

1                   ABA Public Hearing - 10-25-02  
2                   have the time and opportunity, it's just a  
3                   few minutes away from here downtown and  
4                   it's wonderful to have you here, thank you  
5                   for this opportunity.

6                   CHAIRMAN CHEEK: Thank you. Dean  
7                   Gillers.

8                   MR. GILLERS: Thank you for inviting  
9                   me. Welcome to New York University Law  
10                  School. I've often taught in this room but  
11                  I've never sat down in this room, so it's a  
12                  pleasure to be sitting up here. I will be  
13                  brief, I have submitted a statement and  
14                  I'll just summarize some of the salient  
15                  points. There are some recommendations in  
16                  your preliminary report of which I  
17                  disagree, some with which I agree and some  
18                  that are not there that I hope you include  
19                  in the final report.

20                  First, as you heard earlier, I  
21                  joined the chorus of others in asking you  
22                  to abandon the should have known standard,  
23                  I think it's unwise. This is an ethical  
24                  document, if we should expand the should  
25                  have known standard in some other context,

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2           in the civil law context, subject law,  
3           statutory lawyer, regulatory line, fine,  
4           this is an ethical document. I don't  
5           believe we should be in the business of  
6           punishing lawyers through discipline for  
7           negligence, we rarely if ever do anyway.

8           I don't think it will make much  
9           difference if it goes in there as a matter  
10          of disciplinary enforcement. I think the  
11          larger effect will be to expand through the  
12          use of this model rule provision, the  
13          potential for civil liability to third  
14          persons for negligence.

15          While perhaps that should be  
16          expanded, perhaps not, I would rather see  
17          it done through common law development than  
18          through the back door of a disciplinary  
19          code amendment. I would suggest that if  
20          you're interested in encouraging lawyers to  
21          know what they should know, that there is  
22          one very nice way you might go about doing  
23          that. As we know, clients can sue for  
24          malpractice if a lawyer doesn't know what  
25          he or she should know and the client

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2           suffers injury and sometimes the client in  
3           suing for malpractice is controlled by a  
4           bankruptcy trustee or a receiver or some  
5           other substitute control person who has  
6           displaced the former control persons who  
7           have behaved badly.

8           There is a doctrine in the law that  
9           says that a professional lawyer,  
10          accountant, who was sued for malpractice  
11          for not knowing what they should have  
12          known, namely that the former control  
13          persons were behaving badly can defend by  
14          imputing to the entity which is now suing  
15          them the misconduct of the former control  
16          person.

17          So if I'm sued by the trustee of  
18          bankruptcy on behalf of my former corporate  
19          client, I can say well maybe I was  
20          negligent but the former president was  
21          acting fraudulently or criminally and that  
22          is a defense that I can assert because  
23          fraud is worse than negligence and his  
24          fraud is imputed to the entity.

25          There are cases on this including

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2                   from the Seventh Circuit and the Ninth  
3                   Circuit. You might encourage a revision of  
4                   that defense so that it is no longer  
5                   available, as it would not be available  
6                   some places.

7                   Finally, rather than should have  
8                   known, I would urge you to further define  
9                   know to make it clear, although we all know  
10                  it's clear, but to make it clear in writing  
11                  that intentional ignorance is knowledge,  
12                  that a studied avoidance of knowledge is  
13                  knowledge for purposes of that standard of  
14                  knowledge. Then a lawyer has to take his  
15                  or her chances that if the lawyer hasn't  
16                  done a further investigation when on  
17                  notice, someone may later say well this  
18                  wasn't simply negligence, this was a  
19                  conscious avoidance of knowledge.

20                  My second point deals with rule 1.6  
21                  and the exceptions to confidentiality. I  
22                  quite agree that the ABA has some delegates  
23                  who erred seriously in rejecting the  
24                  additional exceptions to confidentiality  
25                  that the ethics 2000 commission recommended

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2                   and I applaud the effort here to reinstate  
3                   them.

4                   Why any lawyer would not want the  
5                   authority to warn victims of a client's  
6                   crime of fraud where substantial financial  
7                   injury to the victim can still be avoided  
8                   or rectified and where the lawyer has been  
9                   the unwitting vehicle in the client's crime  
10                  of fraud, why any lawyer would want to  
11                  avoid the authority to give that up is  
12                  beyond me. Why the profession would want  
13                  to silence the lawyer and deny him or her  
14                  the right to warn, the right, the power,  
15                  not the obligation, I will come to that in  
16                  a minute, but the power to warn when the  
17                  lawyer has been so abused by a client who  
18                  has been so abusive is something I cannot  
19                  fathom.

20                  So I applaud that change. I think  
21                  that the back door solution to this problem  
22                  that we have adopted via the withdrawal  
23                  theories is inadequate because the NOISE  
24                  withdrawal theory will often not work,  
25                  there may not be anything to withdraw. The

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2                   lawyer may not have issued a document or  
3                   made a statement that the lawyer is in a  
4                   position to disaffirm. The lawyer may not  
5                   be known to be the lawyer for the client by  
6                   the intended victim. So calling up to say  
7                   I withdraw is going to be met with a  
8                   response well who are you and what are you  
9                   withdrawing from and what does this mean to  
10                  me and a lawyer can only say I can't tell  
11                  you.

12                  Further, a NOISE withdrawal is often  
13                  sufficient to put someone on alert who  
14                  sometimes will not be and the very doctrine  
15                  forbids the lawyer to go beyond the  
16                  statement of withdrawal and the  
17                  disaffirmance of any document and the like  
18                  that the lawyer may have issued. I would  
19                  urge you not to make the exception  
20                  mandatory, I urge you very strongly, I  
21                  think it's unwise.

22                  Very few jurisdictions mandate  
23                  revelation under this exception. You would  
24                  do so not only if it's a crime but if it's  
25                  only a fraud and not a crime and even fewer

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2                   jurisdictions mandate revelation of  
3                   non-criminal frauds. I'm not sure that any  
4                   do, maybe New Jersey, maybe one or two  
5                   others, but overwhelmingly we have just not  
6                   gone down that path and I think we are  
7                   probably uncomfortable with that prospect.

8                   I think we don't have to do it  
9                   either. Certainly if you create this  
10                  exception the lawyer is on notice that if  
11                  he or she is sued for not warning, the  
12                  lawyer will not be able to hide behind the  
13                  ethical rule. As today, the lawyer will  
14                  not be able to say I'm sorry, I would have  
15                  liked to have warned you but I couldn't  
16                  because there's no exception in the rules  
17                  that would allow me to do so and absent of  
18                  exception, it would be unethical for me to  
19                  have done so and these rules are adopted by  
20                  the court that licenses me. Right now a  
21                  lawyer can make that argument. If we  
22                  create the exception the argument is gone  
23                  and the lawyer is aware, hopefully aware  
24                  that it's gone and the exposure to civil  
25                  liability is enhanced if the lawyer has the

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2                   authority. So I think that will encourage  
3                   lawyers to think twice about not electing  
4                   to use the authority.

5                   I'm also concerned about  
6                   overreaction, a lawyer thinking that the  
7                   elements of mandatory revelation are  
8                   present can possibly have any number of  
9                   false positives where the lawyer reveals  
10                  under a sense that he or she must when  
11                  asked when as the facts turn out it was not  
12                  so. So I would stay with the overwhelming  
13                  view of American jurisdictions and limit  
14                  this exception to a permissive exception.

15                 My third point deals with rule 1.13  
16                 and here I come to an issue that you don't  
17                 really address and I wish you would. Think  
18                 about this, in rule 1.6 you support  
19                 exceptions that would allow or mandate  
20                 warnings to victims of client crimes or  
21                 frauds, third parties, but rule 1.13 does  
22                 not have a confidentiality exception that  
23                 would allow a lawyer for the company to  
24                 reveal confidences outside the company to  
25                 protect the company.

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2                   Sometimes the company will be the  
3                   only victim or for some other reason the  
4                   exception you advocate and I advocate on a  
5                   permissive basis that rule 1.6 will not  
6                   apply because the lawyer's services have  
7                   not been employed in the commission of the  
8                   crime or fraud, so there will be no  
9                   opportunity to use a 1.6 exception.

10                  Now, what sense does it make not to  
11                  allow a lawyer to go outside the company  
12                  and reveal confidences to the extent  
13                  necessary to protect the client when we are  
14                  prepared to allow or even require the  
15                  lawyer to go outside and warn a third  
16                  person to protect the third person. So I  
17                  urge you to import into rule 1.13 an  
18                  exception to confidentiality like there is  
19                  now a mission in New Jersey, maybe one or  
20                  two other places that under very limited  
21                  circumstances would allow a lawyer to  
22                  protect his or her own client against  
23                  people who are abusing it by going outside  
24                  the client, that is beyond the directors  
25                  perhaps to major shareholders, perhaps even

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2                   to a regulator.

3                   I offer you language which you will  
4                   not try to parse here that could be used in  
5                   that way, it's a first draft, you can play  
6                   with it, but I think you should address  
7                   this issue. I also think that rule 1.13 is  
8                   knowledge and 1.13(b) that triggers the  
9                   obligations, whatever they may be, is too  
10                  high. Why require knowledge before you  
11                  obligate the corporate lawyer to take the  
12                  1.13 protective steps when all you require  
13                  is reasonable belief in rule 1.6 as a  
14                  precondition to revelation of confidential  
15                  information to third persons. Why isn't  
16                  standard reasonable belief, it's a standard  
17                  that is defined in the model rules, it is  
18                  an objective/subjective standard, it  
19                  requires that the lawyer believe it and  
20                  that his belief be reasonable.

21                  So I would substitute for the word  
22                  know in rule 1.13 B a reference to  
23                  reasonable belief and I would expand rule  
24                  1.13(c) to make it clear that the lawyer  
25                  has the option on appropriate facts and

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2                   with a mens rhea of reasonable belief to  
3                   protect the client by revealing  
4                   confidential information outside the  
5                   client.

6                   The suggestion of the current  
7                   version of rule 1.13(c) that the lawyers  
8                   only option in that regard is to resign is  
9                   entirely unacceptable. To say to the  
10                  lawyer that when you find these terrible  
11                  things going on and your client at great  
12                  risk and you're unable to get any  
13                  rectification or satisfaction pursuant to  
14                  rule 1.13 B, your response to abandon your  
15                  client is entirely unacceptable. The  
16                  response should be to save the client,  
17                  indeed if that means revealing confidential  
18                  information then so be it.

19                  Finally on this point and then I  
20                  will come to my fourth brief point and  
21                  stop. Protecting the lawyer in this  
22                  situation ought to be part of our  
23                  consideration. We all know that there has  
24                  been a growth in the last 15 years in the  
25                  recognition of a claim of retaliatory

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2           discharge for employed lawyers,  
3           economically dependent lawyers, when they  
4           are constructively or actually terminated  
5           from compliance with their ethical  
6           obligations, save only the erratic and  
7           indefensible legal deal by the Supreme  
8           Court on this issue, the momentum has been  
9           in favor of recognizing a retaliatory  
10          discharge claim, although in various  
11          scopes.

12                 I won't rehearse the differences  
13           here, except to say that I urge you to  
14           speak to this issue in two ways. One is as  
15           in New Jersey and some other jurisdictions,  
16           to recognize that the claim should be able  
17           to be in tort and not just in contract so  
18           it has some teeth to it, and this is quite  
19           important, although it's rather inside  
20           baseball, it's quite important to make it  
21           clear that in pursuing the retaliatory  
22           discharge claim a lawyer may resort to the  
23           exception to confidentiality in rule  
24           1.6(b)2, that's the exception that allows a  
25           lawyer to use client confidences when

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2                   necessary to defend the lawyer against a  
3                   claim of malpractice or in a lawsuit for a  
4                   fee. Let us make it clear in the language  
5                   of rule 1.6(b)2 that retaliatory discharge  
6                   claims are also included and the ABA has  
7                   issued an opinion so stating, but I urge  
8                   that it be reduced to the text and that  
9                   that text be presented to state courts.

10                   Finally, my last point is that with  
11                   the changes I'm suggesting and others that  
12                   you recommend and I endorse, I don't think  
13                   it's necessary at this point to extend the  
14                   rule 1.13 obligations to lawyers who know  
15                   of misconduct but the misconduct is in  
16                   connection with the matter that is not  
17                   related to the lawyer's work. I think that  
18                   goes too far, I don't know, I'm worried  
19                   about how expansive that suggestion may be.

20                   Some companies hire hundreds of  
21                   lawyers, I think we're putting those  
22                   lawyers in a difficult position, they don't  
23                   have the ability to run down information,  
24                   to get information about matters that are  
25                   not their matters. They may err on the

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2                   side of over-revelation. I think I would  
3                   exclude them from the obligations of  
4                   1.13(b). I think the other changes will  
5                   sufficiently ameliorate the problem.

6                   In conclusion, let me remind you  
7                   that with all of the corporate wrongdoings  
8                   that have been exposed in the press and  
9                   otherwise, lawyers have not been villains.  
10                  Two prominent law firms have been sued in  
11                  Texas, the case is at an early stage, who  
12                  knows where that will go or whether or not  
13                  the allegations can be supported and one  
14                  lawyer only, one in-house lawyer has been  
15                  mentioned as a possible focus of a criminal  
16                  investigation, unfairly in my view, but one  
17                  lawyer. So I think we have a lot to be  
18                  thankful for, I think the profession has  
19                  largely escaped column B in the current  
20                  crisis and I think that fact ought to make  
21                  your recommendations proportionate to the  
22                  reality of our experience. Thank you.

23                  MR. JACOBS: Dean, I was struck by  
24                  early in your comments you seemed to not  
25                  want to go to the issue of civil liability

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2           in terms and I think your phrase was it may  
3           or it may not be appropriate to have  
4           expanded liability for lawyers where they  
5           fail to discover or fail to disclose to  
6           third parties something that's caused harm  
7           to a third party, but then toward the end  
8           of your remarks you were reaching for us to  
9           go and address civil liability with respect  
10          to discharged lawyers.

11                 So you want us to go to substantive  
12          law where in fact it's going to be for the  
13          benefit of a lawyer, but you don't want us  
14          to go to address substantive law where  
15          we're talking about the rights or interests  
16          of non-lawyers. There's nothing that I  
17          understand in the challenge that's been  
18          given to the task force that limited the  
19          task force to address the problems in terms  
20          of amendments to the model rules.

21                 I think in fact that the task force  
22          was trying to solve as much of the problem  
23          as it thought it could through the vehicle  
24          of the model rules, but to the extent we  
25          believe that substantive law changes,

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2                   indeed common law changes, should be urged,  
3                   that's certainly free to the task force to  
4                   do it. With that thought in mind, would  
5                   you be willing to revisit your initial  
6                   ambivalence about whether lawyer liability  
7                   should or should not be expanded?

8                   MR. GILLERS: No. Let me make it  
9                   clear that I have no problem if you go  
10                  beyond the model rules, I welcome it. What  
11                  I know are the model rules and what I'm  
12                  speaking about here are the model rules.  
13                  Beyond that, the distinction you make I  
14                  think is not a valid distinction. I have  
15                  no problem with addressing standards of  
16                  liability of lawyers to third persons. I  
17                  spent a great deal of time on that issue in  
18                  my case book and in class.

19                  If you want to make recommendations  
20                  for amending the civil law in one way or  
21                  another through case law or statute or what  
22                  have you in that regard fine, let's do it.  
23                  I would oppose, however, expansion through  
24                  rule as opposed to through case law of a  
25                  lawyer's exposure for negligence to third

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2           persons. That gets very close to  
3           threatening the attorney/client  
4           relationship.

5           Sometimes it's right as when the  
6           third person is a third-party beneficiary  
7           of the attorney/client contract. I would  
8           oppose however to trying to legislate this  
9           issue in some universal way through a rule,  
10          that's part one. Part 2 is I absolutely  
11          oppose trying to do it by amendment to the  
12          model rules in the expectation that those  
13          amendments will not play into discipline  
14          because they won't, but will play into  
15          civil liability arguments in trial or  
16          appellate courts, that's an indirect way to  
17          do it. If you want to try to do it do it  
18          directly.

19          Final point on this. If you want to  
20          expand liability to third persons for other  
21          than negligence and in my case and I list  
22          about 12 different theories, there are  
23          many, we are at risk in many ways that we  
24          were not 50 years ago, fine, I'm happy to  
25          entertain and give you my view on those

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2                   suggestions, but that's got nothing to do  
3                   with my recommendation that lawyers who  
4                   following their obligations, who comply  
5                   with what the rules permit or require and  
6                   serve public policy thereby, should if they  
7                   suffer economically by being fired from  
8                   their job, their one client job as employed  
9                   lawyers be protected by the state that has  
10                  imposed these rules on them through a real  
11                  retaliatory discharge claim.

12                 MR. JACOBS: What's the difference  
13                 between the employed lawyer in your example  
14                 and the outside lawyer who has one client?

15                 MR. GILLERS: We don't know the  
16                 difference, that's where the border is  
17                 soft. The case law in California or  
18                 elsewhere has emphasized the real economic  
19                 dependence of the employed lawyer, we can  
20                 all understand that. We can all understand  
21                 that the law firm with 3,000 clients that  
22                 loses one doesn't need this kind of  
23                 protection.

24                 Obviously there are situations in  
25                 which a law firm may have two or three

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2                   clients, one of them may account for 70  
3                   percent of this business and maybe it  
4                   should have a retaliatory discharge claim  
5                   as well, I don't know. I do know that we  
6                   want to clear up the plate, the dilemma of  
7                   the employed lawyer and protect that person  
8                   when they do what we say should be done in  
9                   order to protect the profession, its ethics  
10                  and third persons. The outside lawyer with  
11                  one client presents a problem we have to  
12                  work on.

13                  MR. McCALLUM: Thank you for your  
14                  very thoughtful comments. Some of his  
15                  comments in an article published in the  
16                  Georgetown Journal of Law and Ethics  
17                  entitled "Model Rule 1.13(c)" gives the  
18                  wrong answer. Just one point, I thought I  
19                  heard you say that you don't like our  
20                  mandatory exception because it would permit  
21                  disclosure or mandate disclosure when there  
22                  was a crime or fraud, our proposal only  
23                  dealt with crime not with fraud. Does that  
24                  change your view of it, all we suggest at  
25                  this point is to make it mandatory in order

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2                   to prevent client conduct known to the  
3                   lawyer?

4                   MR. GILLERS: It doesn't change my  
5                   view. If there should be mandatory  
6                   disclosure anywhere I think there should be  
7                   in B1 dealing with threats of physical  
8                   life. It would be anonymous to have  
9                   mandatory disclosure for B2 and 3 but not  
10                  B1. No, it doesn't change my view.  
11                  Charlie, I'm guided heavily by what I sense  
12                  to be the center of gravity in the  
13                  profession. I think it's important not to  
14                  get too far out ahead of the profession and  
15                  while sometimes it needs prodding and while  
16                  sometimes it's appropriate, I don't read  
17                  the various state articulations of  
18                  confidentiality exceptions as ready for  
19                  this and I'm not sure they are wrong in  
20                  that.

21                  MR. OLSON: One of the points made  
22                  in the American Corporate Counsel  
23                  Association survey of its Americans, about  
24                  1,000 lawyers which was issued on Monday is  
25                  the substantial number of those lawyers

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2                   feel that their life would be easier and  
3                   they would be better protected against  
4                   retaliation or pressure if there were a  
5                   mandatory disclosure requirement. I  
6                   thought that was an interesting  
7                   perspective.

8                   MR. GILLERS: I'm surprised and I  
9                   don't know what substantial number means.

10                  A SPEAKER: 35 percent.

11                  MR. GILLERS: 35 percent doesn't win  
12                  an election.

13                  MR. OLSON: Those favoring  
14                  disclosure were 35 percent and the balance  
15                  were undecided, but 70 percent of the  
16                  survey thought there should be clearer  
17                  rules when the disclosure is mandatory so  
18                  they wouldn't have to make the choices  
19                  without guidance. If you put all of that  
20                  together there seemed to be a consensus  
21                  that some mandatory disclosure and clearer  
22                  rules about the mandate would be very  
23                  helpful in guiding the conduct of employed  
24                  counsel and also protecting them against  
25                  pressure or retaliation.

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2 MR. GILLERS: Well, as the polsters  
3 say, I'd like to see the question and I  
4 would like to see what they actually think  
5 they are buying into. I'm skeptical that  
6 if you really have a serious conversation  
7 about these issues with this group that  
8 they would adhere to that view.

9 MR. GILLERS: There's never going to  
10 be clear guidance, you can clarify some  
11 things but you'll always have ambiguity  
12 elsewhere and sometimes the clarification  
13 creates other ambiguity. So on this  
14 particular matter if you say they disclose  
15 or must disclose, it seems to me they are  
16 both equally clear. I don't think may is  
17 an ambiguous word, I don't think there is  
18 an absence of clear guidance in making it  
19 permissive, they are both clear.

20 I think the lack of clarity is going  
21 to come antecedent to the verb or the  
22 auxiliary verb, it's going to come in  
23 describing the circumstances in which you  
24 may or must disclose and those  
25 circumstances have to be described whether

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2                   you use the word may or must. So the  
3                   ambiguity, if that's the concern of this  
4                   group, is still going to be present.

5                   Now maybe they have a different  
6                   concern, maybe their concern is I want to  
7                   be able to tell my boss, boss I don't have  
8                   any choice, I have to tell, I'm sorry; if I  
9                   could conceal this I would but I have to  
10                  tell. That's interesting, I want to have  
11                  that conversation. I still think there's  
12                  ambiguity because I could imagine the  
13                  subsequent conversation going why, well  
14                  because it says if 1, 2 and 3 are true I  
15                  have to tell. Well, George, 2 is not  
16                  really true, it says and then you begin to  
17                  parse the language.

18                  So there's going to be ambiguity and  
19                  the boss is going to say you know George,  
20                  if you tell with the ambiguous language of  
21                  2 allows you to resolve this dispute in my  
22                  favor, you're violating your  
23                  confidentiality obligations to me and  
24                  you're back in ambiguity land. We can go  
25                  on with this conversation but it is a

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2                   surprise to me that you got 35 percent with  
3                   any question containing the word must and I  
4                   would like to see the question.

5                   MS. PETERS: Dean Gillers, I was  
6                   with you up until that last point. I want  
7                   to know if this is a question or a comment  
8                   but it's triggered by a point made by  
9                   Mr. Robertson which I thought supported the  
10                  mandatory exception in this case and that  
11                  is one of the key things that we as  
12                  attorneys have learned if you're in  
13                  practice for any amount of time, is that  
14                  you have to manage the expectations of your  
15                  client, and without doing so you are  
16                  walking along the edge of a perpetuus.

17                  From my point of view and I'm trying  
18                  not to be judgmental here, this mandatory  
19                  requirement is an essential tool in today's  
20                  world to be used to manage the expectations  
21                  of the client over the long-term, whether  
22                  you're in-house counsel or outside counsel.  
23                  If you look at it that way rather than  
24                  we're enshrouding the legal profession with  
25                  sword and shield to protect the unwitting

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2                   victims out there.

3                   Just look at it in a very practical  
4                   aspect. Doesn't it really make more sense  
5                   than not to have the mandatory expectation  
6                   so that that conversation between general  
7                   counsel or associate general counsel and  
8                   the boss or outside counsel and the general  
9                   counsel or the CEO doesn't go on around and  
10                  around to get to the point where you're  
11                  picking at things, because basically you're  
12                  negotiating the terms of the employment  
13                  contract or the engagement letter or  
14                  whatever it is. You're trying to accept  
15                  the parameters of the client's expectations  
16                  of the provider of legal services.

17                  MR. GILLERS: I would answer in two  
18                  ways, one with a rhetorical question. If  
19                  you go this route you must eventually  
20                  answer how can you mandate revelation to  
21                  warn the victim under the particular  
22                  conditions of 1.6(b) that you identified,  
23                  but not have any even permissive authority  
24                  in 1.13 to reveal confidential information  
25                  to protect your own client.

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2 MS. PETERS: We're not resisting  
3 that.

4 MR. GILLERS: It was not in your  
5 preliminary report and insofar as 1.13(c)  
6 necessarily incorporates the authorities or  
7 obligations in 1.6, the 1.6 obligations are  
8 limited to what you recommended. So it  
9 seems to me if you're not resisting it then  
10 I expect fully to see it in your final  
11 report.

12 CHAIRMAN CHEEK: It's under  
13 consideration.

14 MR. GILLERS: My second answer to  
15 Ms. Peters' question is that apart from  
16 what I call the healthy regard for the  
17 general view of the legal profession now as  
18 rejecting a mandatory revelation  
19 requirement, I don't know empirically and I  
20 want to have some empirical basis for  
21 knowing before I went down this avenue how  
22 an obligatory provision would affect the  
23 texture of the attorney/client  
24 relationship. How people talk to each  
25 other, what they say to each other, what

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2                   the client who is aware of this new  
3                   obligation does and does not choose to  
4                   reveal to counsel. Who if kept in  
5                   ignorance won't even have the capacity to  
6                   dissuade the client or to elect permissive  
7                   revelation if it comes to that.

8                   Without that kind of empirical  
9                   support and I'm not asking for a scientific  
10                  study, but intuitively I think it will  
11                  affect the nature of the conversations  
12                  between lawyers and clients, without that I  
13                  would be loath to make this kind of change.

14                 MS. PETERS: I agreed with you 100  
15                 percent. About a half hour ago I was  
16                 thinking that is the real key to the issue  
17                 and that is what will the lawyer not know  
18                 if this is a mandatory requirement. What I  
19                 would submit Dean that right now whether  
20                 you're willing to make an active faith that  
21                 disclosures between clients and their  
22                 attorneys are fulsome and all encompassing,  
23                 and after some 35 years in practice I'm not  
24                 so sure that I believe that, having earned  
25                 a livelihood representing clients.

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2 It's hard for me at least as a  
3 former practicing attorney to make the one  
4 active leap of faith and say I can't make  
5 the other. In other words, I'm not so sure  
6 that the attorney-client privilege  
7 guarantees that we know all we should know.

8 MR. GILLERS: You have to wonder if  
9 you adopt this rule will that cause clients  
10 to take steps to ensure that lawyers don't  
11 get information, number one.

12 MS. PETERS: I agree.

13 MR. MUNDHEIM: The companies were  
14 public companies and a material arm of a  
15 public company would normally create harm  
16 to the shareholders, so how you might get  
17 out to the warning so-called third party.  
18 Let me put my question.

19 Suppose you as a lawyer have given a  
20 10(b)5 opinion and later find out that the  
21 facts are different and that you shouldn't  
22 have given that opinion; do you have any  
23 obligation to withdraw that opinion, to see  
24 that the people who would have relied on  
25 that opinion would know that you have

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2 withdrawn that opinion?

3 MR. GILLERS: You've given that  
4 opinion to third persons?

5 MR. MUNDHEIM: You're given a 10(b)5  
6 opinion in a corporation.

7 MR. GILLERS: As you know it will.  
8 Certainly you have civil law disclosure if  
9 you leave it out there. I think the way  
10 the rules are now structured whether or not  
11 you must withdraw that as opposed to may  
12 withdraw it would turn on whether or not  
13 the substantive law defines silence as  
14 assisting a client's crime of fraud, that's  
15 what the commentary says, that sometimes  
16 silence amounts to assistance of a crime of  
17 fraud and therefore even if it means  
18 revelation of confidential information you  
19 cannot remain silent.

20 Whether or not that is true is going  
21 to be a substantive law question. I could  
22 not tease out an independent duty in the  
23 model rules to obligate you on learning  
24 that you have unwittingly given an opinion  
25 based on false facts to withdraw the

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2 opinion.

3 MR. MUNDHEIM: If we were coming to  
4 that result that you would be required to  
5 withdraw the opinion, would that trouble  
6 you?

7 MR. GILLERS: Is there prospective  
8 harm that we're talking?

9 MR. MUNDHEIM: It's the same set of  
10 issues that you worried about in terms of  
11 would that lessen the degree to which  
12 clients would talk to their lawyers  
13 honestly.

14 MR. GILLERS: Would it trouble me if  
15 the lawyer imposes an obligation --

16 MR. MUNDHEIM: In that limited  
17 circumstance that you would have to  
18 withdraw and communicate the withdrawal and  
19 the people you reasonably belief would have  
20 known about the opinion and may have relied  
21 on.

22 MR. GILLERS: If the substantive law  
23 goes that way and then applies to lawyers  
24 then no, it would not trouble me. I would  
25 not have any problem with a decision

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2                   through substantive law to impose that  
3                   obligation. In other words, to call  
4                   silence on those facts actionable or fraud,  
5                   such that the lawyer by virtue of rule  
6                   1.2(b) would have to withdraw it, no, it  
7                   would not trouble me. That's a different  
8                   route to the objective and I have no  
9                   problem with that.

10                   MR. MUNDHEIM: It's a different  
11                   route but it's the same issue.

12                   MR. GILLERS: It's not the same  
13                   thing if it has a different route. It's  
14                   the same result on the facts, but if you  
15                   use your language of 1.6(b) and make it  
16                   mandatory, you may go way beyond those  
17                   facts, beyond what the substantive law  
18                   would independently require.

19                   MR. MUNDHEIM: That depends on how  
20                   one drafts that?

21                   MR. GILLERS: If you draft it to be  
22                   nothing more than the substantive law  
23                   independently requires, then I have another  
24                   problem and that is the rules of ethics are  
25                   not very useful to say you can't break the

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2                   law, I don't need them for that purpose.

3                   So having got them anyway rule 1.2(b), so I

4                   don't see why it's necessary.

5                   CHAIRMAN CHEEK: Thank you, Dean, we

6                   very much appreciate it. Thank you, Ms.

7                   Teslik, for joining us and we are pleased

8                   and appreciate you coming.

9                   MS. TESLIK: Thank you very much. I

10                  appreciate the opportunity to address the

11                  group as this. I will not pretend to be

12                  the kind of expert that some of your other

13                  speakers are and I will therefore focus for

14                  a few moments on the corporate governance

15                  aspects of your proposal and for even fewer

16                  moments on the lawyer aspects.

17                  As you know, I represent the Council

18                  of Institutional Investors, which is an

19                  organization representing \$2 trillion of

20                  corporate union on and public pension plans

21                  that exist to address investment issues.

22                  They don't exist to address legal issues

23                  and therefore I have a limited ability to

24                  speak, quite apart from my own ignorance

25                  because I have to be careful to imply that