

**PROGRAM – ETHICAL ISSUES IN CONSUMER FINANCIAL
SERVICES PRACTICE**

**American Bar Association
Committee on Consumer Financial Services
Winter Meeting – Scottsdale, Arizona
January 12, 2008**

PROGRAM – ETHICAL ISSUES IN CONSUMER FINANCIAL SERVICES PRACTICE

Presentation: *“What can we learn, what should we learn, and what have we learned from the seismic shift in the financial market?”*

Speakers:

Kathleen Keest, Center for Responsible Lending, Durham, NC
Eldon Spencer, Leonard O’Brien Spencer Gale and Sayre, Ltd., Minneapolis, MN
Oliver Ireland, Morrison & Foerster, LLP, Washington, DC

KATHLEEN E. KEEST

Ms. Keest is currently serving as a Senior Policy Counsel at the Center for Responsible Lending, in Durham, North Carolina. CRL is a non-profit, non-partisan organization dedicated to combating abusive financial practices. CRL is affiliated with the Center for Community Self-Help, a non-profit community development financial institution that has provided over \$5 billion of financing to low-wealth families, small businesses and non-profits around the country.

Previously, she was Deputy Administrator of the Iowa Consumer Credit Code and an Assistant Attorney General in Iowa, a specialist in state and federal consumer credit laws at the National Consumer Law Center, Boston, Massachusetts, and a legal services attorney in Iowa. She has served on the Federal Reserve Board's Consumer Advisory Council, has testified before Congress on mortgage, credit card, and regulatory issues, and has written and trained extensively on consumer credit and the subprime mortgage industry around the country.

BIOGRAPHICAL SUMMARY -- ELDON J. SPENCER, JR.

ELDON SPENCER, a CFS Committee member since 1990 and former Litigation Subcommittee Co-Chair, is a shareholder with the Minneapolis, Minnesota law firm of Leonard, O'Brien, Spencer, Gale & Sayre, Ltd. Eldon's practice involves a full range of services to clients in the financial services industry, from document creation and compliance review, governmental affairs and administrative/regulatory representation, transaction documentation, and litigation in federal and state courts. Eldon clerked for the late Judge Eugene Wright on the 9th Circuit Court of Appeals, and also served as a legislative assistant to former United States Senator Dave Durenberger. He is an adjunct professor of banking law at William Mitchell College of Law, and an adjunct professor of consumer law at Hamline University School of Law. Eldon has served on the boards of numerous civic, environmental, and artistic and service organizations, and is the immediate past Chair the Bloomington, Minnesota, Planning Commission. He received his B.A. *magna cum laude*, from Carleton College, before earning an M.A. in Economics from the University of California and his J.D. from Harvard Law School, where he served for two years as an editor of the Harvard Law Review. He maintains active membership in the State Bars of Minnesota and Wisconsin.

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Professional Summary



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Education

- Yale University (B.A., 1970)
 - University of Texas School of Law (J.D., 1974)
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Bar Admissions

Admitted only in

- District of Columbia
- Illinois
- Massachusetts

Oliver Ireland is a Partner in the Financial Services Practice Group in Morrison & Foerster's Washington, D.C. office. Mr. Ireland's practice focuses primarily on retail financial services including electronic commerce, compliance with Federal Reserve regulations, including Regulations Z and E, compliance with the Gramm-Leach-Bliley Act privacy provisions, the Fair Credit Reporting Act, E-SIGN, the U.S.A. PATRIOT Act and telemarketing rules. His practice also includes all types of payment transactions, including compliance with NACHA rules, bank regulatory issues and other aspects of financial markets such as margin lending.

Prior to joining the firm, Mr. Ireland served as Associate General Counsel of the Board of Governors of the Federal Reserve System, Vice President and Associate General Counsel of the Federal Reserve Bank of Chicago, and Attorney, the Federal Reserve Bank of Boston.

Mr. Ireland has been named one of Washington's top banking and privacy lawyers by the *Washingtonian* magazine (2004) and he is listed in *The Best Lawyers in America* (2006 – 2009) and *Washington DC Super Lawyers* (2008) as a leader in the field of banking law. He was named a leading lawyer in financial services law in the *Chambers USA Guide to America's Leading Business Lawyers* put out by Chamber & Partners Publishing (2006-2008).

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***What Can We Learn, What Should We Learn, and What Have We Learned From the
Seismic Shift in the Financial Markets?***

The architects of the current financial situation are many and diverse. Few categories of players whose judgment was involved in shaping the myriad forces that converged to make this “extreme event” can escape some measure of responsibility.

This session will present an opportunity to discuss what lessons lawyers may take from this breakdown – both as professionals and as citizens.

The role of lawyers outside of specific litigation: Advisors vs. Advocates

The Canon of Ethics most of us learned commanded us to “zealously represent” our clients within the bounds of the law. When we have an assigned role in the course of specific litigation, we have a good idea of what that means.

But outside that context, what does it mean? The Model Rules of Professional Responsibility differentiate between “Advisors” and “Advocates.”

Model Rule 2.1 “Advisor”

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. 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.

Questions for Discussion:

1. “Legal” vs. “Illegal”

Over the past three decades, the trend was toward greater deregulation, (some parts of the field more so than others). There were fewer explicit prohibitions, leaving only generalized principles: “safety and soundness”, “unfair and deceptive acts and practices”, and various common law principles – fraud, misrepresentation, fiduciary duty, etc.

Outside the litigation context, how does the business lawyer help the client determine appropriate boundaries for business conduct?

2. Playing by the rules vs. changing the rules

Lawyers representing clients in specific disputes have a bench mark against which to evaluate their clients' behavior, and the code of professional responsibility lays out some fairly specific guidelines to help lawyers "play by the rules."

But what factors should lawyers consider when they, in the course of their professional lives as lawyers, try instead to change the rules?

i. Is there a difference when it is in the context of representing specific clients than when it is "free-lance?"

ii. Has the competitive nature of the legal practice made a difference?

3. Accountability? too much or too little?

Over the last fifteen years, one of the trends in this field has been to minimize corporate conduct to legal exposure on many fronts.¹

i. Knowing what we know now, should there have been more legal accountability?

ii. Did responsible legal advice lose leverage with the business side because the perceived gains too far outweighed perceived legal risk?

iii. What standards of conduct are appropriate – workable – and sufficiently specific, in the case of different participants in the mortgage lending marketplace?

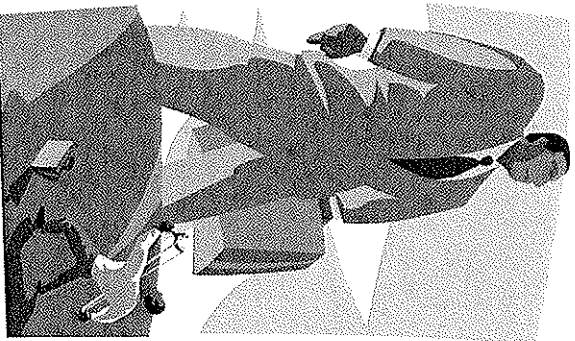
- brokers
- appraisers
- realtors
- lenders/investors
- trustees
- servicers
- "counselors"

iv. What standard of care should a court apply in determining whether a standard of conduct was violated, causing damages?

- actual knowledge
- constructive knowledge
- *respondeat superior* extended to contractors as well as employees

¹ See, e.g. general themes in Keest, *Disarming David*, in this session.

Disarming David



Professional Responsibility: What do we owe & to whom?

ABA Consumer Financial Services

January 12, 2009

Kathleen Keest*

Senior Policy Counsel, Center for Responsible Lending

The opinions expressed are those of the author, and not necessarily of CRL or anyone else, although I am sure that there are at least a few others.

Consumer Issues in Court

- Not a battle of equals ...
 - Not “B2B” business disputes
 - Not “P2P” disputes between individuals
 - Individual v Corporation, which puts the parties on an unequal footing

“All Men Are Equal Before the Law”

- American system is *Adversarial*, not **Investigatorial**
 - Each party requires a “champion” – an advocate -- to navigate the complex process and even more complex content of the legal system
 - The “champions” are professionalized
 - Post graduate degree required (expensive to get)
 - Certification required
 - Not cheap (See above)

A functioning “adversarial” system requires

- Each party to have access to a “gatekeeper”
- For gatekeepers to effectively keep the scales of justice balanced, need
 - Tools
 - The wherewithal....

Problem # 1:

- Blunting the tools
 - Deregulation
 - Leave the market to “market forces;” reduce regulation
 - Preemption
 - Federal rules and agencies preempting state law and state enforcement

Problem # 2

“Ninety percent of our lawyers represent ten percent of our people.”
Pres. Carter, 1978



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"I'm afraid you're retaining lawyers."

“Old” Thinking: Effort to level the playing field a little

- * Consumer protection, civil rights statutes with “fee-shifting” provisions: law violators must pay attorneys fees for prevailing consumers
- * Procedural rules to allow for efficient, economic access to the courts (class actions)
- * Add consumer protection authority function to public enforcement (e.g. state AGs, regulators)

Improves Access to Gatekeepers: The 3-legged stool

- Private enforcement / Non-profit
- Private enforcement / “private attorneys general” to make it possible for consumers to be represented
- Public enforcement
 - (*at least the agencies that want to)

“New” thinking: shorten the legs on that three-legged stool

Private enforcement / non-profit

Prohibit legal services from receiving attorneys fees from successful representation & prohibit class actions

Private enforcement/ private bar

Make economically less feasible to make a living by representing consumers – by various ways of reducing effectiveness of fee-shifting provisions, various means of restricting class actions, tort “reform”, and “demonizing” the lawyers in the collective mind through harsh rhetoric and tarnishing with broad brush strokes (“greedy trial lawyers” “greedy plaintiff’s bar”, etc),

Public enforcement /

“Starve the beast” tax rhetoric and policies / “government is the problem” rhetoric/

What the heck Bar access to courts entirely...

Mandatory, binding arbitration / limited judicial oversight

..... And don't forget the blunted tools.

Lawyers' Role: Advocate vs. Advisor

Canon 7: “A lawyer should represent a client zealously within the bounds of the law”

Outside context of specific litigation, what does that mean?

Model Rule 2.1 Counselor/Advisor

“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. 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.”

