

# **The Roles, Responsibilities and Challenges of Corporate Gatekeepers**

**ECOA Program**

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# Actions Against Outside Counsel

36 SEC enforcement actions against outside counsel  
(2001 – 2006)

Most common theories:

- False or misleading SEC filings
- Unregistered securities
- Invalid legal opinions
- Failure to disclose information to auditors
- Structuring fraudulent transactions
- Improperly conducted internal investigations

# Outside Counsel as Gatekeeper

Old view:

- Zealous advocacy for client
- Duty of loyalty to client, not investors
- No independent “certification” role (unlike auditors)

New view (post Sarbanes-Oxley)

- Duty to monitor client
- Duty to report wrongdoing (“up the ladder”)
- Duty to withdraw

# Sarbanes-Oxley Reporting Obligations

SOX section 307 and 17 CFR Part 205 impose “up the ladder” reporting obligations on outside counsel:

- Apply to lawyers who represent issuers before SEC
- Impose “minimum standards of conduct”
- Impose “up the ladder” reporting obligations when a lawyer “becomes aware” of “evidence” he “reasonably believes” shows a “material violation” of securities laws or breach of fiduciary duties by a company or its officers, directors, or employees.

# Sarbanes-Oxley Reporting Obligations

SOX section 307 and 17 CFR Part 205 impose “up the ladder” reporting obligations on outside counsel:

- To chief legal officer or chief executive officer
- To audit committee (and other directors with knowledge of issue)
- Permissive (but not mandatory) disclosure of confidential information if necessary to prevent material violation of law.
- Permissive (but not mandatory) “noisy withdrawal”

# Legal Theories And Remedies Against Outside Counsel

## Legal Theories:

- Primary liability as “participant” in representation
- Primary liability for furtherance of scheme
- Aiding and abetting liability
- Malpractice and fiduciary duty claims
- Section 102(e) claim

## Remedies:

- Civil damages, civil penalties, and disgorgement
- Officer and director bar; bar from SEC practice
- Permanent injunction and adverse publicity

# Recommendations for Outside Counsel

1. Independently assess company's interests. Don't blindly execute management's instructions.
2. Independently confirm accuracy of company's representations. Don't blindly accept management's statements.
3. Guide company towards best legal course of action. Don't just provide legal advice.
4. Be willing to withdraw.