the law requires.

APPENDIX A

FIDUCIARY DUTY ADVICE QUESTIONNAIRE

Your identity and responses to this questionnaire will remain confidential. Questionnaire responses from many lawyers and law firms will be collected and the aggregate responses will be used in a published research paper, but without identification of the respondents.

I. Background Information

1. In which city and state do you primarily practice? ____________

2. Do you practice in a law firm or are you in-house counsel at a corporation? ____

3. If you practice in a law firm, how many attorneys practice in your firm? ____

II. Advising Corporate Directors

NOTE: If your responses require more space than we have provided, please use whatever additional paper you need to fully answer the questions and include those pages with this questionnaire.

4. Please generally describe how you advise a corporation's Board of Directors, or individual directors, as to their fiduciary duties?
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   a. Do you advise directors in transactional settings, non-transactional settings, both, or neither? Please list examples of situations where you would advise directors on their fiduciary duties.
   ____
   ____
   ____
   ____
   ____
   ____

b. Do you *or your firm* have a standard or "model" set of instructions for advising directors on fiduciary duties? If so, would you kindly enclose a copy?

____

c. What do you say to directors of Delaware corporations about the fiduciary duty of care? If you do not represent Delaware corporations, what do you say to directors about the fiduciary duty of care under the law of the state where the majority of your corporate clients are organized, and which state is that?

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____
____

d. What do you say to directors of Delaware corporations about the fiduciary duty of loyalty? If you do not represent Delaware corporations, what do you say to directors about the fiduciary duty of loyalty under the law of the state where the majority of your corporate clients are organized?

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e. What do you say to directors of Delaware corporations about the fiduciary duty of good faith? If you do not represent Delaware corporations, what do you say to directors about the fiduciary duty of good faith under the law of the state where the majority of your corporate clients are organized?

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III. Advising Corporate Officers

5. Please generally describe how you advise senior corporate officers (Chief Executive Officer (CEO), Chief Financial Officer (CFO), for example) as to their fiduciary duties, specifically in their capacity as senior corporate officers?

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a. Do you advise officers in transactional settings, non-transactional settings, both, or neither? Please list examples of situations where you advise officers on fiduciary duties. Specifically, which officers (CEO, CFO, for example) do you advise as to fiduciary duties?

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b. Do you *or your firm* have a standard or "model" set of instructions for advising officers on fiduciary duties? If so, would you kindly enclose a copy?

____

c. What do you say to officers about the fiduciary duty of care?

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d. What do you say to officers about the fiduciary duty of loyalty?

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e. What else, if anything, do you say to officers about their fiduciary duties?

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IV. Additional and Follow-up Information

6. Is there anything else you would like to describe in connection with offering fiduciary duty advice to directors and officers?

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7. Are you willing to discuss further, with Professor Lyman Johnson, by telephone or in-person, the subject of advising directors and officers as to their fiduciary duties? If so, please provide your name and telephone number below. Your responses, however, will remain confidential.

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THANK YOU FOR YOUR RESPONSES.