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GATEKEEPING AND THE ETHICAL DILEMMA OF SECURITIES LAWYERS

Securities lawyers face a complex ethical landscape. Numerous federal regulators, and the Securities and Exchange Commission in particular, have adopted the view that lawyers serve as more than just legal counselors. According to the latter school of thought, lawyers are also “gatekeepers” for the integrity of the securities market, uniquely positioned to prevent client transgressions. This gatekeeping ideal poses a critical question: does the securities lawyer owe an obligation to the client, to market participants, or to both? And, if both, can “gatekeeping” be reconciled with the lawyer’s obligation to zealously represent his or her clients? Or does it create an intractable conflict of interest? This article explores the gatekeeping dilemma in more detail, examining the relevant state and federal legal frameworks, as well as the paradoxes caused by the gatekeeping ideal. While the debate about the propriety of holding lawyers accountable to a “gatekeeping” standard is far from over, this article aims to provide guidance on the current state of the law to help practitioners navigate an otherwise unsettled area of professional responsibility.

By Sarah Eichenberger *

Consider the following hypothetical. The General Counsel of a publicly traded company has received an anonymous tip from a Whistleblower. The Whistleblower claims that a senior officer in one of the company’s sales divisions is improperly recording revenue to inflate that division’s balance sheet. The General Counsel reports the matter to the Audit Committee, which, in turn, hires Outside Counsel to assist with its investigation of the claim. During its investigation, Outside Counsel discovers that the Whistleblower’s tip is not only accurate, but that the scope of the misconduct will materially impact the Company’s consolidated financial statements. Outside Counsel reports this information to the Audit Committee, but the Audit Committee fails to act. What

is Outside Counsel’s obligation? Is it obligated to say something? Or is it obligated to say nothing at all?

This hypothetical raises a perennial question for attorneys representing audit and special committees in securities-related matters: to what extent do lawyers owe duties not just to their clients, but to market participants as well? This longstanding debate juxtaposes two concepts. It pits the lawyer as the so-called “gatekeeper” on the one hand against the lawyer as “advisor” on the other.

The Securities and Exchange Commission’s (“SEC” or “Commission”) iteration of the lawyer’s role has historically favored the “gatekeeper” mindset, a

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