## *II. The Professional Responsibility of Lawyers and the Financial Crisis*

### A. Introduction

This article examines the professional responsibility of lawyers during the 2008 financial crisis and discusses the ways in which that responsibility has evolved as a result of the recent economic meltdown. Primary focus is placed on lawyers[1] who played key roles in the creation and distribution of mortgage-backed securities ("MBS"),[2] the catastrophic devaluation of which spurred the financial collapse.[3] After first exploring the role of lawyers during the financial crisis, the purposes for which they were retained and the effects of their actions, this article will discuss the inherent limitations of imposing ethical duties on lawyers where their clients' actions do not violate the law and then conclude by considering the future of professional responsibility in light of the financial crisis.

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[1] This includes structured finance lawyers who facilitated securitization transactions and securities lawyers who prepared disclosure documents for mortgage-backed securities offerings.

[2] MBS are complex, financial instruments created through the securitization of residential mortgage loans. Simply put, MBS represent a claim to a portion of the interest payments made on a pool of mortgages. *See* Chris Wilson, *What is a Mortgage-Backed Security?*, SLATE (Mar. 17, 2008), http://www.slate.com/articles/news_and_politics/explainer/2008/03/what_is_a_mortgagebacked_security.html (providing an elemental definition of MBS); *See generally infra* note 4 and accompanying text (explaining the mortgage securitization process).

[3] The drastic fall in housing prices in 2007 resulted in unprecedented delinquency and default on subprime mortgage loans, thereby halting the flow of payments to MBS investors. Consequently, MBS defaulted en masse and rating agencies downgraded their ratings of MBS accordingly. Systemically important financial institutions awash in MBS were forced to write-down their value, resulting in hundreds of billions of dollars in losses and, in some cases, insolvency. *See, e.g.*, FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT (2011) (providing an extensive analysis of the causes of the financial and economic crisis in the United States).

## B. The Role of Lawyers in the Financial Crisis

### 1. Structured Finance Lawyers Facilitated Securitization Transactions by Issuing Legal Opinions

Structured finance lawyers serve as counsel to originators of securitization transactions.[4] In this capacity, structured finance buyers issue two types of legal opinions: the "true-sale" opinion and the "non-consolidation" opinion (collectively "structured finance opinions").[5] The purpose of structured finance opinions is to "assure investors and rating agencies that the structure of the special-purpose vehicle ("SPV") transaction is bankruptcy remote,"[6] i.e., mortgage payments will continue to inure to MBS investors in the event that the originator goes bankrupt.[7] The two most important factors that

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[4] In a typical mortgage securitization transaction, an originator sells the rights to payments on loans ("assets") to a wholly-owned special-purpose vehicle ("SPV"). The wholly-owned SPV transfers those assets to an independent SPV ("issuer"), which pools the assets and issues "tranches" of securities to capital market investors. Rating agencies assign credit ratings to the separate tranches based on their level of risk; the tranches most insulated from default receive the highest ratings—in some cases, AAA. *See* Steven L. Schwarcz, *The Public Responsibility of Structured Finance Lawyers*, 1 CAPITAL MKT. L. J. 6, 6-7 (2006) [hereinafter *The Public Responsibility of Structured Finance Lawyers*] (explaining the structure and operation of securitization transactions); Aaron Lucchetti & Serena Ng, *Credit and Blame: How Rating Firms' Calls Fueled Subprime Mess*, WALL ST. J., Aug. 15, 2007, http://www92.homepage.villanova.edu/shawn.howton/Fin%202227/articles/subprimemess.pdf ("[M]ost of the higher tranches traditionally were considered well-enough insulated from defaults to merit investment-grade ratings—in some cases, [AAA] ratings.").

[5] A true-sale opinion analyzes whether the transfer of financial assets from the originator to the SPV constitutes a sale under applicable bankruptcy law. Achieving a true sale would isolate those financial assets in the SPV for the benefit of the SPV's investors. A non-consolidation opinion analyzes whether the originator and the SPV would be substantively consolidated in the event of the originator's bankruptcy. *See The Public Responsibility of Structured Finance Lawyers*, *supra* note 4, at 7 (discussing the nature of structured finance opinions).

[6] *The Public Responsibility of Structured Finance Lawyers*, *supra* note 4, at 7-8 (footnote omitted).

[7] *See* JAMES A. ROSENTHAL & JUAN M. OCAMPO, SECURITIZATION OF CREDIT: INSIDE THE NEW TECHNOLOGY OF FINANCE 87 (1988) ("[R]ating

rating agencies take into consideration when assigning credit ratings to MBS are structured finance opinions and the creditworthiness of the underlying mortgages.[8]

Often, investors purchased MBS "substantially based on their [agency-assigned] ratings,"[9] many of which proved to be highly defective.[10]But such defective ratings were not the product of inaccurate structured finance opinions, i.e., poor lawyering. Rather, as the unprecedented incidence of mortgage default clearly indicates,[11] rating agencies unequivocally failed to properly assess the creditworthiness of the underlying mortgages.[12] Thus, while

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agencies require that the transaction be structured to eliminate the risk that a bankruptcy of the originator would interfere with timely payments on the notes.").

[8] *See id.* at 86-88 (discussing the importance of structured finance opinions to rating agencies in assigning credit ratings); *Legal Criteria For U.S. Structured Finance Transactions: Overview of Legal Criteria for U.S. Structured Finance Transactions*, STANDARD & POOR'S (Oct. 1, 2006) (on file with author) ("Relying on the insulation of assets in structured financings, Standard & Poor's is able to base its ratings of securities issued in such transactions on the creditworthiness of the isolated assets, without regard to the creditworthiness of the original owner of the assets."). For a list of factors that rating agencies consider when assigning credit ratings, see STEVEN L. SCHWARCZ, STRUCTURED FINANCE: A GUIDE TO THE PRINCIPLES OF ASSET SECURITIZATION § 8:9 note 94 (Adam D. Ford ed., 3d ed. 2010).

[9] Lucchetti & Ng, *supra* note 4 (quoting Edward Grebeck, CEO of debt-strategy firm Tempus Advisers).

[10] FIN. CRISIS INQUIRY COMM'N, *supra* note 3, at 418 ("Credit rating agencies erroneously rated [MBS] . . . as safe investments.").

[11] *See supra* note 3 and accompanying text (explaining how widespread mortgage default led to the drastic devaluation of MBS).

[12] *See* Floyd Norris, *Moody's Official Concedes Failures in Some Ratings*, N.Y. TIMES, Jan. 26, 2008, http://www.nytimes.com/2008/01/26/business/26moodys.html (quoting Raymond W. McDaniel, Jr., CEO of Moody's) ("[I]t is pretty clear that there was a failure in some key assumptions that were supporting [Moody's] analytics and . . . models."); *see also* Peter Hawkes, *Reaching the Bottom of the Barrel: How the Securitization of Subprime Mortgages Ultimately Backfired*, 24 REAL EST. FIN. J. 55, 58-59 (2008) ("Since [MBS] issuers conduct only cursory due diligence in many cases, the summaries they provide to rating agencies are often incomplete and approximate . . . While working with incomplete (and sometimes inaccurate) data, rating agencies also had to contend with the lack of historical precedent of widespread subprime lending, which introduced significant uncertainty into their risk models.").

rating agencies did rely on structured finance opinions when evaluating MBS, those opinions did not lead to the erroneous valuation of MBS that sparked the financial crisis.[13]

### 2. Securities Lawyers Prepared Disclosure Documents for MBS Offerings

Issuers of MBS customarily retain securities lawyers to help prepare disclosure documents for MBS offerings.[14] The securities lawyer's role in preparing disclosure documents is paramount. The attorney, not the client, dictates the content of the disclosure, often forcing the issuer to reveal sensitive matters that may reflect negatively on the marketability of the proposed offering.[15] Any material misstatement, or omission of material information from, disclosure documents constitutes a violation of the Securities Exchange Act of 1934.[16]

Investors have filed claims against MBS issuers, alleging that the quality of the underlying loans was inadequately disclosed or misleading, but courts have yet to decide on those issues.[17]

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[13] *See* FIN. CRISIS INQUIRY COMM'N, *supra* note 3, at 418 (explaining how the failure of rating agencies to accurately rate MBS contributed significantly to the financial crisis).

[14] *See, e.g.*, Lynnley Browning, *Small Law Firm's Big Role in Bundling Mortgages*, N.Y. TIMES, Feb. 1, 2008, http://www.nytimes.com/2008/02/01/business/01legal.html (reporting on one law firm's role in the preparation of disclosure documents for MBS). *See generally* 17 C.F.R §§ 229.1100-1123 (2010) (setting forth disclosure requirements for offerings of MBS).

[15] *See* Gilbert Manning Warren III, *The Primary Liability of Securities Lawyers*, 50 SMU L. REV. 383, 390 (1996) (discussing the role of lawyers in preparing disclosure documents).

[16] *See* Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2006) (prohibiting the use of manipulative or deceptive devices in connection with the sale of securities); 17 C.F.R § 240.10b-5 (2010) (prohibiting material misstatements and omissions in connection with the sale of securities).

[17] *See, e.g.,* Dan Levine, *Judge Narrows MBS Lawsuit Against WaMu*, THOMSON REUTERS, Oct. 24, 2011, *available at* http://newsandinsight.thomsonreuters.com/Legal/News/2011/10_-_October/Judge_narrows_MBS _lawsuit _against_WaMu/ (discussing pending case against Washington Mutual); David McLaughlin, *Assured Guaranty Sues Credit Suisse, DLJ Mortgage in New York State Court*, BLOOMBERG (Oct. 18, 2011), http://www.bloomberg.com/news/2011-10-17/assured-guaranty-sues-credit-

Regardless, their decisions will have little impact on the broader regulatory scheme because the Dodd-Frank Act recently overhauled the disclosure requirements for MBS offerings.[18] Nevertheless, even where risks were perfectly disclosed, investors often lacked the resources to properly analyze them,[19] so much so that "[e]ven people running Wall Street firms didn't really understand what they were buying and selling."[20] MBS are inherently complex instruments, such that disclosure documents for MBS offerings are perplexing and exceedingly long, often prompting investors to rely on agency ratings rather than "spending the time and effort needed to fully understand the hundreds of pages of disclosure."[21] As "[o]ver-reliance on [agency] ratings appears to have been endemic,"[22] the extent to which lawyer-prepared disclosure documents led to the financial crisis remains unclear.

### 3. Lawyers in Non-Traditional Legal Roles

During the financial crisis, some lawyers were engaged in non-traditional legal roles, such as helping to design and structure financial instruments.[23] However, because of ethical rules prohibiting

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suisse-dlj-mortgage-in-new-york.html (discussing the pending case against Assured Guaranty).

[18] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C.A. § 78o (West 2011) (establishing, in reaction to the financial crisis, enhanced disclosure and reporting requirements for MBS offerings).

[19] *See* Lucchetti & Ng, *supra* note 4 (reporting that many investors lacked the resources to analyze complex MBS disclosures).

[20] Nelson D. Schwartz & Julie Creswell, *What Created This Monster?*, N.Y. TIMES, Mar. 23, 2008, http://www.nytimes.com/2008/03/23/business/23how.html (reporting statement of Byron Wien, Chief Investment Strategist, Pequot Capital).

[21] Steven L. Schwarcz, *Disclosure's Failure in the Subprime Mortgage Crisis*, 2008 UTAH L. REV. 1109, 1114 (2008) [hereinafter *Disclosure's Failure*].

[22] *Id.* at 1115.

[23] *See* Steven L. Schwarcz, *The Role of Lawyers in the Global Financial Crisis*, 24 AUSTL. J. CORP. L. 1, 6 (2010) [hereinafter *The Role of Lawyers in the Global Financial Crisis*] (describing how the author was "intimately involved in the design of financial products" when he practiced law); *see also* Claire A. Hill, *Who Were the Villains in the Subprime Crisis, and why it Matters*, 4 ENTREPRENEURIAL BUS. L. J. 323, 343 (2010) ("[L]awyers on complex financial deals sometimes almost act like investment bankers . . . .").

lawyers from disclosing confidential information relating to the representation of clients, the extent to which lawyers were giving advice on the non-legal aspects of transactions is largely unknown.[24] Regardless, because lawyers are ethically bound to abide by their clients' decisions regarding the objectives of the representation, clients presumably maintained ultimate discretion over the structure and design of financial instruments.[25]

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[24] *See* Sarah Kellogg, *Financial Crisis 2008: Where were the Lawyers?*, DCBAR (Jan. 2010), http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/january_2010/financial_crisis.cfm (discussing how confidentiality rules may conceal the details of lawyers' involvement in the financial crisis); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2011) (describing limited circumstances under which a lawyer may divulge information relating to the representation of a client). Every state except for California has adopted a code of professional conduct substantially based on the ABA Model Code of Professional Conduct. *See Alphabetical List of States Adopting Model Rules*, ABA, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Oct. 9, 2011).

[25] *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2011) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . . ."); *see* Kellogg, *supra* note 24 ("[T]he multifaceted transactions that are the fabric of the financial services industry demand a level of knowledge that surpasses the skills of even the savviest corporate counsel."); *The Role of Lawyers in the Global Financial Crisis*, *supra* note 23, at 10 (citing Steven L. Schwarcz, *The Limits of Lawyering: Legal Opinions in Structured Finance*, 84 TEX. L. REV. 1, 29 (2005)) ("To the extent clients have more or better information about the consequences of a business transaction (other than the transaction's legality), they would be better positioned to make business decisions.").

## C. The Professional Responsibility of Lawyers During the Financial Crisis

### 1. Lawyers Have Limited Responsibility Where Actions Do Not Violate the Law

A lawyer's responsibility first turns on whether his or her client's actions actually violate the law.[26] Where a client's actions involve criminal or fraudulent conduct, the lawyer's responsibility is clear: a lawyer has a duty to not assist a client in conduct that is known to be criminal or fraudulent and must withdraw from representation of a client where the representation would, in effect, serve to further such conduct.[27] Under certain circumstances, a lawyer must, upon becoming aware of criminal or fraudulent conduct, report the violation to the highest acting authority in the organization.[28] Despite their potential for abuse by market participants,[29] there is nothing inherently fraudulent or illegal about

[26] *The Role of Lawyers in the Global Financial Crisis*, *supra* note 23, at 6 ("[R]esponsibility should turn in the first instance on whether the client's actions . . . actually violate law.").

[27] *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2011) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ."); MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1) (2011) ("[A] lawyer . . . shall withdraw from the representation of a client if . . . the representation will result in violation of the rules of professional conduct or other law.").

[28] A lawyer must "report up" unless he or she believes that doing so is not in the best interest of the client-organization. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2011). *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2011) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."). The Securities Exchange Commission promulgated rules under the Sarbanes-Oxley Act of 2002 that similarly require a lawyer, upon becoming aware of a material violation, to report up. *See* 17 C.F.R. § 205.3 (2010) (setting forth reporting requirements for lawyers).

[29] *See* Steven L. Schwarcz, *Protecting Financial Markets: Lessons from the Subprime Mortgage Meltdown*, 93 MINN. L. REV. 373, 387-90 (2008) [hereinafter *Protecting Financial Markets*] (discussing the moral hazard created by the "originate to distribute" model, whereby originators made and sold loans at a premium without regard to whether the borrowers could actually pay).

securitization transactions.[30] In fact, they provide many important economic benefits.[31] In such cases, where a client's actions result in harmful social consequences that do not actually violate the law,[32] the lawyer has no legal obligation to report those actions or to withdraw from the representation.[33]

### 2. Lawyers Do Not Have a Duty to Question Their Clients' Lawful Business Decisions

#### *i. Lawyers Are Not Trained to Make Business Decisions*

If the presence of potentially harmful consequences prevented lawyers from facilitating otherwise lawful securitization transactions, lawyers would be forced to substitute their judgment regarding the consequences of transactions for that of their clients.[34] However, lawyers, being experts in only matters of law, are not

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[30] Steven L. Schwarcz, *The Limits of Lawyering: Legal Opinions in Structured Finance*, 84 TEX. L. REV. 1, 6 (2005) [hereinafter *The Limits of Lawyering*] ("[T]here is nothing inherently deceptive or illegal about . . . structured-finance transactions . . . .").

[31] *See id.* at 6 n.29 (arguing that securitization is efficient, fair and economically desirable); *Subprime Mortgage Market Turmoil: Examining the Role of Securitization: Hearing Before the Subcomm. on Sec., Ins. & Inv. of the S. Comm. on Banking Housing & Urban Affairs*, 110th Cong. 126 (2007) (written testimony of Christopher L. Peterson, Assoc. Professor of Law, Univ. of Florida) (arguing that securitization, in general, has been a positive development for American consumers).

[32] This type of scenario was typical during the financial crisis. *See* Hill, *supra* note 23, at 344 ("[L]awyers were not themselves involved in anything they knew or had reason to suppose was fraudulent or even deeply flawed.").

[33] *See The Role of Lawyers in the Global Financial Crisis*, *supra* note 23, at 11 (concluding that lawyers have no legal obligation to resign from representation where the client's *lawful* actions may result in social harm); *cf.* In re Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549, 704-06 (S.D. Tex. 2002) (refusing to dismiss claims against a law firm when the complaint alleged, among other things, that the law firm issued structured finance opinions necessary to effectuate the client's allegedly *fraudulent* plan).

[34] *See The Role of Lawyers in the Global Financial Crisis*, *supra* note 23, at 10 (arguing that lawyers should not have a duty to second-guess their clients' business decisions).

trained to assess the costs and benefits of the transactions they facilitate.[35] To the extent that clients typically have more financial expertise and are better informed about the consequences of a securitization transaction, they are in a better position to decide whether to accept the risk of harm as a cost of doing business.[36] Even in situations where clients are not in the best position to assess risk,[37] efforts aimed at reducing harm should focus not on lawyer conduct but on whether to legally prohibit or otherwise limit potentially harmful transactions.[38] Ultimately, lawyers "should not have to decide, at the risk of liability, whether client actions are socially harmful where society itself has not made that explicit determination."[39]

#### *ii. Requiring Lawyers to Question Their Clients' Business Decisions Would Be Inefficient*

Additionally, imposing a duty on lawyers to second-guess or impede their clients' lawful business decisions would be inefficient

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[35] Kellogg, *supra* note 24 ("[T]he multifaceted transactions that are the fabric of the financial services industry demand a level of knowledge that surpasses the skills of even the savviest corporate counsel.").

[36] *See The Role of Lawyers in the Global Financial Crisis*, *supra* note 23, at 10 (arguing that clients are in a better position than lawyers to evaluate business transactions).

[37] For example, during the financial crisis, the "originate to distribute" model created perverse incentives for originators to completely disregard risk of borrower default. *See Protecting Financial Markets*, *supra* note 29, at 387-90 (discussing the perverse incentives created by the "originate to distribute" model).

[38] *See The Public Responsibility of Structured Finance Lawyers, supra* note 4, at 12 ("[W]here structured finance lawyers facilitate lawful transactions that create problematic externalities, the focus should not be on lawyer conduct but instead on whether to legally prohibit or otherwise limit those transactions."). For example, in *Protecting Financial Markets*, *supra* note 29, at 387-390, Professor Schwarcz argues that the excesses of the "originate to distribute" model can be managed by aligning the interests of originators and investors with a requirement that the former to retain a risk of loss.

[39] *The Role of Lawyers in the Global Financial Crisis*, *supra* note 23, at 11 (citing Steven L. Schwarcz, Reply, *We Are all Saying Much the Same Thing: A Rejoinder to the Comments of Professors Coffee, Macey, and Simon*, 84 TEX. L. REV. 93, 101-2 (2005)).

in at least two ways. First, vaguely defined duties to the public, such as a responsibility to prevent harmful social consequences, "threaten to increase the agency costs of legal representation, as lawyers may seek to pursue their own ideological goals in favor of client interests."[40] Second, a duty to prevent harmful social consequences would increase the actual costs of legal representation because lawyers would be required to expand the scope of their representation to include an analysis of the consequences of the entire transaction.[41] Such an analysis would require not only that lawyers be experts in law but in finance and economics as well.

#### 3. Enhanced Lawyer Responsibility Would Not Have Prevented the Financial Crisis

Proponents of enhanced lawyer accountability argue that "without lawyers and their ability to structure and document complex transactions the subprime mortgage boom and bust might not have been possible or would have been attenuated."[42] However, this argument overlooks the fact that companies generally have no obligation to retain counsel when engaging in business transactions.[43] Thus, while employing legal counsel may have been the most efficient way to "structure and document complex transactions,"[44] there is no evidence that the same transactions could not have been effected without the assistance of lawyers.

Others have proposed that lawyers "could have been more involved in [performing] due diligence on the actual mortgages."[45] However, even if lawyers had recognized the declining quality of mortgages being securitized, they might have supposed (as everyone

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[40] *The Limits of Lawyering*, *supra* note 30, at 29 n.150 (quoting Sean J. Griffith, *Afterword and Comment: Towards an Ethical Duty to Market Investors*, 35 CONN. L. REV. 1223, 1234 n.43 (2003))

[41] *See supra* note 5 and accompanying text (discussing the limited scope of structured finance opinions).

[42] William V. Rapp, *The Lawyers and the Meltdown: The Role of Lawyers in the Current Financial Crisis*, 11 INT'L FIN. REV. 135, 154 (2010) (arguing for enhanced professional standards and regulatory penalties for lawyers involved in securitization transactions).

[43] *See The Limits of Lawyering*, *supra* note 30, at 36 (recognizing the "existing norm that companies generally have no obligation to retain counsel when engaging in business transactions").

[44] Rapp, *supra* note 42, at 154.

[45] Hill, *supra* note 23, at 344.

else did) that the securitization transactions were appropriately taking the quality of the underlying mortgages into account,[46] as there is nothing problematic, at least in theory, about turning low-quality mortgages into AAA-rated securities so long as there is a large enough pool of assets.[47] Also, requiring lawyers to perform extensive due diligence on the actual mortgages would further raise the actual cost of legal representation by forcing lawyers to expand the scope of their representation and become experts in loan valuation.

### D. The Professional Responsibility of Lawyers after the Financial Crisis

Contemplating the legal profession, former Chief Justice Harlan Fiske Stone once lamented that modern business and finance have "made the learned profession of an earlier day the obsequious servant of business . . . ."[48] Although neither the Model Rules of Professional Conduct nor the Dodd-Frank Act have imposed any new duties on lawyers in the wake the financial crisis, now is a time of reflection, during which lawyers should reevaluate their role in business transactions.[49]

[46] Hill, *supra* note 23, at 344 (arguing that lawyers could have reasonably supposed that loan quality was being taken into account and that performing due diligence would have been practically impossible, given the enormous quantity of loans being securitized).
[47] *Id.* (explaining that in a loan pool large enough, even numerous defaults will not affect payment to holders of the highest rated tranches).
[48] *The Limits of Lawyering*, *supra* note 30, at 16 (quoting Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 7 (1934)).
[49] The most recent changes to the Model Rules have been to Rule 1.10 and concern imputation of conflicts of interest. ABA Comm. on Ethics & Prof'l Responsibility, Report 109 (2009) (altering Rule 1.10). Unlike the Sarbanes-Oxley Act of 2002, which was enacted in the wake of the Enron scandal, the Dodd-Frank Act imposes no new professional responsibilities on lawyers. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); *supra* text accompanying note 28 (discussing reporting requirements under the Sarbanes-Oxley Act).

### 1. Lawyers Should Be Trained to Better Understand Finance, Economics and Their Clients' Motivations

On a foundational level, lawyers should be educated to "better understand the core principles of corporate law and finance, thereby broadening their perspectives and enabling them to better identify and assess consequences."[50] Business lawyers must recognize that client actions can cause harmful consequences that are not immediately obvious, that market participants do not always see or appreciate the potential harm their actions may cause and that individuals often suffer from conflicts of interest due to compensation incentives.[51] Occupying the unique role of counsel, a risk-conscious lawyer may have the opportunity to curb hazardous corporate behavior.

### 2. Lawyers Should Inform Clients of Potentially Harmful Consequences and Consider Withdrawing from Representation If Their Clients Persist in Harmful Action

While a lawyer is not required to withdraw from represen-]tation where his or her client's actions do not amount to criminal conduct, the lawyer may still inform the client of potentially harmful consequences, counsel against courses of action that may cause harm and refuse to participate in conduct that is socially harmful.[52]

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[50] *The Role of Lawyers in the Global Financial Crisis*, *supra* note 23, at 13.

[51] *The Role of Lawyers in the Global Financial Crisis*, *supra* note 23, at 12 (discussing some of the risks inherent in the legal representation of business clients). Such a conflict of interest may arise, for example, where an individual earns a commission for making a loan but is not penalized if that loan performs poorly.

[52] MODEL RULES OF PROF'L CONDUCT R.1.16(b)(4) (2011) ("[A] lawyer may withdraw from representing a client if . . . the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement . . . ."); MODEL RULES OF PROF'L CONDUCT R. 2.1 (2011) ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."); *The Role of Lawyers in the Global Financial Crisis*, *supra* note 23, at 11 (arguing that lawyers have a

Lawyers that help to facilitate transactions that are later criticized are often subject to reputational loss or worse.[53] Thus, there are both practical and moral reasons for choosing to withdraw from representation.[54]

To date, the fallout from the financial meltdown has yielded only aspirational changes in professional responsibility. However, lawyers would still be wise to heed the lessons from this unfortunate experience. While it seems clear that lawyers did not cause this financial crisis, they may be in a position to prevent the next one.

Brian E. Berger[55]

right to inform their clients of harmful consequences and withdraw from representation if the client persists in its action)

[53] *See The Role of Lawyers in the Global Financial Crisis*, *supra* note 23, at 11 (explaining that when the public suffers harm, prosecutors and judges may be tempted to hold the lawyer liable despite actual legal liability); *see also* Browning, *supra* note 14 (reporting on a law firm's involvement in the sale of MBS backed by low-quality mortgage loans).

[54] *The Role of Lawyers in the Global Financial Crisis*, *supra* note 23, at 11 ("The lawyer's motivation [for choosing to withdraw from representation] may be aspirational, or it may even be practical.").

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