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Securities litigator
Nicki Locker '83
defends companies
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SPEAKING TRUTH TO FRAUD

The board of directors has just learned that its company's numbers aren't adding up. Nicki Locker '83 is ready to defend them, but first they have to come clean.

BY JONATHAN RABINOVITZ

It looked like a routine insider trading case. A flurry of sales in the stock of a software company, Critical Path, had occurred in the hours before the company released a disappointing quarterly statement.

ON TUESDAY, JANUARY 30, 2001, Wilson Sonsini Goodrich & Rosati dispatched Nicki Locker, a 43-year-old partner, to look into the matter for the company, one of the firm's clients. Her first few conversations with employees in Critical Path's San Francisco offices turned up nothing unusual, but then Larry Reinhold, the newly recruited chief financial officer, pulled her aside. He was trembling and told her that they needed to speak privately—on the telephone—as soon as she left.

"Are you sure you're not being hysterical?" asked Locker, a native New Yorker who is known for asking the most blunt questions in the most disarmingly friendly manner. He assured her he wasn't.

A few hours later, Locker understood what Reinhold had discovered. Months later it would be determined that roughly 20 percent of the previous two quarters' reported revenues did not exist. But on that day all Reinhold and Locker knew was that several transactions appeared to be questionable.

Critical Path, a four-year-old dot-com with a market value of nearly \$2 billion, was about to be one of the first companies to enter a new era of securities litigation. And the challenge the case would pose—winning mercy from government lawyers by documenting fraud and restoring good corporate practices—would soon be the priority assignment for Locker and other securities lawyers.

As soon as Locker finished her telephone conversation with Reinhold, she kicked into crisis mode. She is a lean, energetic woman who gets antsy if she hasn't done her morning run of five miles, and over the next 72 hours she barely slept as she prepared the company to take a series of emergency measures, from halting trading in its stock to suspending the executives who appeared to be responsible for a fraud.

The pivotal moment came at the emergency meeting of Critical Path's board of directors that she had organized at Wilson Sonsini's San Francisco office. It started at 3 p.m. on Thursday and lasted past midnight. None of the directors were prepared for Locker's and Reinhold's news: The company's numbers appeared to be false, and immediate action was needed. There were people at the board meeting who asked whether they could have more time to study the problems before alerting the market and regulators, says Reinhold. Locker answered that it was essential to go public with the problem immediately, he adds.

On Friday, February 2, at 9:09 a.m., the NASDAQ

announced it had halted trading in all shares of Critical Path. The company had issued a news release declaring that its previous quarter's results may have been "materially misstated" and that two top executives had been placed on leave. The board had asked Locker to conduct an investigation. The company's existence turned on whether Locker could quickly determine what had happened and correct the problems.

Speaking of her response those first three days, Locker says, "I did what any lawyer would do." But other lawyers disagree. "She was doing post-Enron crisis control in a pre-Enron environment," says Joseph Grundfest '78, W. A. Franke Professor of Law and Business and a former commissioner on the Securities and Exchange Commission. "She was ahead of the curve."

A New Era

Securities litigators have a different job now than they did a couple of years ago.

Before 2002, they were primarily dealing with shareholder lawsuits and plaintiffs' attorneys, battling to get the claims dismissed and generally settling those that weren't. Today, lawyers like Locker are more concerned with cooperating with the SEC and the Justice Department, conducting internal investigations of their clients, and pushing them to improve governance practices. Enron, WorldCom, and other frauds led to this change in the securities law practice. The biggest cases in 2003 aren't about missed forecasts, but about big financial restatements, accounting irregularities, the handling of initial public offerings, and conflicts of interest.

At a conference of financial managers in San Jose in May, Locker was on the keynote panel with one other speaker, Harold Degenhardt, the district administrator of the SEC's office in Dallas. Degenhardt says that the SEC had 262 cases for financial fraud and disclosure in 2002, more than double the number it was investigating in 2001. Today's problems don't come from "the tension between aggressive and conservative accounting, but from legal versus illegal accounting," he says. And he advises the executives in the room that when the SEC invites them in for a chat, they should come in immediately. "We don't like people to miss our message," he says. "It hurts our feelings."

Locker takes the microphone. She is one of the few women in the room, before a Silicon Valley crowd of 150, standing out from the button-down shirts and khaki pants in

her elegant St. John suit, with Peter Pan lapels, that complements her piercing green eyes. Her talk concentrates on the subject that is on everyone's mind: "How to get off the SEC's radar screen." There's no easy answer, she warns, noting that even companies in compliance with Generally Accepted Accounting Principles have found themselves before the SEC. She urges companies to implement systems to detect fraud. That would include, for instance, a quarterly review of all deals in which the company is both buying from and selling to the same partner. And she cautions against Degenhardt's advice to drop by immediately after receiving his call. "You don't go by there until you've done some type of investigation," she says. The company needs to know beforehand how serious the problem is, as well as to demonstrate its intent to get to the bottom of it, she adds.

The respect Locker shows to the SEC is typical of her style—and an important new trait for lawyers handling today's securities cases. The relationship between plaintiffs'

Nicki Locker was certainly bright. She graduated from Yale College summa cum laude in a special major she designed herself (law and ethics in medicine) and was elected to Phi Beta Kappa. In her senior year, it appeared that she would fulfill her mother's dream. She was accepted into the joint MD/JD program at Duke University and was ready to go until she had a sudden revelation. "I didn't like to look at blood," she says.

Locker grew up in Queens, and she has the accent to prove it. Her mother was the general counsel at Queens College. Her father, a mechanical engineer, was a national handball champion. Locker was an all-city field hockey player and a member of the tennis team at Yale. She recently ran a marathon and is now training to do a triathlon.

For law school, Locker decided that she needed to get away from the East and enrolled at Stanford. She was a clerk to Anthony Kennedy, at that time a Judge on the U.S. Court of Appeals for the Ninth Circuit (now a Justice on the

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and defense lawyers in securities litigation has traditionally been as contentious as any in a profession that has in recent years lost much of its civility. "You see lawyers on both sides making extreme arguments," notes Robert Gans, a plaintiffs' lawyer who has been litigating against Locker for three years in a case involving the company Network Associates. Many plaintiffs' lawyers believe that corporate executives are out to defraud shareholders, and many corporate lawyers see all shareholder lawsuits as frivolous, he says. "Nicki isn't one of those," he adds. "Aside from being an excellent lawyer, she's a straight shooter—she doesn't hide the ball."

Such credibility is of particular importance now, because resolving cases involves a greater amount of collaboration between the two sides. It's no longer enough to simply get the case dismissed or have the insurer pay out a settlement. Increasingly, the company must work with the parties bringing the action to show that it has adopted better practices.

Grundfest highlights this change in a forthcoming article. "Settling entities will have to agree to forms of behavior modification that will promote 'good governance' agendas and provide for active monitoring designed to assure that wrongful conduct does not recur," he says. "The simple injunction commanding 'go and sin no more' will become scarcer in the evolving enforcement environment."

An Unlikely Securities Star

Nicki Locker was not supposed to be a securities litigator. "Every good Jewish mother wants a bright daughter to be a doctor," says Lola Locker, Nicki's mother.

Supreme Court), then joined Wilson Sonsini, where she has stayed her entire career. She married Lionel Boissiere, MBA '85, in 1986, and they have a nine-year-old son, Jacob, and a seven-year-old daughter, Jaye Cori.

Locker's career is unusual in that she started in intellectual property, migrated to commercial litigation, then, as a partner, decided to make her specialty securities litigation, a field in which the firm is renowned. "In lieu of a midlife crisis, she decided to change directions in her career," remarks Boris Feldman, a Wilson Sonsini partner and one of the nation's most highly regarded securities litigators. Few other lawyers, he says, could have done it: She would put her children to bed, then read decisions, briefs, and the statutes into the early morning hours. "In very short order she knew as much as any of us," he says.

Locker insists that she's not entirely sure why she made the switch. She says she was drawn to securities litigation partly because that's where the big cases are, and partly because it seemed like a challenge. "I want to be where the action is," she says. "I like pressure, I like high profile, I like very intense. What can I say? I think this work is a blast." And she makes an admission that would raise the eyebrows of some corporate defense lawyers: "If I weren't at Wilson Sonsini, I'd love to work at the SEC."

The switch only added to her stature within Wilson Sonsini. She has served on the executive and compensation committees and was the co-chair of the member nominating committee, which selects new partners. Larry Sonsini, the firm's chairman, calls her a leader who has a "future in high

level management” at Wilson Sonsini.

What makes Locker’s success all the more remarkable is that securities litigation remains one of the last male bastions in the legal profession. For better or worse, there’s a machismo to the field, and a widespread perception remains that women face a tougher time being rainmakers in such high-stake cases, says Feldman. Locker, however, has managed to build a strong client list, including Agilent Technologies, Guidant, I2 Technologies, Juniper Networks, Networks Associates, and Veritas Software, among others.

Settling with Reforms

No case has done more for Locker’s reputation for being on the leading edge of securities litigation than a giant shareholder lawsuit charging that the stock prices of several hundred initial public offerings were fraudulently inflated. It involves 309 companies that went public and the 55 brokerage firms that underwrote the offerings. There are dozens of defense lawyers on the case, but Locker represents more issuers than anyone else—50 high-tech companies—and she was one of the two defense lawyers for the issuers who presented oral arguments in the case.

After U.S. District Court Judge Shira A. Scheindlin declined to dismiss the claims, Locker and the other lawyers representing the issuers worked with the insurance companies to hammer out a proposal for an unprecedented settlement, guaranteeing to pay investors \$1 billion if the plaintiffs

Assuming the settlement goes through, it will be a coup for the issuers. The guarantee would average out to roughly \$3.3 million per issuer, to be paid—if at all—by the insurers. “The issuing companies probably view Nicki as a hero,” says Grundfest. “It may get them out of this complex litigation without having to dig into corporate pockets.”

The deal, however, is also significant for what it shows about corporate defense lawyers being willing to step up and reform corporate practice. Whether the issuers publicly accept the plaintiffs’ argument that they should have been aware of the alleged stock manipulations by the underwriters, the settlement places the issuers in the position of adding pressure to the underwriters to improve their practices. *New York Times* reporter Gretchen Morgenson writes that the proposed settlement creates an incentive for the companies to assist the plaintiffs’ lawyers in their action against the Wall Street firms. Locker says it’s too soon to say whether that incentive will lead to any action. But Melvin Weiss, the lead lawyer on the other side, told Morgenson that the agreement would require issuers to provide documents and other support to the shareholder lawyers.

The IPO case is unique among securities cases in its scale and its focus on public offerings. But even in more typical cases, Locker has demonstrated an ability to win for her clients, while also improving corporate practices. Take her representation of Network Associates, a company that had acknowledged problems in its accounting and had restated

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do not win at least that much from the underwriters. “This is the mother of all securities settlements,” remarks Jeff Rudman, a partner at Hale and Dorr who serves with Locker on the steering committee of lawyers representing the issuers.

The settlement proposal, which has yet to be approved, is not the work of one lawyer, but Rudman describes Locker as invaluable in working through the “endless negotiations” with insurance lawyers and plaintiffs’ lawyers. “If there’s a semicolon missing on page 42, she’ll find it,” he says. And she made sure that the very complicated formulas in the deal were not obfuscated in jargon, but spelled out clearly. Says Rudman: “Other folks in the room might be abashed at saying, ‘I don’t know what this means,’ but Nicki would interrupt, ‘Look fellows, I know you’re all geniuses, but why don’t you explain it to me, because I know I’m not stupid.’” (One colleague refers to Locker as Columbo with a St. John’s wardrobe.) The problem often wasn’t with Locker, but with a clause that didn’t make sense.

its earnings and revenues.

Locker and other lawyers at Wilson Sonsini aggressively fought a class action lawsuit against their client, and in March they succeeded in having a large portion of the fraud claims dismissed. The briefs highlighted her encyclopedic grasp of the facts. They persuaded the judge, for instance, that the plaintiffs’ confidential witnesses didn’t have the basis to know the information that they had provided the plaintiffs. And the judge was also convinced that the complaint’s allegations weren’t “sufficiently particularized” to state a claim for revenue recognition fraud.

In the past, such a court outcome would have been sufficient representation for a corporate attorney, but Locker did more. She scrutinized the company’s operations, and, in the areas where it did not meet best practices, she worked with the new management to make improvements. Kent Roberts, general counsel at Network Associates, says that the first few times he met her, it didn’t feel like she was working for him,

because she was so tough in her questions. Only now does he fully appreciate what she did. “One of the most important things about lawyering is the ability to change behavior so it’s more compliant with the law,” he says. “She personifies that ability.”

Notwithstanding the court victory, Network Associates’ case is far from over. The company’s former controller pled guilty in June to charges of securities fraud. That plea would cause headaches for any litigator defending a securities class action, but at least Locker’s credibility is still intact.

weekend retreat in Southern California. Over the next few weeks they interviewed 20 more. The team read over thousands of pages of sales contracts and accounting documents.

The moment of truth came on April 18—78 days after Locker first learned that something was amiss—when she presented the findings of her investigation in an informal hearing before six members of the SEC. She laid out all the transactions that need to be restated. She provided the SEC with the number of employees who had been terminated for questionable behavior, described their roles, and then told of

“One of the most important things about lawyering is the ability to change behavior so it’s more compliant with the law,” says a client of Locker’s. “She personifies that ability.”

“The facts in this case have only gradually come to light, but I’ve always been confident that she is upfront about the basis of her knowledge,” Gans says. “And in the process she has done a great job for her client.”

Cooperating with the SEC

Proof that being open can be the best defense is perhaps best seen not in a case brought by plaintiffs’ lawyers but when the SEC is knocking at a company’s door. And with Critical Path, Locker embraced that approach.

On the day the company’s stock stopped trading, Locker knew that if the SEC brought a §10(b)5 enforcement action, essentially a fraud charge under the securities laws, it would be fatal to the company. With the company’s blessing, she set out to do an investigation that would satisfy the commission rather than try to deflect its inquiry.

In the past, corporate defense lawyers didn’t always conduct an internal investigation when accounting problems were discovered. They didn’t want to be doing any work for the plaintiffs’ lawyers. In February 2001, the plaintiffs’ lawyers were circling Critical Path, but Locker knew that the best thing she could do to defend the company was to air its dirty laundry and clean up its practices so thoroughly that the SEC would see no need to take further action.

“We had to establish our credibility,” she explains. “We wanted to hand over the fruits of our investigation and have it wrapped up for them. We needed to show that Critical Path had become a good corporate citizen.”

In the first weekend after the emergency board meeting, Locker, with assistance from colleagues, interviewed 30 employees in Critical Path’s sales department, who were at a

the new managers who had been recruited. She detailed the new accounting systems that would ensure that revenues would not be counted until sales were fully completed. And she pointed to other changes in corporate governance, among them new internal auditing practices, that would prevent fraudulent practices from occurring again.

The SEC accepted most of Locker’s findings. And in February 2002, in return for the company’s having owned up to the problems, the agency settled the case with its most lenient cease-and-desist order. No fines were levied, no sanctions imposed.

The result is that Critical Path is alive—an outcome that was once very much in doubt. The company avoided bankruptcy, and it held on to customers who had been understandably wary about buying its products. While it’s a much smaller company—in the number of employees and its ambitions—than two years ago, it remains in business.

And Locker’s handling of the case now looks like it was a blueprint for the SEC on what to expect from companies under serious scrutiny. Seven months after her appearance before the commission, the agency issued a report on the “relationship of cooperation to enforcement decisions.” It says that the commission, when considering enforcement actions, will take into account the company’s response to the crisis: “Did the company commit to learn the truth, fully and expeditiously? . . . Did the company promptly make available to our staff the results of its review? . . . What assurances are there that the conduct is unlikely to recur?”

When Locker worked the Critical Path case, she covered every point that the SEC’s five-page report lists. Indeed, it’s a report that could have been written by Nicki Locker.