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Maureen Duffy-Lewis

Daniel B. Garrie

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OPINION

DANCING IN THE RAIN: WHO IS YOUR PARTNER IN THE CORPORATE BOARDROOM?

HONORABLE MAUREEN DUFFY-LEWIS[†] AND
DANIEL B. GARRIE^{††}

The first thing I ask a new client is:

“Have you been saving up for a rainy day?”

“Guess what? It’s raining.”¹

In the crime thriller, *Primal Fear*, Richard Gere’s character, Martin Vail, the masterful and overly confident criminal defense lawyer, utters

[†] Maureen Duffy-Lewis is a judge of the Los Angeles Superior Court. Her judicial career began in 1987, when she was appointed to the Los Angeles Municipal Court by Governor George Deukmejian. In 1996, she was elected, unopposed to the Superior Court of Los Angeles. Her assignments on the court have included assignment to the Clara Shortridge Foltz Criminal Justice Building which is the Central Criminal Court of Los Angeles conducting major felony trials and The Stanley Mosk Central Civil Courthouse, where she currently sits in department thirty-eight, hearing matters in Unlimited Jurisdiction General Civil. She is an author, teacher and popular lecturer at the Judicial and College Level. Judge Duffy-Lewis is from Los Angeles, graduated with a Bachelor of Arts from The University of Southern California, and received her Juris Doctorate from the Loyola Law School in Los Angeles.

^{††} Daniel Garrie regularly consults with attorneys and technologists on electronic discovery and discovery management issues related to litigation, commercial disputes, business claims, and enterprise information archiving implementation. Mr. Garrie was admitted to practice law in New York and New Jersey and is editor-in-chief of the Journal of Legal Technology Risk Management. Mr. Garrie has a Juris Doctorate from Rutgers School of Law, M.A. and B.A. in Computer Science from Brandeis University. Mr. Garrie specializes in the synchronization of policies with information technologies and related best practices to ensure legal compliance for enterprises worldwide. Mr. Garrie has published more than 30 articles and books on E-discovery, software, intellectual property, compliance, technology, legal, telecommunications, US and EU privacy policies, and a range of other e-law issues. Mr. Garrie resides in New York City and he can be reached at Daniel.garrie@gmail.com. Contributions for this essay include Michael Robak and Ronald J. Lewis.

1. *Primal Fear* (Paramount Pictures 1996).

those words to a hapless in-custody client charged with the murder of a beloved archbishop, and impresses the idea that when trouble comes, it will not be cheap. In today's corporate boardrooms, to paraphrase Martin Vail, it's raining! The executives and board members who long relied on the civil courts to resolve questionable behavior in the boardroom are now seen as mere criminals. Even well meaning board members, acting in a way they believe is consistent with their mandate and obligations are looking over their shoulder for potential criminal liability. The clouds continue to gather. This essay examines the importance of the white collar criminal lawyer to the new clouds gathering over the corporate boardroom – the clouds of e-discovery.

For as long as most can remember, what happened in the boardroom stayed in the boardroom, *unless* the U.S. Securities and Exchange Commission ("SEC") regulators wanted to chat.² All things done in the name of corporate activities seem to dance to the same music, and joint intermissions were called when the SEC or their brethren thought a company was going too low under the limbo bar. Even when legal action was taken it was almost always resolved with *meas culpas*, more oversight, and a lot of money.³ Even where criminal charges were threatened, though rarely filed, money, restitution, and fines seemed to assuage all involved.⁴

2. Even then, the SEC's enforcement mechanism was seen as lax. *See e.g.*, Toni Anne Puz, *Private Actions for Violations of Securities Exchange Rules: Liability for Nonenforcement and Noncompliance*, 88 COLUM. L. REV. 610 (1988). The legislative history of the 1975 amendments is replete with congressional concern over SEC passivity in the realm of exchange rulemaking and enforcement, suggesting that the express remedies provided by the 1975 amendments were intended to supplement, rather than to supplant, the availability of private actions. In an expansive study prior to the 1975 amendments, a senate committee noted that "the major regulatory problems in the securities industry have not been the result of the SEC's lack of authority but rather a "tame watchdog" that exercises its direct supervisory powers over exchanges only sparingly, preferring instead to cooperate with and defer to exchanges in the area of rulemaking. Congress observed that "[s]ixteen different years of amendments make clear Congress' readiness to assure the [SEC] the power to protect investors, but no amount of legislative tinkering can build within the SEC the commitment and vitality to make full use of the tools Congress provides." And it was not until the early 1980's amendments to the regulations that more enforcement authority was provided. *See e.g.*, James D. Cox and Randall S. Thomas, *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 DUKE L.J. 737 (2004) (discussing the amendments of the securities laws in 1984, 1990, and 2002, whereby Congress expanded significantly the SEC's enforcement arsenal).

3. Interview with Roderick Hills, Chairman of the Securities and Exchange Commission from 1975 to 1977, December 20, 2002, *available at* <http://www.sechistorical.org/collection/oralHistories/interviews/hills/hills1222002Transcript.pdf> ("You may recall, as is still the case, that the authority of the SEC's Enforcement Division to threaten a case was probably more important than bringing a case.")

4. David M. Weiss, *Reexamining the SEC's use of Obey-The-Law Injunctions*, 7 U.C. DAVIS BUS. L.J. 6 (2006)

Since the go-go days of the 1980's, as portrayed in Oliver Stone's *Wall Street*, many criminal lawyers have heard the din of the thunder clouds. The corporate scandals of Michael Milken, Ivan Boesky, and Charles Keating were transcended by the Enron, Worldcom, Adelphias, and Brocade scandals.⁵ The hue and cry from individuals financially ruined after years of hard work appeared on the front page of every newspaper and television nightly news program. The "perp walk" seemed to become a staple of the nightly news.⁶ To assist America's corporations' quest to comply, civil firms have opened up entire new areas of practice, focusing in corporate governance and compliance and, more importantly, the white collar criminal practice specialty tied to the more traditional business law practice. Rarely in the expansion of the business lawyer's office would one find a door that said "Criminal Lawyer." Criminal law in the boardroom had come into its own and prosecutors now had a new venue to explore, laws to prosecute, and people to protect.

In days gone by, the American public was interested in Wall Street's goings and comings but they were not overwhelmingly investing their retirement nest eggs on the corner of Wall and Broad. Enter the American public, who now invest in corporate America to the tune of trillions. It is estimated that nearly 50% of the American public invests in Corporate America through a number of financial vehicles ranging from stocks, bonds, and mutual funds, either individually or through their re-

"During 2005, the Securities and Exchange Commission ("SEC" or the "Commission") filed 947 enforcement actions and obtained a record amount of more than \$3 billion in penalties and disgorgement. As in any given year, the vast majority of these cases were not litigated but filed as settlements. In addition to money penalties and disgorgement, most SEC settlements levy "obey-the-law" injunctions – injunctions (or consent decrees) against future violations of securities laws in which a perpetrator agrees to "sin no more" or risk contempt of court—as a remedy. The injunction has been a "cornerstone" of the SEC's enforcement program since the Commission's founding in 1934."

5. The Past Enforcement Directors Roundtable: (television broadcast June 14, 2006), available at http://www.sechistorical.org/collection/papers/2000/2006_0614_SECEnforcement.pdf.

6. *Caldarola v. County of Westchester*, 343 F.3d 570, 572 (2d Cir. 2003)

"The "perp walk," is, when an accused wrongdoer is led away in handcuffs by the police to the courthouse, police station, or jail, [which] has been featured in newspapers and newscasts for decades. The normally camera-shy arrestees often pull coats over their heads, place their hands in front of their faces, or otherwise attempt to obscure their identities. A recent surge in "executive perp walks" has featured accused white collar criminals in designer suits and handcuffs. Whether the accused wrongdoer is wearing a sweatshirt over his head or an Armani suit on his back, we suspect that perp walks are broadcast by networks and reprinted in newspapers at least in part for their entertainment value. Yet, perp walks also serve the more serious purpose of educating the public about law enforcement efforts. The image of the accused being led away to contend with the justice system powerfully communicates government efforts to thwart the criminal element, and it may deter others from attempting similar crimes."

tirement 401Ks.⁷

Of course, the boardroom is not run by a bunch of nefarious criminal minds, but corporations that end up with criminal issues can end up losing, or worse, going out of business. A recent example is the criminal activity of Hewlett Packard's ("HP") former chairwoman, Patricia Dunn, who avoided the original felony charges that stemmed from a scheme to illegally acquire other HP board member phone records using a method called pretexting.⁸ When CEO's and board members make decisions that deeply affect a large number of Americans' financial well-being, no stone will be left unturned if questions of impropriety are raised.

The untrained ear of a Wall Street business or corporate types, including some of their civil lawyers, may have missed the early sounds of the new storms brewing. And this new thunder clapping overhead is but a portent of the storms to come. It is evident, given the dramatic corporate misdealing, class action litigation, and heightened awareness that Sarbanes-Oxley and other federal regulations seek to impose, the secrecy that enveloped the boardroom bunker is gone and corporate malfeasance can no longer be swept under the rug. Everywhere in corporate America, boards and their legal advisors are evaluating procedures, disclosures, and overall transparency to comply with new legislation and laws.⁹ Transparency is king and the boardroom bunker is no longer secure. Activity by corporate boards and their Presidents and CEO's - along with all individuals within upper management who are responsible for reporting to the board - is open for scrutiny. Especially, those who owe a fiduciary obligation to shareholders will find themselves in a potentially new category not covered by liability insurance. The new category? It is called Defendant, and some will become targets for criminal investigations. With this potential lurking, it behooves the corporate boardroom to add another watchful set of eyes and ears to listen for potential consequences of boardroom members' activities while exercising their duties. It is in the board's best interest to prepare. Discovery, for example, is essential in every lawsuit. But a new avenue is opening up with the advent of electronic discovery ("e-discovery") and it will need to be mastered in order to properly prepare for future litigation.

E-Discovery is becoming the norm in lawsuit discovery. E-mails,

7. Investment Company Institute, *Equity Ownership in America* (2005), available at http://www.ici.org/pdf/rpt_05_equity_owners.pdf.

8. See Market Watch, *All Charges Against Ex-HP Chair Dropped*, <http://www.marketwatch.com/news/story/charges-against-ex-h-p-chairwoman-patricia/story.aspx?guid=%7B80A6AC3F-5B09-4440-920F-4CD70DDE41D8%7D> (last visited Mar. 24, 2008); see also *Remsburg v. Docusearch, Inc.*, 816 A.2d 1001 (N.H. 2003).

9. See Proxy Voting Guidelines, www.ethosfund.ch.

documents, instant messages,¹⁰ Blackberry messages, and other digital artifacts¹¹ from the boardroom can be discovered today via e-discovery under the amended Federal Rules of Civil Procedure. The proposed rule changes relating to electronic discovery affect Rules 16, 26, 33, 34, 37, 45, and Form 35; went into effect on December 1, 2006.¹² The new rules are aimed at streamlining the discovery process and resolving ambiguity and uncertainty by requiring parties to address e-discovery in the earliest stages of litigation. From a very broad view, the rules are seen as, among other things, creating new disclosure requirements and standards, creating new meeting and conference requirements, changing or redefining the scope of discovery requests, and allowing some flexibility in the form of production.¹³

As e-discovery enters center stage and the latest cases on metadata, spoliation, or cost-shifting receive scrutiny, both corporate and criminal lawyers are swarmed by vendors wanting bigger, better, and faster document review tools.¹⁴ Yet, even with this awareness, a growing number of corporate lawyers and in-house counsel neglect to perform a thorough review of their computer systems creating a significant risk for themselves and their clients. Specifically, when these non-technical corporate attorneys construct policies and practices based only on assumptions about their Information Technology ("IT") system, the policies and practices can explode and create complex discovery problems in future litigation - unnecessarily creating civil and criminal risks for their companies. Corporate counsel cannot rely on reports of how the system was set up to run or how IT staff thinks it runs; counsel must learn how the company's employees actually use the system¹⁵ because reasonableness governs discovery obligations.

10. See, e.g., Careful: Employee E-Mails, IMs Must be Tracked, <http://listserv.edu-cause.edu/cgi-bin/wa.exe?A2=ind06&L=smallcol&D=1&P=38497> (last visited Dec. 1, 2006).

11. Marilee S. Chan, *Paper Piles to Computer Files: A federal Approach to Electronic Records Retention and Management*, 44 SANTA CLARA L. REV. 805, 809 (2004).

12. U.S. Courts, *Rules*, available at http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf.

13. See *Hiding the Inaccessible Truth: Amending the Federal Rules to Accommodate Electronic Discovery*, 25 REV. LITIG. 115 (2006).

14. Law.com, In House Attorneys Become IT Gatekeepers, Oct. 2005, available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1128342926735> (describing the corporate counsel response to the anticipated new e-discovery issues). The GC, in 2005, related that for many corporate counsel they cannot find enough ways to prevent disaster. *Id.* Presciently, Marathon Oil's General Counsel suggested ". . . it could be five years before the e-discovery frenzy calms down and the courts offer clear directions on what companies must produce. *Id.* Until then [Marathon GC] Kerrigan adds, e-discovery 'is like planning for Armageddon. No one knows how much is enough.'" *Id.* (emphasis added).

15. Browning Marean, E-Discovery Looks Like Risky Business, Law Technology News, Oct. 17, 2007 ("A significant challenge facing the profession is the need to attain sufficient competence to deal with the many deep complexities surrounding EDD.")

Cohasset Associates, a Chicago-based record management firm, conducted a survey in 2007 of record management professionals and concluded, in part, this bleak assessment of the state of corporate electronic records: "The number and magnitude of organizational and operational problems reflected in the survey findings collectively *represent stunning business risks*. Senior management should consider these risks unacceptable to have and untenable to continue."¹⁶

People who run corporations need more than just run of the mill governance, compliance, and regulatory attorneys; they need attorneys with criminal defense experience. Companies that do not seek criminal defense attorney advice for the corporate boardroom expose shareholders to unnecessary risks. Attorneys with general criminal defense and economic criminal defense experience *are steeped in dealings involving economic transactions with millions of potential documents involved in discovery*. And, since many white collar crimes are intent crimes which often hinge on circumstantial evidence, understanding how to comb through the mountains of evidence on behalf of the client's case is second nature. These cases so often depend on "[e]videntiary nuances and related inferences. . .and often involve numerous documents, many of which are complex financial records and sophisticated corporate materials that can only be fully understood with. . .those familiar with the vagaries of the underlying business transactions."¹⁷ Corporate lawyers must learn to collaborate with their criminal attorney brethren to help position companies to design policies and practices that are defensible. Of course, given the magnitude of the issue (Armageddon, indeed),¹⁸ one better grasps the shorthand of Martin Vails' "It's raining!"

16. Cohasset Associates, White Paper, *Electronic Records Management Survey, 2007*, available at <http://www.merresource.com/downloadWhitepaper.htm?fileId=1>(emphasis added).

17. Robert G. Morvillo, Barry A. Bohrer, and Barbara L. Balter, *Twentieth Survey of White Collar Crime: Motion Denied: Systematic Impediments to White Collar Criminal Defendants' Trial Preparation*, 42 AM. CRIM. L. REV. 157 (2005).

18. Law.com, *supra*, note 13.