

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

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Mr. Chair, Members of the Commission.

I am very honored to appear before you today. I hope that my personal experience in confronting a serious ethical issue will be instructive to this Task Force. However, I have given a great deal of thought to the purpose of this Task Force and I hope that my comments will be supportive of a broad perspective of the issues facing our profession.

I have studied and evaluated the statements by the witnesses from the Public Hearing in Chicago and those statements are also reflected in my testimony. I fully agree that the urging of Alfred P. Carlton, Jr., President of the American Bar Association, that this Task Force should make broad policy recommendations for the ABA House of Delegates. As Mr. Carlton emphasized, a mere tweaking of the Model Rules is not sufficient to address the crisis of our profession today. I will, therefore, attempt to make some public policy arguments, rather than focusing primarily on the language of the Model Rules.

I think it must be appreciated that the status quo ante is not sufficient. The recent events have shown conclusively that our profession needs to do a reality check on its ethical underpinnings. The lawyers working on complex transactions and advising corporations must operate on a higher ethical plane that simply avoiding illegal acts and taking measures to prevent personal liability in the event of a shareholder lawsuit.

Again, as Mr. Carlton noted, the members of this Task Force are recognized leaders in the bar. I hope that the message of the final report reflects the wisdom of each member and, in essence, comes to life. I believe that a report which primarily describes proposed changes to the Model Rules will not carry the moral heft needed at this time. A recent New York Times article emphasized that corporations should demonstrate that they recognize the rationale for the public's anger, should acknowledge what has gone wrong and then lead the effort for reform. See Kurt Eichenwald, "Even if Heads Roll, Mistrust Will Live On," The New York Times, October 6, 2002 (attached hereto as Exhibit 1). The bar should also participate in this process. Attorney Leslie Jacobs, a partner at Thompson Hine in Cleveland, was recently quoted as saying that the ABA should act aggressively to combat the impression that the profession is indifferent to

corporate wrongdoing. See Douglas McCollam, "Road Kill," The American Lawyer, October 10, 2002 (attached hereto as Exhibit 2).

Finally, the Task Force should endeavor to provide an ethical support base for those lawyers who are facing a difficult ethical choice. It is too much to expect each attorney to bear the brunt of retaliation if that attorney's ethical acts subject the attorney to serious career damage and retribution. The bar should attempt to stand united in urging and supporting the highest possible ethical goals. This effort is absolutely necessary to reassure the public that the legal profession will serve its clients ethically and will not assist in cutting corners or trying to mislead investors. Our profession must have a much higher concern than simply avoidance of personal liability in a lawsuit from shareholders or others who feel that the legal profession has not done its job.

**I. My experience when facing an ethical dilemma at the United States Department of the Treasury.**

I am recounting my experience at the United States Department of the Treasury because it provides the basis for my statement. I have included sufficient details to demonstrate the impact that facing an ethical dilemma can have on a legal career. My background leading up to employment at the Treasury is as follows: I attended Indiana University and then earned a B.A. in Mathematics in 1970 from the University of Evansville. I worked as a computer programmer at Whirlpool Corporation for two years and then attended the Graduate School of Industrial Administration at Carnegie-Mellon University, earning an M.S.I.A. (the equivalent of an M.B.A.) in 1974. I moved to Michigan and worked at Ford Motor Company, including positions on Finance Staff, from 1974-1977. I then attended the University of Michigan Law School, earning a J.D. in December 1979.

In my first job after law school, I sought the opportunity to work at the United States Department of the Treasury on the Chrysler Loan Guarantee program. I believed that working on the Chrysler bailout would provide me an ideal opportunity to combine my law and business training with my interest in the auto industry.

The situation in which I found myself is instructive for the purposes of the Task Force. The reporting requirements placed on Chrysler were "deliberately onerous." See Robert B. Reich and John D. Donahue, Legal Times: The Chrysler Revival and the American System (1985), at pp. 198-200 (attached hereto as Exhibit 3). Reich and Donahue explained that the reporting requirements served the purpose of irritating Chrysler executives, in part as a deterrent to other firms who might consider requesting government aid. It must be appreciated that attorneys often find themselves in high-pressured situations when careers and large amounts of money are at stake. Therefore, the attorney who must make an ethical objection or block a desired transaction will face great pressure to be compliant.

I asked Luke D. Lynch, Jr., General Counsel of the Chrysler Loan Guarantee Board, if the reports were needed. He replied that I had to get them. When I did not

succeed in getting the reports after making a trip to Chrysler headquarters in Detroit, Lynch called Chrysler's general counsel and said that the reports had to be submitted within two days or Lynch would tell Congress. Frederick W. Zuckerman, a Chrysler executive, told me that he knew that I was the instigator of the deadline for the reports, that I had "messed" up and that I was going to cause Chrysler to go bankrupt. Zuckerman was very angry at me.

On December 8, 1980, the day that Chrysler Chairman Lee Iacocca came to the Treasury for a meeting with the Chrysler Loan Guarantee Board to request additional funds, I was ordered terminated by Assistant Treasury Secretary Roger C. Altman. I subsequently went to the Treasury Inspector General and the I.G. conducted an investigation. Shortly after ordering my termination, Altman (who is not an attorney) left the Treasury and returned to his investment banking career, in which he had Chrysler as a client. I believe that Altman was more concerned with gaining favor with the Chrysler executives, which would be useful to him when he returned to the private sector, than he was in carrying out the responsibilities at Treasury of monitoring Chrysler's financial condition.

Chrysler's compliance with the loan guarantee reporting requirements and my termination were discussed in several articles (attached hereto as Exhibit 4). In a New York Times article, Altman stated that I was "preoccupied with obtaining all of a multitude of reporting forms from the auto company, which he conceded were often submitted 'quite late'." See Ann Crittenden, "Treasury's Ousted Chrysler Critic," The New York Times, March 6, 1981, at D1.

In addition to ordering my termination from the Treasury, Altman and others spread false and derogatory rumors about me. It is not necessary to describe these allegations in detail. The allegations generally were that I was caught by a security guard, going through papers in Altman's office, and that I was leaking to the press. The allegations cannot be analyzed too closely, because there are different versions of them. The hysteria about my actions increased and, apparently, it was thought that I might steal documents to leak to the press.

The incident that was transformed into the allegation that I was caught by a security guard in Altman's office actually involved my seeking the assistance of the security guard. In the early evening of November 3, 1980, I had a very upsetting telephone conversation with Chrysler executive Zuckerman and determined that I had to talk to Altman at once. I was walking down the hallway at Main Treasury, crying, when I saw the security guard (a member of the Uniformed Division of the Secret Service). I implored him to help me find Altman. We went to Altman's office, but Altman was not there. We called the Treasury operator, looking for Altman. The description of this incident are included in statements (attached hereto as Exhibit 5) in the Treasury I.G. report, including the statements of Altman and the guard, Lt. Robert Anderson. The rumor that I had been caught in Altman's office took hold and resulted in a false and backdated Secret Service memorandum being created, which purported to describe that incident.

I was also accused of leaking to The New York Times. This is another wholly false allegation and I have obtained a number of statements (attached hereto as Exhibit 6) that refute that charge. However, Altman said in his statement to the Treasury Inspector General that he ordered my termination in part because I “presented a potential risk for damaging news leaks.” Altman also said that I “adversely affected Treasury’s relationship with Chrysler due to her insistence that Chrysler was not submitting certain reports required by the Agreement.”

Even though the allegations were not proven and are generally absurd, they were effective in discrediting me and making me look like a troublemaker. I was even called a “security risk.” The existence of these allegations, which are included in government documents, still causes me great pain. I have worked persistently to have these allegations retracted, but have been wholly unsuccessful.

The Task Force should discuss in the final report the reality that lawyers who face a difficult ethical dilemma or who insist that unwilling clients follow the law may suffer such retaliation and damage to their careers.

## **II. The problems in our profession have been acknowledged for a long time, but effective solutions have not been implemented.**

The problem facing lawyers who make difficult ethical decisions and thereby alienate their superiors or their clients has been fully recognized. However, there apparently has been limited guidance on solutions for lawyers caught in this awkward position. The easy answer would be to avoid getting in this situation - perhaps by ignoring obvious ethical concerns.

In my experience, I sought guidance and solace, but found little support. I wrote to noted professor Geoffrey C. Hazard, Jr., concerning the problem of an effort to act ethically causing damage to a career. Professor Hazard was considerate in his reply to me. He responded that “I do not know of any solution, except to try to find jobs in honest environments.” See correspondence with Professor Hazard (attached hereto as Exhibit 7).

This ethical dilemma also was apparently considered by the Commission on Evaluation of Professional Standards (known as the Kutak Commission). In a letter dated May 24, 1982 (attached hereto as Exhibit 8), Robert J. Kutak explained that my comment on the proposed Model Rule 1.13 and the so-called whistleblowing problem had been received by the Commission and was available to the Commission in its review of the proposed Model Rules. Mr. Kutak noted that I had raised “hard questions” and he appreciated my contribution.

The intractability of the problem I faced after expressing my ethical concerns at Treasury is illustrated in the 1991 correspondence (attached hereto as Exhibit 9) between my father, attorney Edward P. Elsner, Jr., and the congressman from my home district in Indiana, Representative Lee H. Hamilton. My father plainly stated my situation to Rep.

Hamilton. In his response, Rep. Hamilton stated, “I am greatly distressed by [Elaine’s] experience at Treasury and the effect it has had on her life and her career. I admire her courage in moving ahead with her own legal practice in the face of such adversity.”

I am requesting this Task Force to include in the final report a section about the problems facing a lawyer caught in an ethical dilemma. The bar should appreciate that requiring lawyers to comply with high ethical standards could be costly in terms of relationship with the client or even with employers. The Task Force should emphasize that retaliation against a lawyer who is exercising her professional judgment and complying with ethical duties must not be tolerated. Perhaps the sting of public or professional disapproval could provide some protection to lawyers.

Unfortunately, my experience has been that expressing ethical concerns or urging compliance with requirements that may be unpleasant simply is asking for career suicide. It is impossible to express the degree of isolation that one suffers after being fired for expressing her ethical concerns. There was literally no safety net or mentor to assist in getting my career back on track.

### **III. There must be incentives to act ethically.**

The message seems to be that “ethics doesn’t pay.” There must be incentives to act ethically. These incentives should include professional standards, peer support and encouragement and, hopefully, some financial security, as well. If law is a business and an attorney is attempting to maximize her profitability or to work her way up the law firm ladder, the incentive will be to do deals and cut corners, not to act ethically.

The Task Force should describe and give examples of why maintaining ethical standards saved the client. There must be an appreciation that cutting ethical corners to do a deal or make a short-term profit may well cost more in the end. In other words, there must be an appreciation that corporations can help their bottom line by encouraging and promoting ethical attorneys. Surely one of the most important duty of attorneys is to give advice and keep clients from taking possibly illegal acts. The attorney who exerts his own independent perspective should be much more appreciated than a craftsman who determines how to do a deal that may not withstand scrutiny if it is examined by others, such as the SEC.

There must be a message - not that ethics don’t pay or that ethics are a nuisance. The client and the public must appreciate that having an ethical attorney does pay. Clients must be educated to take the long-term point of view. What may seem like a great scheme in this quarter may cost the company in later losses or liability.

The auto industry long relied upon the motto that “safety doesn’t sell” in marketing its cars. That is a marketing strategy that surely has been abandoned. Our profession should not operate on the premise that “ethics don’t sell.” We must articulate why clients should want to pay top dollar for ethical attorneys and why clients will get a full return on the investment in having advice from an attorney who speaks her mind with

full awareness of her ethical duties.

#### **IV. The role of the Model Rules.**

It is not clear to what extent the Model Rules have functioned effectively to encourage ethical behavior or to provide protection for those who act ethically in a difficult environment. Based on comments from the September hearing, the Model Rules essentially are used as a sword against lawyers in litigation. Thus, it appears that there is an incentive to leave the Model Rules vague so they will not provide concrete guides by which a lawyer can be found liable in court. If this is the primary purpose of the Model Rules, then they are certainly not useful in encouraging ethical behavior.

It is useful to note that lawyers do not daily recite the Model Rules in their practice. Similarly, the case law for attorney ethics (such as it is) does not seem to be necessarily driven by the Model Rules. The Task Force should appreciate that lawyers make ethical decisions based on a variety of concerns, rather than by simply referring to the Model Rules.

The Preliminary Report cites no cases concerning attorney ethics and gives no explanation as to how the Model Rules in practice translate into encouraging ethical acts by attorneys. For example, to what extent has the opportunity for lawyers to consult with clients ultimately prevented the fraudulent or other troubling actions that have created the present crisis? Moreover, it would be useful for the Task Force to describe the issues presented and resolved by the Kutak Commission and the Ethics 2000 Commission, with an analysis as to what findings need to be revised from the conclusions of those Commissions.

The proposals to change the Model Rules are useful. However, I believe that the Task Force should use this time of reflection in the legal profession to construct broader solutions to the problems identified. In a sense, addressing this fundamental challenge to the ethical standing of our profession by tinkering with rules evokes a sense of legalism, rather than professionalism.

The emphasis on ethics needs to be raised to a much higher level. How many ordinary attorneys have participated in this Task Force process? How many have read the Preliminary Report, asked to submit a statement or even expressed an interest in improving our profession in light of this crisis? There should be a heartfelt statement of goals for our profession, which set out the aspirations as to what we contribute to our local, national and international communities.

In addition, the ethical duties of attorneys include more responsibilities than the possibility of reporting wrongdoing of the client. Perhaps the focus in the Model Rules on reporting is misguided or, at least, overemphasized in importance. If the attorneys vigorously carry out their ethical duties and give clear and strong advice to their clients, the potential wrongdoing by the clients will hopefully be avoided or the impact of the wrongdoing minimized.

Further, it must be appreciated that many of the corporate practices that have proven so troubling may not be fraudulent or illegal. In other words, those practices may not be those which an attorney is supposed to report to higher authorities. Thus, this Task Force should address more than just the practices that may be fraudulent or illegal. Once again, the ethical duty of attorneys is much broader than simply having a duty under the Model Rules to report illegal actions.

**V. There needs to be a more detailed analysis concerning what practices of lawyers have contributed to the problems of corporate governance and its lack of credibility.**

To the extent that attorneys have contributed to the present crisis of confidence in corporate governance, that contribution may be because the attorneys failed to act in a strong and ethical manner. Those attorneys may have emphasized doing the deal, cutting the corner and pleasing the client. The attorneys who behaved in that manner presumably were not faced with an ethical dilemma as to whether to report potential wrongdoing by the client. To the contrary, those attorneys apparently were willing or even pleased to go along with the schemes of the client. Those attorneys likely thought that going along would increase their profits or avoid making the client mad. Neither of these objectives should take precedence over the ethical duties of attorneys.

The revisions to the Model Rules recommended in the Preliminary Report concern the requirement that attorneys report on the wrongdoing of others, such as corporate officers. However, a more fundamental issue should be the conduct of the attorneys themselves. Judge Stanley Sporkin, who has a resume that plainly shows he has the experience to speak with authority, starkly framed the issue during the savings and loan crisis. In a widely-quoted opinion, Judge Sporkin wrote:

There are other unanswered questions presented by this case. Keating testified that he was so bent on doing the “right thing” that he surrounded himself with literally scores of accountants and lawyers to make sure all of the transactions were legal. The questions that must be asked are:

Where were these professionals, a number of whom are now asserting their rights under the Fifth Amendment, when these clearly improper transactions were being consummated?

Why didn’t any of them speak up or disassociate themselves from the transaction?

Where also were the outside accountants and attorneys when these transactions were effectuated?

What is difficult to understand is that with all the professional talent involved (both accounting and legal), why at least one professional would not have blown the whistle to stop the overreaching that took place in this case.

Lincoln Sav. and Loan Ass'n v. Wall, 743 F.Supp. 901, 919-920 (D.D.C. 1990).

Judge Sporkin's profound questions have not been answered and the recent corporate scandals have caused them to be raised with greater urgency. In the final report, the Task Force should undertake to give some measure of an answer to Judge Sporkin's questions.

The Preliminary Report noted recent criticism of legal advisers by citing the Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corporation. That Report stated at pages 25-26 that:

Vinson & Elkins, as Enron's long-standing outside counsel, provided advice and prepared documentation in connection with many of the transactions discussed in the Report. It also assisted Enron with the preparation of its disclosures of related-party transactions in the proxy statements and the footnotes to the financial statements in Enron's periodic SEC filings. (Footnote omitted). Management and the Board relied heavily on the perceived approval by Vinson & Elkins of the structure and disclosure of the transactions. Enron's Audit and Compliance Committee, as well as in-house counsel, looked to it for assurance that Enron's public disclosures were legally sufficient. It would be inappropriate to fault Vinson & Elkins for accounting matters, which are not within its expertise. However, Vinson & Elkins should have brought a stronger, more objective and more critical voice to the disclosure process.

Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp. by William C. Powers, Jr., Chair, dated February 1, 2002, at 25-26.

In an additional example of questions about the involvement of lawyers in transactions now under scrutiny, a Legal Times article explained that another law firm's actions have been questioned in the Enron matter. This law firm furnished true sale opinions needed for securitization transactions. However, a recent report by the court-appointed Enron examiner questioned whether the transactions were actually loans, rather than sales. See Otis Bilodeau, "New Questions Over Lawyering In Enron," Legal Times, October 2, 2002 (attached hereto as Exhibit 10).

Attorney Gregory Shaw, head of the securitization practice at Cravath, Swaine & Moore, was quoted in the article. He noted, "How does the legal profession police itself in this area or in similar areas?" Concluding that, as a practical matter, the legal profession probably can't police itself, Shaw explained, "I just don't think policing in areas of professional judgment in complex, highly fact-sensitive issues is feasible except in the most egregious cases."

These examples from the Enron case show that the actions of lawyers themselves are part of the problem. The lawyers who participated or facilitated questionable

transactions were presumably talented and well-paid. They may have honestly believed that the transactions were appropriate or they may have willingly gone along with questionable deals. Perhaps more troubling is the possibility that the lawyers gave no thought to whether the transactions were proper, in addition to being profitable. I believe that the final report of the Task Force should describe in more detail the types of activities of attorneys that may have contributed to the crisis of confidence. If the problem is not fully described, then actions needed to solve the problem may not be taken. The Task Force should state more strongly that the legal profession - or at least some of its members - are part of the problem.

The proposed revisions of the Model Rules concern the duty of attorneys to report the wrongdoing of corporations or others. A fundamental concern is the duty of attorneys to act ethically in their own actions. Specifically, attorneys must take a proactive role in questioning the fundamentals of the transactions in which they participate or the litigation positions that they put before the court. There can be no doubt that lawyers owe a duty of candor to the court. See United States v. Shaffer Equipment, 11 F.3d 450, 457-59 (4th Cir. 1993).

The regulation of our profession must come at an earlier stage and a more effective forum than when attorneys are defendants in shareholder or legal malpractice lawsuits.

## **VI. The provisions of Sarbanes-Oxley may change the ethical enforcement provisions for attorneys.**

The Sarbanes-Oxley Act became effective on July 30, 2002. Several provisions are pertinent to the work of this Task Force. Those provisions are:

### **Section 307. Rules of Professional Responsibility for Attorneys**

Not later than 180 days after the date of enactment of this Act, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule --

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

(2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly

or indirectly by the issuer, or to the board of directors.

**Section 806. Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud.**

(a) IN GENERAL - Chapter 73 of title 18, United States Code, is amended by inserting after section 1514 the following:

**‘Sec. 1514A. Civil action to protect against retaliation in fraud cases**

‘(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES - No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 .... or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--

‘(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by --

‘(A) a Federal regulatory or law enforcement agency;

‘(B) any Member of Congress or any committee of Congress; or

‘(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

‘(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

‘(b) ENFORCEMENT ACTION -

‘(1) IN GENERAL - A person who alleges discharge or other

discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by --

‘(A) filing a complaint with the Secretary of Labor; or

‘(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

‘(2) PROCEDURE -

...

‘(D) STATUTE OF LIMITATIONS - An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.

‘(c) REMEDIES -

‘(1) IN GENERAL - An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

‘(2) COMPENSATORY DAMAGES - Relief for any action under paragraph (1) shall include --

‘(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

‘(B) the amount of back pay, with interest; and

‘(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

‘(d) RIGHTS RETAINED BY EMPLOYEE - Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.’.

(b) CLERICAL AMENDMENT ...

**Section 1107. Retaliation against Informants.**

(a) IN GENERAL - Section 1513 of title 18, United States Code, is amended by adding at the end of the following:

‘(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.’.

It is important to appreciate that Section 307 of Sarbanes-Oxley now provides that the Securities and Exchange Commission (“SEC”) will be issuing rules for the professional conduct of attorneys appearing before the Commission. There is concern that the SEC rules will usurp the traditional role of the state courts in setting ethical standards. Moreover, it is not clear what will happen if the SEC rules conflict with the existing state rules or the rule changes proposed by this Task Force. See George W. Jones, Jr., “from the president: Federal Regulation of the Practice of Law: Unthinkable?” The Washington Lawyer, October 2002, at 6 (attached hereto as Exhibit 11); ABA Fact Sheet Federal Regulation of Corporate Attorneys (attached hereto as Exhibit 12). .

The Task Force should address the relationship between the Model Rules and the rules to be promulgated by the SEC. Surely it would be useful for the ABA to provide leadership in the SEC rule promulgation process. Moreover, there may be a real problem if the SEC rules contradict the Model Rules or place a stricter duty to report on attorneys. In the article titled, “Road Kill,” attorney Leslie Jacobs was quoted as saying that he hopes that “Sarbanes-Oxley is a floor, not a ceiling, on ethics.”

Similarly, Section 806 (Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud) and Section 1107 (Retaliation against Informants) presumably should apply to attorneys, even though those sections refer to employees of publicly traded companies and to “any person.”

The final report of the Task Force should address the relationship between the Model Rules, Sarbanes-Oxley and the broader ethical concerns for lawyers.

## **VII. The Task Force should consider whistleblower protections for lawyers.**

The Task Force should include a discussion in the final report about possible whistleblower protection for lawyers. It appears that Section 806 of Sarbanes-Oxley may provide some protection for lawyers who are employees of publicly traded companies. However, there apparently is no protection for lawyers who work for law firms.

A.P. Carlton emphasized in his testimony at the September hearing that there will be developing common law to improve the level of corporate responsibility. There may well be growing common law as to the duties of attorneys and remedies to protect attorneys who suffer retaliation. In addition, the federal and state whistleblower statutes

may become more comprehensive and possibly be designed specifically to address the situations in which professionals, such as lawyers and accountants, confront ethical dilemmas. However, at this time, the protections for lawyers who suffer retaliation after expressing ethical concerns appear wholly inadequate. A 1997 Wall Street Journal article described the unfortunate plight facing lawyers who do report wrongdoing. See Paul M. Barrett, "When Lawyers See Fraud at a Company, What Must They Do?" The Wall Street Journal, August 22, 1997, at A1 (attached hereto as Exhibit 13). Although it is generally believed that there is whistleblower protection for federal employees, I received no protection under the federal whistleblower statutes, because I was in the excepted service rather than a civil service employee.

If a lawyer loses her job after raising questions about the ethics of a transaction or after disclosing information in a manner consistent with the Model Rules or Sarbanes-Oxley, what recourse does she have? Even if there is a possible cause of action that may be alleged in a lawsuit, the lawyer will be facing a very difficult battle against a company or organization that may well have deep pockets and that wishes to utilize scorched-earth litigation tactics. That lawyer is very susceptible to being characterized as a troublemaker, an incompetent or even worse. In any lawsuit based on the claim of wrongful termination, the judge will not hand out gold stars to the lawyer who was fired simply because the lawyer alleges that she was motivated by her ethical concerns or duties. If the Model Rules serve as a basis for suing lawyers, do they also serve as a standard by which the lawyer could sue for wrongful discharge? It should be noted that the Third Circuit permitted a claim of retaliatory discharge under Title VII by a senior in-house counsel to proceed. See Kachmar v. Sungard Data Systems, Inc., 109 F.3d 173, 179-80 and n. 1 (3rd Cir. 1997)(noting the dynamics of an attorney serving as a corporate employee and having a significant advisory and compliance role in a regulated environment).

Moreover, a lawyer looking for another job after having been fired will face additional obstacles. What does the lawyer say when she is asked why she left her last job? Does she say she was fired after she expressed concerns based on her ethical duties as a lawyer? What law firm or in-house counsel will jump at the chance to hire such a lawyer?

An overriding concern of the bar is to avoid liability in lawsuits. The prominent reaction to the Preliminary Report expressed at the September hearings was that a revision in the Model Rules would provide additional avenues for suing lawyers. See ABAJournal eReport, September 27, 2002 (attached hereto as Exhibit 14). To the extent the profession is concerned about not being sued, it should also be concerned with helping attorneys who do find themselves in difficulty after facing an ethical dilemma. Particularly if the SEC rules or the revised Model Rules make the duty to disclose mandatory, there may be a number of attorneys who find themselves in an awkward career position after complying with that ethical duty to disclose. The Task Force could contribute greatly if it sets out guidelines that assist and support attorneys who do have to follow their ethical duty and then suffer retaliation.

The Task Force may find that the term, “whistleblowers,” is not helpful to the debate. Perhaps it would be instructive if the final report gave concrete examples (hypothetical, if necessary) of attorneys who complied with the duty to disclose and the options then available to provide protection for those attorneys. The Task Force should provide a description of an ethical attorney that avoids what may be the pejorative term, “whistleblower.” The attorney who is labeled a whistleblower may, in fact, be an attorney who is carrying out her ethical duty to bring concerns to those in positions of authority. That action of reporting (or counseling clients against possible unethical or illegal activity) may be a central part of the attorney’s job responsibility, rather than an unauthorized disclosure by a free-lancing attorney.

The Task Force should address the protections needed for attorneys who may be called “whistleblowers,” or for those who make a disclosure based on ethical requirements and suffer career damage as a result.

### **VIII. Proposed Actions**

There must be exhortations in the final report that it is the utmost duty of attorneys to act ethically. The Model Rules should not be used solely as a standard to determine liability in lawsuits. Moreover, the elements that make our line of work a profession, rather than a money-making enterprise, must be explained to the public. It is paramount to emphasize that each attorney must exercise her professional judgment based on her training and experience.

There is no doubt that the heritage of the legal profession is something that must be nurtured. I believe that much of my love and respect for the profession is inherited. My father, Edward P. Elsner, Jr., is senior partner at Montgomery, Elsner & Pardieck in Seymour, Indiana. He was privileged to practice with his father, Edward P. Elsner, in the firm of Elsner & Elsner until my grandfather died in 1951, only a month after finishing a jury trial. In his testimony at the September hearing, Linscott R. Hanson made a similar point. He stated that he was fortunate to have been born into a family of lawyers and to have joined a firm of competent and caring partners to whom he could speak with candor. Mr. Hanson also proposed study groups and a hotline to support attorneys seeking ethical guidance. These are useful suggestions.

The role of legal education must be emphasized. All practicing lawyers reminisce about what they learned in law school. The Task Force could communicate to the law schools the importance of ensuring that lawyers have ethical grounding from the beginning of their practice. I would like to acknowledge the strong guidance and support of two of my professors, Thomas M. Kerr at Carnegie-Mellon University and Douglas A. Kahn at the University of Michigan. The emphasis on ethical behavior incorporated by Professor Kerr in his teaching (no matter what course he was teaching) is illustrated in the affidavit (attached hereto as Exhibit 15) that he generously provided to me.

I also believe that it would be useful for the bar to take a higher profile with the public in emphasizing the ethical obligations of lawyers. A statement describing the role

of lawyers and the duty of lawyers to counsel clients against undertaking fraudulent activities may increase confidence in corporate governance. The final report should make it clear that lawyers are concerned about a lot more than simply avoiding personal liability for wrongdoing.

It would be useful if this Task Force could be a leader in assuring the public about the role of attorneys in our society. It is necessary to put a face on the bar. ABA President Alfred P. Carlton, Jr., and President-elect Dennis W. Archer are both impressive speakers and should be advocates for enhancing trust in the legal system. However, I believe that corporate lawyers and other leaders in the bar also should spread a message about the ethical role of lawyers and the efforts of our profession to restore confidence in corporate governance. Even if no lawyers are accused of criminal wrongdoing in these scandals, the general public may get the impression that lawyers were involved behind-the-scenes, giving assistance to the wrongdoers. This impression must be overcome with a positive message from the bar leadership and from individual lawyers.

We need to educate and reassure the bar, the corporate and investment banking community and the public in general that our profession will be a strong leader in restoring confidence and fostering strong ethical behavior. Just as the country-doctor image has faded, so has the belief in the lawyer as someone who can help the ordinary person or is a servant for the good of the public. The bar must do more in responding to this crisis than simply tweak the Model Rules or express concern that lawyers may be subjected to more lawsuits if the Model Rules are revised. Because Sarbanes-Oxley has become law, it is without doubt that the ethical duties of lawyers will be subject to greater scrutiny. The bar should be a leader in promoting ethical behavior, not simply responding reflexively in an effort to deflect scrutiny.

Thank you for providing me the opportunity to present my thoughts. I would be pleased to assist the Task Force in any manner in this important undertaking.