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2 CHAIRMAN CHEEK: I will begin the
3 public hearing of the American Bar
4 Association in New York. We have had one
5 public hearing to date in Chicago, we found
6 that hearing to be immensely useful to us.
7 We expect this hearing to be equally as
8 useful and we will take our travel shows to
9 San Francisco and Stanford in a couple of
10 weeks and then we will begin a process by
11 which we will hopefully come to a
12 conclusion with a final report.
13 So we very much appreciate all of
14 the witnesses appearing before us and
15 assisting us in this process and
16 Mr. Miller, Mr. Robertson, we appreciate
17 you being here and you will open.
18 MR. MILLER: We are very pleased
19 that we're here this morning, Chair Cheek.
20 Ladies and gentlemen, I am the president of
21 the New York County Lawyers' Association.
22 For those of you who are not familiar with
23 New York, New York County is the island of
24 Manhattan, we have approximately 9,000
25 members, we are situated on Vessey Street

2 which was the northern perimeter of the
3 World Trade Center, we are at the edge of
4 what is now called ground zero and a short
5 walk to the center of our financial
6 markets.
7 In August at the ABA's House of
8 Delegates meeting, I had the opportunity to
9 obtain a copy of your preliminary report
10 and in the course of reading it it struck
11 me that the issues you were grappling with
12 were issues that we at the New York County
13 Lawyers' Association ought to be involved
14 in discussing with you and so I asked our
15 vice president, Dave Robertson, seated to
16 my left who is a member of the firm
17 Caldwalader, Wickersham & Taft to head up a
18 presidential task force to take a look at
19 the constellation of issues that have
20 emerged as a result of the corporate
21 scandals that have rocked the faith in our
22 financial markets.
23 The first charge that I gave to our
24 task force was to take a look at your
25 report and to comment and make

2 recommendations where they felt
3 appropriate. We had a very short time line
4 and the summer is not always the best time
5 for certainly for local Bar associations,
6 so I didn't follow our usual procedure
7 which would be submit to the various
8 committees that might be involved, but
9 instead asked the chair of our ethics
10 committee and the chair of our securities
11 and exchanges committee and a few other key
12 folks to serve on the task force and get
13 back to me and to our board of directors
14 rather quickly. They did so and I'm
15 grateful that they did.
16 I'm going to ask Dave to tell you in
17 some detail the concerns that our task
18 force has. I'm sure you've all read our
19 submission so we're not going to read that
20 to you. Just to highlight some of the
21 issues that they've raised. NYCLA is
22 particularly troubled by a should know or
23 should have known standard for awareness of
24 wrongdoing.
25 This would impose what we feel is

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2 unreasonable and render the client less
3 likely to be forthcoming with all
4 information necessary for an attorney to
5 render competent advice and we oppose the
6 task force's proposal to require disclosure
7 of crimes or intentions to commit crimes,
8 but rather we urge discretionary
9 disclosure.
10 We have some concerns with the
11 notion of independence that we found in the
12 report which seems to be frankly more
13 appropriate in the context of the
14 accounting profession. We stress that a
15 lawyer's independence is a professional
16 standard regarding the lawyer's freedom
17 from outside influence and giving advice to
18 the client, and not a duty to blow the
19 whistle on the client. The touchstone of
20 the lawyer's independence is freedom from
21 third party influence while a public
22 accountant's independence is grounded on
23 the responsibility to the third party users
24 of financial statements and other documents
25 that the third parties rely upon.

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2 We note that and I think it's
3 important to remind ourselves and to try
4 and remind the public that there is no
5 evidence that the scandals that we're all
6 so troubled by were caused by lawyers
7 exploiting some weaknesses or loopholes in
8 the standards of professional conduct, but
9 rather they were caused by plain old
10 fashioned greed and violations of the law.
11 At this point I would like to turn over the
12 floor to my colleague, Dave Robertson.
13 MR. ROBERTSON: Thank you very much
14 for hearing us today. We favor all of the
15 preliminary reports recommendations to
16 strengthen corporate governance, the SEC,
17 the stock exchange, the Congress, they are
18 all on the case, this is a work in
19 progress. Our problem though is your
20 proposals only go to public companies, that
21 may not be enough because major charities
22 and major not-for-profits, labor
23 university, they have similar problems and
24 scandals during the last decade and the
25 same set of rules ought to apply to all of

1
2 these things.
3 We're here to address the proposals
4 for change in the modern model rules.
5 Their position is stated in the submission
6 and I'm not going to repeat it again. We
7 endorse strongly a concept of reinforcing
8 the notion that if the organization, at
9 least the client, not the CEO, not the
10 officer, not a subsidiary, not a division,
11 not a business unit; we support the concept
12 of allowing the lawyer to disclose
13 discretionarily the client's intent to
14 commit a crime.
15 We already have a rule like that in
16 New York for any crime, not just death or
17 bodily injury, as are DR4101C3, we're
18 comfortable with that and we urge it on all
19 the Bar. We do have a problem with
20 disclosing past conduct that has caused
21 damage except for the lawyer's own work
22 product or involvement, in effect to help
23 perpetuate a crime. We think that may go
24 too far, it should be discretionary, not
25 mandatory.

2 Now, the real issue I think is that
3 every other lawyer in America we believe
4 that practices is going to join the force
5 of saying mandatory is a bad thing, don't
6 make mandatory disclosure a requirement, it
7 should be discretionary if at all. We
8 support the discretionary disclosure. The
9 issue I think is in the practicality of the
10 up-the-ladder proposals, which we think are
11 great. We believe that the notion of
12 disruption to the client or disruption to
13 the organization should be de-emphasized so
14 as to encourage a lawyer to go to the
15 appropriate authorities within the client
16 to disclose what goes on.
17 We have some practical
18 considerations which I know are not in any
19 detailed language because we haven't gotten
20 to the detailed language, but we offer
21 these considerations in no particular order
22 of importance. The concept of going up the
23 ladder works great in a multi-billion
24 dollar company that is listed on the New
25 York Stock Exchange, because those entities

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2 already have the infrastructure, indeed the
3 superstructure of ideal corporate
4 governance, they have an audit committee
5 that's identified, their independent
6 directors that are identified. You know
7 who to go to when you got a problem, who
8 the CEO is, you know who the general
9 counsel is and indeed most major
10 corporations, major businesses like that
11 already have a structure in place dealing
12 with billing.
13 Lawyers report their budgets on a
14 quarterly or indeed monthly basis in some
15 issues, so there is contact and
16 communication between the general counsel's
17 office and a lawyer somewhere in the middle
18 of America working on a problem that
19 stumbles across something that doesn't
20 smell right.
21 For other businesses of the 13,000
22 public companies and all the charities,
23 those rules and that governance structure
24 and that infrastructure are not as clear or
25 maybe not present at all. Something needs

2 to be done to put that into effect for
3 every organization, or at least make it
4 clear as to who you go to when you got a
5 problem if you are a practicing lawyer.
6 Smaller companies, as I say, do not
7 have that and the issue is going to be I
8 believe what are the client's expectations,
9 how does the lawyer manage those
10 expectations and how can the model rules or
11 any other set of ethical rules provide
12 lawyers with a framework for managing the
13 expectations of the client. Remember, some
14 lawyer who goes up the ladder ought to be
15 treated as a hero and not a goat. If the
16 expectations are not there that that will
17 happen the lawyer will be the goat and not
18 the hero, the rules ought to make that
19 clear.
20 Now, there are a lot of ways to
21 manage those expectations, you can have it
22 contained in a retainer letter, in an
23 engagement letter, you can have it spelled
24 out in detail in whatever ethical rules are
25 present. However, if it's not spelled out

2 with a certain degree of specificity it's
3 going to be a source of heartburn and the
4 lawyer is not going to come away a hero.
5 As I mentioned, these things ought
6 not to be limited to public companies. I
7 know that's the focus of the current
8 scandals, I know that is your report, so on
9 the recommendations we think it should be
10 expanded to all charities.
11 Look at the scandals with some
12 religious organizations or labor unions,
13 the same set of rules ought to apply, the
14 same kind of guidance, the same
15 understanding between the lawyer and the
16 client. We submit that the ADA and indeed
17 every Bar association should be fostering
18 good relations between the client and the
19 lawyer, not putting them as adversaries.
20 If it is understood, if it is clear, if it
21 is unmistakable what you do when you have
22 one of these problems things will work
23 right, if not, no problem is going to ever
24 work out properly if there is difficulty.
25 It's like a waltz, I was thinking

1
2 the other night of how best to put it.
3 Think of Ginger Rogers and Fred Astaire
4 they are waltzing and all of a sudden they
5 are going up the stairs, well they do it
6 great, you never saw Fred Astaire or Ginger
7 Rogers fall, that's because they had good
8 choreography and practice.
9 You folks are going to be writing
10 that choreography for that dance up the
11 steps, if the dance is not right either the
12 dancing partner is going to fall or old
13 Fred is going to go rolling down the steps
14 and be laughed at the end of the day. I
15 know that is a trivial or trite example but
16 it really is what goes on in the real
17 world.
18 Most lawyers that practice in this
19 town, the Big Apple, do transactional work
20 as well as generally represent the
21 corporation or an organization in every
22 single thing. If you do the SEC work for
23 somebody it's easy to know what to do and
24 how to do it. If you're working on a labor
25 problem or an environmental problem and you

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2 don't have the same sort of relationship
3 and communication lines open that someone
4 who's filing 10Ks or 10Qs or helping them
5 with the ABAs, you're not going to know
6 what to do easily. Please give us some
7 rules that provide that kind of guidance.
8 The source is to make it work, not to have
9 headaches or heartburn.
10 There are some models that already
11 exist for how to work with a choreography.
12 The legal profession, indeed the ABA took
13 the lead on this 25 years ago dealing with
14 FASB5 inquiries. Accountants write
15 letters, they say is there a contingent
16 liability, by the way please confirm. Your
17 understanding is when you have a problem
18 with financial statement disclosure you
19 will discuss whether it ought to be
20 disclosed.
21 That should cover most contingent
22 liabilities that have a material financial
23 statement impact, but the problem with some
24 of these scandals related to related party
25 transactions or other questionable things

2 is they may not have stuck the radar screen
3 for financial statement materiality. So
4 maybe the accountants can say so what, it's
5 not material. When it blows up later on
6 and there is a serious legal problem and a
7 CEO is going to be indicted for perjury,
8 maybe that is material but you can't put a
9 dollar figure on it in the incipient
10 phases.
11 Perhaps something that says lawyers
12 will confirm with the compensation
13 committee that they have discussed all
14 consultations relating to executive
15 compensation or benefits or that any kind
16 of serious legal problem with an
17 environmental issue, a labor problem has
18 been discussed with the appropriate
19 committee, will it be the corporate
20 governance committee, will it be the audit
21 committee, will it be the management
22 disclosure committee that companies are
23 setting up in order to review their SEC
24 filings. I don't know which one is best,
25 but the model already exists about dealing

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2 with FASB5 issues.
3 The accounting profession has a rule
4 in SAS 61 that says that the internal
5 auditor must discuss with the audit
6 committee any disagreements with
7 management, must discuss with the audit
8 committee any audit changes that have been
9 discussed, whether adopted or not by the
10 client. Those types of things already
11 exist in the accounting profession under
12 SAS 61, they may form a basis for
13 considering whether similar sorts of rules
14 should be part of the engagement letter to
15 the understanding between lawyers and
16 clients.
17 As I mentioned the before, labor
18 unions, charities, major pension funds
19 ought to be subject to the same rules, it
20 ought not to be limited to public
21 companies. I want to thank you for giving
22 us a chance to appear before you and share
23 our views. Six months ago Bob Hershon
24 visited our place downtown in our
25 rededication ceremony where we reopened our

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2 landmark building at the lip of ground
3 zero, he stood up and said that he was
4 proud to be an American lawyer.
5 As close witnesses to the outrage of
6 9/11 and the outrages of the financial
7 scandals, we know that the organized Bar
8 can be part of the process for dealing with
9 the damage to the integrity of their
10 financial markets. We're in the middle of
11 it down here and if there's anything that
12 we can do to assist you in your daunting
13 task, and I know it is daunting, please
14 call upon us to help. Thank you very much.
15 CHAIRMAN CHEEK: Thank you for your
16 helpful comments. The question that we
17 have wrestled with is one that we have
18 focused on which is the discretionary
19 versus the mandatory issue and the context
20 of some of the examples you gave about
21 communications up the ladder and the
22 discretionary qualities of a rule format
23 which make it difficult from time to time,
24 particularly for in-house counsel, to go up
25 the ladder with the jeopardy of losing

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2 their jobs at stake is one factor that was
3 considered by us in the context of trying
4 to develop a system by which the
5 discretionary nature of the obligation was
6 removed and so that it gave a certain
7 clout, if you will, to the inside counsel
8 to be able to articulate the concerns in a
9 forceful way because of the mandated
10 obligation to go forward up the ladder.
11 The concern about that issue is one that I
12 think has troubled all of us in our
13 deliberations, so any observations about
14 that?
15 MR. ROBERTSON: What I understand
16 you to be saying is what you want to do is
17 to give inside counsel the gun or outside
18 counsel the gun or some basis for making a
19 credible threat that if you don't deal with
20 this I'm going to deal with it myself.
21 CHAIRMAN CHEEK: I have to deal with
22 it myself, I don't have any discretion.
23 MR. ROBERTSON: For inside counsel I
24 do not know whether that is appropriate or
25 not. For outside counsel I think it's a

2 killer because outside counsel are much
3 easier to get rid of than inside counsel
4 and outside counsel have a way, if they are
5 any good, of sitting down with a client and
6 convincing them that what they are about to
7 do is a big big mistake. Now when someone
8 inside a company is personally going to
9 profit from wrongdoing, sometimes that
10 conversation is constructed and you deter
11 that individual from doing something bad.
12 Other times the person is not going to be
13 deterred.
14 The mechanism that we have in our
15 system in this country, whether good or bad
16 that we're going toward on the notion of
17 disinterested directors and people who are
18 even more pure that are now going to be
19 called independent directors, people who
20 have nothing to lose by doing the right
21 thing.
22 That's the superstructure that the
23 stock exchange and the SEC is going to
24 impose on it in having a rule that I
25 believe is going to be mandatory when it

2 comes out of the SEC that requires people
3 to go up the ladder to the independent, not
4 merely disinterested, but the independent
5 directors who have nothing to lose but the
6 right thing is probably the best thing to
7 do. To make that mandatory in the case of
8 general counsel, that's probably the best
9 thing to do but that's what the proposed
10 rules that change the up-the-ladder process
11 are calculated to do and we favor that.
12 MR. OLSON: It's very hard though to
13 draw a line between in-house general
14 counsel and outside counsel, particularly
15 pertaining to the points you made earlier,
16 that many smaller companies don't have the
17 same structure, may not even have an
18 internal law department and may be looking
19 to one or more law firms to perform that
20 function. The SEC rule under the Edwards
21 Amendment Section 307 I think is not going
22 to make that distinction, it's going to
23 impose this obligation quite broadly.
24 We understand from conversations
25 with the senior SEC staff that it is going

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2 to also ask the question as to whether once
3 the ladder has been climbed to the
4 independent directors there should be a
5 mandatory obligation to report outside the
6 corporate entity, either to public
7 authorities or to others, to either prevent
8 a report of violative activity. Although I
9 don't think the SEC is going to propose a
10 rule now on that but is going to ask for
11 comment on that.
12 We also take your point, at least I
13 do and I think we all do, that we ought to
14 think hard about what the standard of
15 knowledge is and the should know or should
16 have known standard is troublesome. On the
17 other hand, as you know the Edwards
18 Amendment sets an evidence standard which
19 is even lower than should know or should
20 have known and it doesn't appear that the
21 SEC is going to give us much comfort in
22 that area.
23 How in view of that likely rule
24 making in that statute should we proceed
25 and how can we proceed to address your

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2 concerns without appearing to be overly
3 concerned about protecting lawyers and not
4 sufficiently concerned about public
5 interests and consumer protection?
6 MR. ROBERTSON: I think that you
7 raised three issues that I would identify.
8 One of them is about lawyer's self
9 interest, we don't want to make the rules
10 look like we're trying to make it easy for
11 ourselves. I've looked at Dean Gillers'
12 proposal and he also proposes the mandatory
13 rule and he is a professional law professor
14 and I don't think his views are tainted by
15 self interest.
16 He also points out that ethical
17 rules are not rules of civil liability,
18 which is great to say except we all know
19 that ten minutes after things become
20 effective they are going to be intended to
21 be used as rules of civil liability. Third
22 is I don't think this is dodging your
23 question, is if lawyers are forced to
24 practice defensive law the way doctors are
25 accused sometimes of practicing defensive

2 medicine, the forced investigations that
3 take place as a result of those should have
4 known standard or evidence or it should be
5 obvious will cause legal services to become
6 more expensive, antagonize the relationship
7 with the client and make it more difficult
8 to do your job.

9 I do not know what the fine
10 distinctions are among should have known,
11 reasonable belief, it is obvious, evidence
12 or know, that's for philosophers and
13 epistemological discourse. I do know that
14 whatever rule or language change that is
15 going to take place is not going to mean
16 what anyone intends it to mean in advance
17 because it's always going to be judged by
18 Monday morning quarterback benefiting with
19 20/20 hindsight who already knows what the
20 answer is in his mind or her mind, as
21 opposed to the way lawyers practice law in
22 the real world which is with imperfect
23 information, groping along day-to-day
24 trying to find the fact while making
25 professional judgments in the process.

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2 Is it an easy answer, no; is it a
3 tough question, yes; should the question be
4 asked, yes. Struggling to get the answer I
5 think is encouraging the profession and it
6 forces all of us to engage in a certain
7 amount of self examination, but I certainly
8 hope at the end of the day you let the
9 lawyer exercise his or her professional
10 judgment based on what that lawyer knows or
11 should be obvious to the lawyer, as opposed
12 to some negligent standard or other
13 standard that forces lawyers to doubt the
14 client initially as a part of practicing
15 law defensively.
16 MR. OLSON: Recognizing all those
17 difficulties, one thing the report proposed
18 which has received favorable comment and it
19 goes to your question about the cook book
20 and the methodology that the lawyers need
21 to suggest that corporations provide a
22 regular opportunity for the general counsel
23 or person or firm fulfilling that role to
24 meet privately with the independent board
25 members and the thought behind that was

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2 that if that opportunity is provided, then
3 there is a regular channel of
4 communications so that these become less
5 dramatic decisions.
6 MR. ROBERTSON: We endorse that.
7 That I think is essential, that's supposed
8 to exist in the area of how accountants
9 interrelate to their client, they are
10 supposed to meet privately with the audit
11 committee and indeed the model already
12 exists in terms of how corporations are
13 supposed to deal with an internal auditor.
14 The head of the internal audit department
15 is supposed to be free from any direct
16 influence by the CFO or financial officers.
17 There are supposed to be dotted lines there
18 with a direct reporting line in the audit
19 committee where the audit committee is
20 supposed to meet privately with the
21 internal auditor. That's a good model for
22 a general counsel's role to be cast into
23 and whatever you folks can do to do that
24 that would be great.
25 MS. PETERS: How would you suggest

1
2 that this committee, if we were to adopt
3 your approach that it should be the
4 standard of slander, should it be the
5 attorney knew or it was obvious, it should
6 have been obvious to the lawyer. How would
7 you articulate in a rule the second part of
8 the standard because I think that in part
9 that's what we are driving at. It's too
10 easy after the fact to say but I didn't
11 know because I blindfolded myself and I had
12 earmuffs on, but you have acknowledged that
13 there is something beyond certainty where a
14 lawyer should be held liable, how do we
15 articulate that it should have been
16 obvious?
17 MR. ROBERTSON: I think if I can
18 divide your question into two pieces it
19 will be real easy. First, if we're talking
20 about going up the ladder, a looser
21 standard or a standard of reasonable belief
22 or a standard of should know has strong
23 suspicions perhaps there is a good rule to
24 use because that's for the benefit of the
25 client, the corporation, going to the

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2 governance committee, going to the
3 compensation committee, going to the
4 independent directors and saying hey, I
5 think there's something wrong here, no, I
6 can't prove it but I see all the earmarks.
7 That's good, most clients want that, most
8 clients want to know they've got a problem
9 before they read about it on the front page
10 of the Wall Street Journal.
11 If the issue in terms of how to cast
12 that language is in terms of mandatory
13 disclosure, then I believe that it is bad
14 anyway, other than absolute knowledge or
15 something even stricter, involvement in the
16 fraud, which already basically a rule. If
17 you are part of the problem you violated
18 about eight different rules and you're
19 supposed to turn yourself in, withdraw,
20 your shoes come untied and your suspender
21 breaks. When it comes to issues of going
22 up the ladder, I think a low triggering
23 threshold would be good and I think a low
24 triggering threshold already exists in the
25 real world.

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2 MS. PETERS: Is your language it
3 should be obvious to the lawyer a low
4 triggering threshold in your view?
5 MR. ROBERTSON: I think should be
6 obvious is a lower triggering threshold
7 than knowledge. Whether that's the same as
8 reasonable belief or not, Dean Gillers can
9 parse out what the rules are on that. I
10 have difficulty distinguishing between the
11 two of them in my own mind. When it comes
12 to going up the ladder a lowering
13 triggering threshold is clearly appropriate
14 because that's in the client's interest.
15 If you represent somebody they want to know
16 they have a problem before it's obvious to
17 them, so I would go for a low threshold in
18 that area.
19 CHAIRMAN CHEEK: There are two more
20 questions for you.
21 MR. MUNDHEIM: Mr. Miller, you said
22 one of the things that you objected to was
23 our proposal on page 32 of the report,
24 which makes mandatory disclosure under 1.6
25 in very limited circumstances. In other

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2 words, those where you need to prevent
3 client conduct known to the lawyer to
4 involve a crime in furtherance of which the
5 client has used the lawyer's services.
6 I understand the objection of making
7 that mandatory, but tell me how that
8 applies to the obligations to withdraw or
9 to signal that you have withdrawn that
10 aspect of your services which have
11 contributed to the violation?
12 MR. ROBERTSON: I think if I
13 understand your question, you're saying if
14 the lawyer has been involved in the
15 wrongdoing and then finds out in which the
16 client has used the lawyer's services, I
17 think the lawyer should be required to
18 withdraw under those circumstances unless
19 the client is going to take corrective
20 action. If the client is not going to take
21 corrective action then the lawyer ought to
22 bale out real quick.
23 MR. MUNDHEIM: When he withdraws
24 does he have to notify the persons who are
25 being harmed by the action that he has

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2 withdrawn?
3 MR. ROBERTSON: I would not go so
4 far as to say that. There are certain
5 circumstances where that occurs as a
6 practical matter. In the first place, if
7 you are no longer going to be working on
8 let's say an S-1 filing with the SEC and
9 all of a sudden some other law firm is
10 taking that over, the SEC is going to
11 connect the dots without the lawyer saying
12 here's exactly what happened. In the
13 context of litigation, when you go into
14 court to withdraw because you find out that
15 something is bad that's going on in the
16 trial, if there's been perjury and you know
17 about it you're supposed to tell the court
18 hey, this fellow just lied and I can't do
19 this anymore.
20 In circumstances where other persons
21 are being harmed, I would say that in that
22 circumstance the lawyer ought not to be
23 required to tell someone by the way you've
24 been defrauded; oh, by the way you've been
25 hurt in some way by what I'm doing.

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2 Telling the world that you are no longer
3 the client for the lawyer is not the
4 lawyer's responsibility, except in the
5 context of litigation or if you are
6 actively involved in some proceedings
7 before an agency.
8 MS. PETERS: You know that auditors
9 have precisely that obligation if they know
10 of wrongdoing that has not been corrected,
11 they fire the client and they have an
12 obligation to file with the SEC using your
13 analogy.
14 MR. ROBERTSON: That's right but
15 that's because the auditor's opinion
16 contained in the audit report would still
17 be relied on by third parties and the
18 auditor's reporting that, in the way that I
19 understand the SAS is on that work, is more
20 to protect the auditor and cut off any
21 claims of liability for people trading on
22 that information afterwards.
23 MS. PETERS: Actually it's an SEC
24 rule that requires that.
25 MR. ROBERTSON: When they withdraw

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2 you explain that you're withdrawing and the
3 client didn't take your advice about
4 something, but in those circumstances I
5 believe there are people relying on the
6 auditor's opinion. In a situation where a
7 lawyer's opinion has been circulated and
8 people are still say buying a private
9 placement or investing in some tax scam or
10 tax incentivised investment, probably in a
11 situation like that the lawyer is indeed
12 going to get in touch with the people to
13 whom those private placement memoranda or
14 tax opinions have been distributed to
15 protect the lawyer himself, not to blow the
16 whistle on the client because the lawyer is
17 concerned about being involved in that kind
18 of fraud and expanding his own liability.
19 MR. McCALLUM: In asking these
20 questions, mindful I think New York is not
21 a model Rule C.
22 MR. ROBERTSON: That's right. We
23 have discretion to report client's intents
24 to commit a crime.
25 MR. McCALLUM: On your point of

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2 public companies versus private companies,
3 obvious as we talk about model rules
4 amendment those would be a general
5 application, so we won't be on it. I take
6 it you're talking about the governance
7 suggestions and you're suggesting that
8 rather than restricting those to public
9 companies, that we propose some of these
10 governance mechanisms like the required
11 meetings between general counsel and an
12 independent board as applicable to
13 companies that are not including
14 not-for-profit corporations.
15 MR. ROBERTSON: Labor unions.
16 MR. McCALLUM: What do you think is
17 the best way to do that, simple best
18 practices languages or should we be urging
19 changes in the Business Corporation Act,
20 what's the mechanism?
21 MR. ROBERTSON: That's a good
22 question. I do not have some proposed
23 language about how someone who is an
24 in-house lawyer should deal with the
25 problem. I believe that another way to

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2 handle it is to say when a lawyer takes on
3 an engagement for an organization, the
4 lawyer should identify those groups that
5 represent authorities in the organization
6 who have responsibility for dealing with
7 certain kinds of problems and to ascertain
8 which of those are independent or which of
9 those are not independent and that the
10 up-the-ladder process would focus on going
11 to those entities or individuals within an
12 organization to report a problem, whether
13 it be a church, a pension fund or whatever.
14 MR. McCALLUM: So you report some of
15 the governance side of the recommendations
16 into the model rules and then make them
17 applicable to lawyers?
18 MR. ROBERTSON: Yes. As a matter of
19 what lawyers ought to do of doing what they
20 are supposed to do in terms of dealing with
21 an organization as a client.
22 MR. McCALLUM: On page 8 of your
23 notes it says "The rule in New York is
24 clear that, when a lawyer learns that a
25 client has perpetrated a fraud upon a

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2 person or tribunal, then the lawyer must
3 call upon the client to rectify the same,
4 and if the client refuses or is enable to
5 do so, the lawyer shall reveal the fraud to
6 the affected person or tribunal, except
7 when the information is protected as a
8 confidence or secret," doesn't that
9 exception swallow the whole rule?
10 MR. ROBERTSON: Not always.
11 MR. MILLER: No. Having been there
12 it doesn't necessarily swallow the rule at
13 all.
14 MR. McCALLUM: Most of the things
15 we're dealing with, if it's not protected
16 as a confidence you presumably can talk
17 about it anyway, there is no restrictions.
18 This seems to say you can disclose the
19 confidence except when it's a confidence, I
20 don't understand how the rule operates in
21 the real world.
22 MR. ROBERTSON: There are secrets
23 and confidences and things protected by the
24 attorney-client privilege which are not as
25 broad as secrets and confidences.

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2 MR. McCALLUM: I'm not talking about
3 privilege issues in litigation.
4 MR. ROBERTSON: Under the model
5 rules it does close the door on it all the
6 way around.
7 MR. JACOBS: There were two things
8 that you said that I'm not completely clear
9 I understand where you're directing this.
10 One is the distinctions that I think you
11 drew between past wrongdoing and ongoing or
12 prospective wrongdoing, and particularly in
13 the sense of public companies and
14 wrongdoing of significance. I'm having
15 difficulty understanding how that is a
16 meaningful distinction, since the failure
17 to disclose the discovery of past
18 wrongdoing can itself be wrongdoing. My
19 first issue is where are you really trying
20 to draw that line.
21 The second thing that I wasn't clear
22 about was on the one hand you're calling
23 for the discretionary standard for out of
24 the entity disclosures, and on the other
25 hand you gave a very apt description for

2 your call of clarity as to the behavior
3 that a lawyer should follow, so that the
4 choreography would not have lawyers
5 tripping on their own feet.
6 You do not see that it's equally
7 desirable to have clarity for the more
8 important function perhaps of when and how
9 you should make outside disclosure, which
10 is the more problematic issue and
11 particularly when you note that civil
12 liability is likely to derive from poor
13 decisions. Isn't it ultimately, while it
14 may be uncomfortable, better for lawyers to
15 have fairly clear standards about when they
16 should be making outside disclosures?
17 MR. ROBERTSON: The answer is that I
18 think the more clarity the better. I would
19 point out that when you're talking about
20 financial statement disclosures, if there
21 is a problem in a financial statement in
22 one year the fraud is going to continue
23 because by definition, financial statements
24 contain two years of balance sheets and
25 three years of income statement and the

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2 fraud continues, but not all corporate
3 wrongdoing comes up in the context of
4 things that have a material impact on
5 financial statements. An environmental
6 problem, some accident or something like
7 that where there's been criminal
8 responsibility.
9 MR. JACOBS: Aren't those all
10 proposing the prospect of substantial
11 liabilities?
12 MR. ROBERTSON: If it's already been
13 reserved for I would not think so. There's
14 been disclosure with regard to whether or
15 not it's financial statement disclosure,
16 not with regard to whether there would be
17 criminal liability, which I think they are
18 two different issues. There is the crime
19 and then there is the crime of covering up
20 the crime and once you take a reserve or
21 something like that, that aspect of it goes
22 away.
23 The answer is I believe a lower
24 trigger for going up the ladder is
25 appropriate. I do not believe that there

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2 ought to be any trigger that requires a
3 lawyer to make mandatory disclosure unless
4 the lawyer has been involved in the fraud
5 and then in those instances it's in the
6 lawyer's own self interest to make sure no
7 one else is relying on the lawyer's opinion
8 or whatever that people are still relying
9 on.
10 CHAIRMAN CHEEK: Thank you very
11 much.
12 MS. RAMO: You mentioned something
13 about extending the rules of the terms of
14 the organization, what in particular that
15 isn't encompassed by the current rules for
16 lawyers would apply to general
17 organizations. Part of my concern about
18 our doing the wrong thing in this area is
19 the fact that most legal services rendered
20 to charitable organizations around the
21 country are done on a pro bono basis and I
22 don't want to do anything that will somehow
23 discourage that activity by inadvertently
24 changing the rules in some particular way.
25 Is there something in particular that you

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2 were talking about?
3 MR. ROBERTSON: Two things, one,
4 identifying who is in charge or who has the
5 appropriate degree of authority in the
6 charity and to make sure that whatever is
7 done with regard to public companies or
8 labor unions is also going to be completely
9 consistent with whatever the rules are with
10 regard to charities.
11 In terms of specific things that I
12 had in mind, I was thinking about some of
13 the scandals relating to the Roman Catholic
14 church in Boston and how in the world does
15 a lawyer who knows that there's a problem
16 there deal with the appropriate level of
17 authority, because I don't think it's
18 particularly clear. There have also been
19 some major things like United Way a few
20 years ago, Hale House here in New York
21 where the executive director --
22 MS. RAMO: What you're suggesting
23 then is when a lawyer is representing a
24 organization pro bono or not, that there be
25 some sort of engagement letter which makes

1
2 clear exactly what the reporting
3 relationship is should the lawyer discover
4 something?
5 MR. ROBERTSON: Yes, ma'am. Who do
6 you go to, who's in charge, who do you
7 report the problem to, the method of doing
8 it, whether it should be in writing or a
9 telephone call, a careful lawyer is always
10 going to do it in writing. If those things
11 are not clear there will always be
12 misunderstanding.
13 MR. MILLER: I want to thank you all
14 for this important work you're doing.
15 While you're visiting our great city I hope
16 you will have an opportunity to come down
17 to lower Manhattan, they need your business
18 desperately. There are some wonderful
19 restaurants that are in serious trouble and
20 to come if you haven't done so and see the
21 enormity of ground zero, visit St. Paul's
22 Chapel, our neighbor, that was George
23 Washington's parish church and was the
24 center of the relief efforts for the relief
25 workers. It is a very special place if you

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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,