

**AMERICAN BAR ASSOCIATION
TASK FORCE ON CORPORATE RESPONSIBILITY**

Supplemental Statement by Elaine J. Mittleman, Esquire
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Mr. Chair, Members of the Commission.

I am presenting this statement as a supplement to my testimony presented at the hearing on October 25, 2002, in New York City.

I. The Final Report of the Task Force must include a section addressing the need to protect lawyers who raise difficult questions and face retaliation or termination.

The Task Force should address the very real dilemmas that lawyers face when raising difficult ethical issues. It is important that lawyers receive adequate protection. Several witnesses have made this point. At the New York hearing, Dean Stephen Gillers suggested that the plight of the employed lawyer who follows ethical requirements and then faces potential retaliation should be addressed. He noted that in-house lawyers are probably in a more difficult position than outside counsel, because their employment is at risk. For outside counsel, losing one client may not be threatening to the lawyer's very livelihood, but can still be an unfortunate outcome. In addition, Dean Gillers indicated that a wrongful discharge claim should be permitted to be a tort, rather than a contract, claim, because a tort claim has more teeth.

Professor Stephen McG. Bundy has also suggested that the Task Force should discuss protection for lawyers. In his statement, Professor Bundy explained:

The hard fact is that lawyers who report misconduct over the heads of their business colleagues often risk their jobs and even their careers. The risk is most grave for in house lawyers. Lawyers who comply with Model Rule 1.13 or who reasonably believe that they are doing so need and deserve more protection.

Statement of Professor Stephen McG. Bundy, dated November 1, 2002, at 3.

I believe that the Task Force should make a very strong statement that lawyers should receive protection. Moreover, the possibility of having to pursue a wrongful discharge lawsuit if a lawyer has suffered retaliation does not constitute adequate

protection. A wrongful discharge lawsuit may provide protection as a last resort. However, the necessity of initiating burdensome litigation to attempt to restore one's career is itself a strong disincentive for any lawyer to take an ethical or difficult position.

I suggest that the Task Force work on fostering a culture that encourages lawyers to express their ethical concerns. The Task Force should also take the lead in establishing customs that show disapproval for actions of retaliation. I believe that a public education project would be very useful in showing the harm - to the client and to the public - in punishing lawyers who give their best independent professional judgment, no matter how unwelcome. The best protection that can be provided for lawyers is to make retaliation against them a professionally-condemned action.

II. The Final Report of the Task Force must include a section addressing the need to encourage lawyers to take a more active and independent role in addressing ethical concerns.

The Task Force should address the need to encourage lawyers to take a more active and independent role by raising ethical and other substantive concerns. Although the Task Force has not explicitly addressed specific ethical failures in the recent corporate governance scandals, there has been some recognition that lawyers did not, in some cases, take as active a role as would be desired. The Bar Association of San Francisco made this point, as follows:

The recent failures of corporate responsibility do not appear to be the result of inadequacies in the ethics rules, but rather of the failure of lawyers properly to conform their professional conduct to already existing rules. ... The existence of these rules, which contain many of the provisions recommended by the Task Force, did not deter the stunning collapse of Enron.

Statement of the Bar Association of San Francisco, November 11, 2002, at 10.

We share the Task Force's concern that too many lawyers engage in conscious avoidance and fail to report violations by corporate clients of its legal obligations or violations of law which are likely to result in substantial injury to the organization or to the public at large. We do not believe, however, that Model Rule 1.13 currently permits a lawyer to turn a "blind eye" to violations of the securities laws or other serious misconduct. At most, a comment should be added to the Rule, or an ethics opinion on the subject should make clear, that lawyers for the corporation cannot remain deliberately ignorant of known misconduct, but rather that they must respond appropriately in the best interests of the organization.

Statement of the Bar Association of San Francisco, November 11, 2002, at 16.

In his statement, Professor Eli Wald emphasized that the allegations in the present cases involving corporate governance suggest an industry-wide corporate law failure, rather than the presence of simply a few bad apples. Statement of Professor Eli Wald, November 11, 2002, at 6.

I believe that the Task Force should specifically address the need for lawyers to be more active in raising ethical concerns. The culture of the practice of law must include a much more explicit focus on lawyers exercising their independent professional judgment. The Task Force should also provide suggestions and guidelines by which the need for more active questioning by lawyers can be encouraged and even rewarded. The particular problems facing in-house lawyers and junior lawyers in a hierarchical organization should be noted.

Further, it would be useful for the Task Force to make specific recommendations, including the creation in large organizations of an ombudsman to which lawyers can report their concerns without fear of retaliation. The ombudsman may be able to advise lawyers about possible avenues for expressing their ethical concerns in a way that can minimize retaliation. The ombudsman may have some investigative authority that would permit review of the validity of the lawyers' concerns. The organization thereby would benefit from an independent perspective on matters that may be quite sensitive. The recent scandals show convincingly that the failure to address serious ethical violations can be destructive to the organization, so it is in the long-run interest of all participants that the professional judgment of lawyers be fully exercised.

I would be pleased to provide further assistance to the Task Force and I very much appreciate the efforts of its members.