



# California Corporate & Securities Law

## They May Be At The Gate, But Lawyers Are Not Gatekeepers

By [Keith Paul Bishop](#) on October 6, 2011

In the sixth century BCE, the king of Clusium (a city in Tuscany) attacked Rome. A one-eyed junior officer, Publius Horatius Cocles, took up the task of defending a key bridge, the Pons Sublicius, when his more senior officers were casting about in confusion. Centuries later, the English historian, politician and poet Thomas Babington Macaulay immortalized Horatius' valiant actions in his *Lays of Ancient Rome*:

Then out spake brave Horatius,  
The Captain of the Gate:  
"To every man upon this earth  
Death cometh soon or late.  
And how can man die better  
Than facing fearful odds,  
For the ashes of his fathers,  
And the temples of his gods?"[\[1\]](#)

Hearing these stirring lines, who does not aspire to the heroic and honorable role of gatekeeper?

Recently, Professor [Stephen Bainbridge](#) posted these [remarks](#) in which he promotes the concept of lawyers as gatekeepers. However noble the sentiment, I believe that the courts have wisely avoided enduing attorneys with the mantle of gatekeeper. In fact, the last time I looked, I couldn't find a single reported decision in the U.S. holding that lawyers are gatekeepers. Here are some reasons why I object to gatekeeper status for attorneys:

**Conflicts of Interest.** If a lawyer is a gatekeeper, then she has responsibilities beyond the client. It establishes a situation akin to Justice Louis Brandeis' notion of "counsel to the situation" rather than counsel to the client. Even Brandeis ran into a lot of trouble with clients who thought that he should be looking out for their interests, and not the interests of the situation. See Melvin I. Urofsky's fascinating biography, *Louis D. Brandeis: A Life* (pages 65-70). Our legal system works best when a party has a lawyer that represents only that party and not the situation, the deal or society as a whole.

**Attorney-Client Confidentiality.** Gatekeeper status invites violations of the confidentiality of attorney-client communications. For example, the Security and Exchange Commission's Part 205

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rules purport to immunize attorneys who disclose client confidences in certain circumstances. In California, the State Bar Act requires attorneys to “maintain inviolate the confidence[s], and at every peril . . . to preserve the secrets, of his or her client[s]. Cal. Bus. & Prof. Code § 6068(e). This obligation is independent of an attorney’s obligations with respect to the attorney-client privilege as set forth in the Evidence Code (Sections 950-962) and the California Rules of Professional Conduct. Jim Fotenos, Steve Hazen, Jim Walther and Nancy Wojtas and I spilled alot of ink over this topic in this [law review article](#).

**Regulatory Capture.** As I noted in this [piece](#), the lawyer as gatekeeper may be more encouraged to stay in the good graces of the regulatory agency than to act as a vigorous advocate for his or her clients’ interests.

***Quis Custodiet Ipsos Custodes?*** If lawyers are gatekeepers, who will watch the gatekeepers? Presumably, this will be the regulatory agencies and thus we are led back into the problems of divided loyalties and regulatory capture.

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[1] The Roman historian, Titus Livius, in *Ab Urbe Condita Libri* (Books from the Founding of the City [Rome]) sums up Horatius’ accomplishment as follows: “pons sublicius iter paene hostibus dedit, ni unus uir fuisset, Horatius Cocles; id munimentum illo die fortuna urbis Romanae habuit” (the Sublician bridge had nearly been given to the enemies, except for one man, Horatius Cocles, who the good fortune of Rome had as its defense on that day). Although Livy was a Roman historian, he had no first-hand knowledge of Horatius whose exploits occurred several centuries before Livy’s birth.

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