

1                   ABA Public Hearing - 10-25-02  
2                   where there's no board overlap because they  
3                   are the most people capable to walk.  
4                   People assume that we are a political group  
5                   who loves to see a tasteful smattering of  
6                   all sorts of walks life on the board. With  
7                   respect to the shortage of directors we can  
8                   worry about that when it happens.

9                   MS. HENNESSY: Do you or the Council  
10                  have a definition of independent directors?

11                  MS. TESLIK: We do and it's on our  
12                  web site. It's on three levels, there is  
13                  the one sentence level that says you're  
14                  independent if you're only non-trivial  
15                  relationship with the company is your board  
16                  seat. Then we have a one-page thing that  
17                  says this means, then we have the footnotes  
18                  because we're lawyers.

19                  CHAIRMAN CHEEK: Thank you very  
20                  much, we appreciate you joining us this  
21                  morning. Mr. Rosner.

22                  MR. ROSNER: Mr. Chair, I am daunted  
23                  by the prospects of starting as you're  
24                  scheduled to have lunch and I am prepared.

25                  CHAIRMAN CHEEK: We have distributed

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2                   your written remarks.

3                   MR. ROSNER: First good morning,  
4                   almost good afternoon. I have been at it  
5                   for eight hours since I was up just after 4  
6                   this morning north of Saratoga Springs to  
7                   come here and visit with you.

8                   I think most of you are aware that  
9                   my main interest initially in coming here  
10                  was to support your position in the  
11                  preliminary report on rule 16(b)2 and (b)3  
12                  as the commission on the Ethics 2000, the  
13                  commission on evaluation of the rules of  
14                  professional responsibility.

15                 As I thought about it and as I read  
16                 on the train coming down this morning,  
17                 reread your preliminary report, if my  
18                 perception is correct that the members of  
19                 the task force are essentially unanimous  
20                 that rules (b)2 and (b)3 that the  
21                 commission proposed should be added to the  
22                 model rules and that the only difference  
23                 among you is whether or not those should be  
24                 mandatory or discretionary. There's so  
25                 much having reread your preliminary report

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2                   that I guess I would like to comment on  
3                   that.

4                   I appear here in my individual  
5                   capacity. You are aware that I am chair of  
6                   the coordinating council for the ABA Center  
7                   for Professional Responsibility and I have  
8                   been in the ethics field working as a  
9                   volunteer for some 30 years, a little bit  
10                  of my background on these particular issues  
11                  may be useful. In 1980 when the QueTech  
12                  Commission of Evaluation for Professional  
13                  Standards first circulated its discussion  
14                  draft I chaired the general practice  
15                  section and that section took a great  
16                  interest in the proposals and was a leader  
17                  and organizer of the opposition to the  
18                  QueTech Commissions and recommendations.

19                  First the format. We at the time  
20                  believed that because all of the states  
21                  virtually were uniform in adopting at the  
22                  time the model code of professional  
23                  responsibility that departing from the code  
24                  was a mistake, we lost that fight.

25                  We did however vigorously oppose

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2                   important subjects which I once thought  
3                   right were found to be otherwise. It is  
4                   therefore that the older I grow the more  
5                   apt I am to doubt my own judgment and pay  
6                   more respect to the judgment of others.

7                   I wish that were a universal norm of  
8                   human conduct, but obviously it is not. I  
9                   share the statements that have been made  
10                  here this morning on the question of  
11                  mandatory as opposed to discretionary  
12                  disclosure. I think the commission got it  
13                  right, the Ethics 2000 Commission. We  
14                  considered that long and hard, there was no  
15                  other single rule that the commission spent  
16                  more time on than rule 1.6.

17                  I am concerned by one comment or  
18                  probably more than one comment, but one  
19                  particular comment that Steve Gillers made  
20                  and that was the relationship of 1.13 and  
21                  1.6 and if I understand him correctly, his  
22                  suggestion that the lawyer, the in-house  
23                  counsel lawyer should have an opportunity  
24                  to go outside the corporation or the  
25                  organizational client to protect the

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2                   client.

3                   As I understand it, the client is  
4                   the corporation. I don't believe that the  
5                   obligation of protecting the corporation  
6                   against that kind of misconduct is the  
7                   lawyer's obligation. I think that's the  
8                   obligation of the highest authority, the  
9                   board of directors, and I may be wrong on  
10                  that because I haven't had time to consider  
11                  it, but my first reaction is that that is a  
12                  very bad idea.

13                  Less Jacobs made I think one comment  
14                  dealing with mandatory vis-a-vis  
15                  discretionary disclosure and clarity and  
16                  Steve Gillers addressed that and I share  
17                  the Dean's response. I don't think that  
18                  clarity has to do with whether the  
19                  disclosure of information relating to the  
20                  representation should be discretionary with  
21                  a lawyer or mandatory. I think clarity has  
22                  to do with the underlying facts within the  
23                  corporation.

24                  If I may, Chair Cheek, I would like  
25                  to also make a comment dealing with process

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2           in time to be with the standing committee  
3           on ethics and professional responsibility  
4           with respect to specific language  
5           amendments for the rules in time for the  
6           Seattle meeting in February, fine; if you  
7           can't, I think it's far more important to  
8           get it right.

9           One other thing that occurred to me  
10          coming down here. I had no intention of  
11          addressing the matters that your  
12          preliminary report deals with in terms of  
13          corporate governance, but rereading through  
14          the report brought to my mind one of my  
15          other hats. I have passed out a card that  
16          I have is as chairman of the Board of  
17          Governance of the Josephson Institute of  
18          Ethics. I am a founding member of that  
19          board and we have been working in the field  
20          of societal ethics, character development,  
21          values trading and ethical trading for  
22          youth and in the organizational and  
23          corporate field as well.

24          I chaired a meeting of that Board of  
25          Governors just last weekend at the

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2                   University of Maryland University College.  
3                   I was daunted going down there because it's  
4                   as you know on the outskirts of Washington  
5                   and any apprehensions of people who  
6                   appeared to be guilty of those crimes had  
7                   not taken place.

8                   We at the Josephson of Ethics  
9                   Institute have for some 15 years been doing  
10                  ethics programs, we call it ethics in the  
11                  workplace, and it has been for senior  
12                  management and leaders of such major  
13                  corporations as Johnson & Johnson, the  
14                  Union Pacific Railroad, the Los Angeles  
15                  Times. In fact the Internal Revenue  
16                  Service engaged the institute to do a  
17                  study, a survey of IRS supervisors and  
18                  employees.

19                  Curiously, you may be interested in  
20                  one of the salient findings of that survey,  
21                  the then director found that most employees  
22                  of IRS misread and misunderstood the  
23                  mission of the Internal Revenue Service,  
24                  almost unanimously they regarded the issue  
25                  of IRS as raising as much money for the

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2                   government as possible.

3                   The director who hired the Josephson  
4                   Institute said that's not our mission, our  
5                   mission is to collect every dollar the  
6                   government is entitled to but not to  
7                   collect a nickel more than the government  
8                   is entitled to. We prepared a series of  
9                   training videos for the IRS to use in  
10                  training all of its supervisors throughout  
11                  the regions.

12                 One standard that I don't think I  
13                 recall reading in rereading your  
14                 preliminary report this morning is one that  
15                 I think is perhaps the most important in  
16                 the governance of any institution and that  
17                 is a sharp focus on the leader of the  
18                 institution, the chairman, the chief  
19                 executive officer.

20                 The corporate culture or the culture  
21                 of any organization comes from the top and  
22                 whatever rules, whatever structures,  
23                 whatever standards and criteria your report  
24                 finally contains, whatever the SEC adopts  
25                 as standards, whatever the New York Stock

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2                   Exchange and NASDAQ adopt as standards, if  
3                   the leaders of corporate America are not  
4                   persuaded that they need to do the right  
5                   thing, those regulations and standards  
6                   won't be meaningless but they will not have  
7                   the affect that all of us intend and hope.

8                   I thought back to what I regard  
9                   maybe as the single most courageous  
10                  corporate decision that I can recall in the  
11                  history of American business and that was  
12                  when Jim Burk, then CEO of Johnson &  
13                  Johnson, said after a public recall with a  
14                  problem with Tylenol, we're withdrawing  
15                  every bottle of Tylenol that's on the  
16                  shelves today and we're doing it because  
17                  it's the right thing to do.

18                 That created, if I recall correctly,  
19                 something like a \$400 million hit that  
20                 Johnson and Johnson took. That's an  
21                 example of ethical correct wonderful  
22                 behavior that should in my judgment make  
23                 Mr. Burk truly an American hero because  
24                 that's not an easy decision to have taken,  
25                 very obviously.

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2                   We have on the Josephson board some  
3                   significant people in corporate America.  
4                   Our vice chair is a man named Robert Holmes  
5                   who is the ethics officer at the southern  
6                   company and who is an ethics officer at the  
7                   association. I don't know whether you have  
8                   had any input from that group, if you have  
9                   not I would think that it would be a useful  
10                  group of people for you to talk to.

11                  Dave Robertson of the New York  
12                  County Lawyers' Association expressed a  
13                  concern about the difference between the  
14                  independence of the CPA and the  
15                  independence of a lawyer, obviously there  
16                  is a vast difference, so much so that in  
17                  fact they are really identical because our  
18                  requirement of independence is independence  
19                  from any outside influence. The CPA's  
20                  requirement of independence is independence  
21                  from client influence.

22                  As many of you know, I served with  
23                  Bob Mundheim who is a liaison from the  
24                  board of governors to the ABA  
25                  Multi-Disciplinary Practice Commission and

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2                   I am not sure that I truly understood what  
3                   Dave Robertson was saying. What I wrote  
4                   was that the lawyer's independence is and  
5                   should be free from extra client loyalties,  
6                   that is to say non-client loyalties and  
7                   facially that's true, but to extend that to  
8                   the last number is not true.

9                   What I thought was implied from that  
10                  is that undivided loyalty to the client,  
11                  and obviously as lawyers for clients we  
12                  don't have completely untraveled and  
13                  undivided loyalty. That's what brought the  
14                  task force together, to determine when our  
15                  loyalty to our clients will be transcended  
16                  or will be trumped by obligations to third  
17                  parties. I think rather than go on I may  
18                  have some other notes, but is there is a  
19                  conversation or questions that members of  
20                  the task force would like to pose, it may  
21                  be a more useful expenditure of your time.

22                  CHAIRMAN CHEEK: Do you have a view  
23                  on mandatory issue with respect to 1.6?  
24                  What about 1.13, do you have a view of  
25                  mandatory or permissive disclosure to whom?

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2 CHAIRMAN CHEEK: Of the latter.

3 MR. ROSNER: As long as it is  
4 completely internal I think I would be more  
5 comfortable with making it mandatory, as I  
6 am fairly uncomfortable making it mandatory  
7 in the 1.6 context. Again, what we are  
8 talking about are disciplinary rules, so I  
9 very much see Gillers' view that some  
10 lawyer conduct that is sanctionable,  
11 sanctionable in the sense that doing  
12 something or failing to do something will  
13 result in some problem for the lawyer. I'm  
14 not comfortable with putting into the  
15 disciplinary rules many of those sanctions.

16 MR. JACOBS: You began there and  
17 were back to the beginning on this  
18 proposition. I genuinely am baffled by  
19 this proposition.

20 MR. ROSNER: Mandatory  
21 discretionary?

22 MR. JACOBS: Yes. The thing that  
23 baffles me about it is while I can  
24 understand a concern that lawyers not be  
25 hauled up for professional discipline, for

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2           questionable exercise of judgment as to  
3           whether or not certain circumstances  
4           warranted warnings or disclosures.  If  
5           you're willing to say let's get it sorted  
6           properly between the ethical rules and the  
7           substantive law rules, but let's deal with  
8           the principal of the thing, that is the  
9           ultimate objective here, whether it's being  
10          handled one way or the other.

11                    What is the possible merit of saying  
12           that in a given set of circumstances where  
13           disclosure could be warranted, that you are  
14           going to put the lawyer in a position where  
15           he may but is not required to disclose; is  
16           that not going to always mean that the  
17           lawyer is negotiating with and against his  
18           client over the lawyer's exercise of  
19           discretion?

20                   MR. ROSNER:  I don't think so.  I  
21           think the lawyer, a lawyer, let's take the  
22           outside lawyer for the moment.  The outside  
23           lawyer in these cases, we're talking again  
24           about serious financial harm to the  
25           financial interest or property of the third

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2           party and that typically is going to be a  
3           public company, it doesn't have to be a  
4           public company. The lawyer is certainly  
5           going to be aware at that level of  
6           sophisticated practice that failure to  
7           disclose where she sees all of the indicia  
8           of client misconduct that's going to lead  
9           to the damage.

10           Failure to disclose, having gone to  
11           the corporation because the predicate here  
12           is you've talked to the client and the  
13           client has ignored your advice, either not  
14           to do the dirty deed because it hasn't been  
15           done yet, that's one of the predicates, or  
16           to cease doing the ongoing crime in  
17           furtherance of which the lawyer's services  
18           aren't used.

19           The lawyer's disclosure it seems to  
20           me, and I think this is what Steve Gillers  
21           was saying as well, is going to take place  
22           under those circumstances as a matter of  
23           self-preservation. The reason not to make  
24           it mandatory in the disciplinary rules is  
25           because of the potential effect of

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2                   lawyer/client relationships.

3                   MR. JACOBS: Is what you're saying  
4                   and I thought I detected this in the Dean's  
5                   comments as well, that it is your premise  
6                   that the disclosure is in fact going to be  
7                   made. Now my question is if that is in  
8                   fact the premise that it's going to be  
9                   made, what are we dancing around here. The  
10                  only place that it matters is where you  
11                  would say I, Seth Rosner, would choose to  
12                  make the disclosure either out of high  
13                  principal or out of self protection, but I  
14                  nonetheless one way or another am going to  
15                  make the disclosure. What is the possible  
16                  value in a substantive law rule or an  
17                  ethical rule that would allow Less Jacobs  
18                  to say the hell with it, I'm not going to  
19                  disclose it.

20                  MR. ROSNER: Your predicate I can't  
21                  agree with because you said either the  
22                  substantive rule or the ethical rule. The  
23                  substantive rule is going to be determined  
24                  in a court of law.

25                  MR. JACOBS: We have complete

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2           discretion as to where we put the  
3           obligation here as a task force because  
4           certainly on corporate governance we're  
5           dealing with substantive rules. What I'm  
6           driving for is please don't be too  
7           protective of the sanctity of the ethical  
8           rules as being somehow something completely  
9           separate, I'm trying to get to the bottom  
10          line what should in fact be happening on  
11          the street, what should lawyers be doing.  
12          Is there a good reason that you're going to  
13          have a lawyer who wants to disclose, who  
14          can disclose, being pressured by the client  
15          not to disclose; is there a good reason for  
16          that?

17                 MR. ROSNER: There may be  
18                 circumstances where the lawyer's perception  
19                 of the underlying facts may not be accurate  
20                 and then the lawyer is in a position under  
21                 your rubric of mandatory rule, based on  
22                 that misperception, thinking that she must  
23                 disclose as a matter of disciplinary rule.

24                 MS. PETERS: If the lawyer is  
25                 persuaded, if your position and Dean

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2                   Gillers' position is correct that nine  
3                   times out of ten the disclosure will be  
4                   made for one reason or the other, isn't  
5                   then the discretionary rule, doesn't it end  
6                   up having the exact same impact on the  
7                   sanctity of the attorney-client privilege  
8                   that a mandatory rule would have?

9                   MR. ROSNER: No, not really. I  
10                  think Dean Gillers pointed out in two  
11                  different context the corporate employee  
12                  executive up to the CEO may first be in a  
13                  position of persuading the lawyer that the  
14                  lawyer's perception is wrong.

15                 MR. JACOBS: If that's the case then  
16                 there isn't even permissive disclosure. So  
17                 you have to accept the proposition that  
18                 after reasonable inquiry it is determined  
19                 that in fact the lawyer is correct and that  
20                 he is authorized. If he's authorized what  
21                 are the circumstances where you would say  
22                 he shouldn't.

23                 MS. PETERS: He's saying he could  
24                 exercise his discretion not to.

25                 MR. ROSNER: I can't think of a

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2                   specific fact circumstance.

3                   MS. HENNESSY: I was impressed by a  
4                   point that you made. Under the old model  
5                   code which I think it's probably safe to  
6                   say that all of us learned in law school,  
7                   it was revised in 1983. Under the old rule  
8                   the lawyer could reveal a client confidence  
9                   to prevent a crime?

10                  MR. ROSNER: Correct.

11                  MS. HENNESSY: That was not imported  
12                  into the new rules when they were revised  
13                  in 1983. Do you know why that change was  
14                  made?

15                  MR. ROSNER: I was to some  
16                  significant extent responsible for that,  
17                  the general practice section in the  
18                  American College, and we organized a group  
19                  of entities represented in the House of  
20                  Delegates in 1982 and '83 and opposed it  
21                  and we were wrong.

22                  MS. HENNESSY: You would now support  
23                  putting it back into the rules?

24                  MR. ROSNER: Absolutely. I  
25                  introduced a resolution last may that would

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2 have come to the House in August.

3 MR. MUNDHEIM: I suppose if you had  
4 took the permissive route, would you write  
5 any kind of language that would encourage  
6 lawyers to use that permission disclosed.  
7 In other words, we've got permissive and  
8 mandatory, would you be comfortable with  
9 permissive plus a strong language say  
10 reminding lawyers that it's important to  
11 disclose?

12 MR. ROSNER: Absolutely. In fact, a  
13 commentary (b)2 and (b)3 does that now and  
14 I certainly would propose strengthening  
15 that in some way to make it even clearer,  
16 although I think it is clear now, that the  
17 lawyer who finds himself in these  
18 circumstances needs to be very wary about  
19 the consequences of failing to disclose in  
20 the circumstances a predicate form.

21 MR. MUNDHEIM: It would be even  
22 stronger to say that in most cases where  
23 you find yourself that way, it is expected  
24 that a lawyer would disclose if the client  
25 won't?

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2 MR. ROSNER: In fact, I think your  
3 predicate may not even be strong enough,  
4 you say in most circumstances. Again, I  
5 don't want to commit myself to a position I  
6 might later regret. In all circumstances  
7 that are envisioned here the predicate is  
8 the client is about to commit a crime that  
9 is reasonably likely to result in  
10 substantial injury, et cetera, et cetera.

11 I guess I need to say to you that I  
12 am not adamantly opposed to a mandatory  
13 disclosure rule here, I'm not comfortable  
14 with it, I don't think it's necessary. I  
15 think there are enough areas of life where  
16 we live under a variety of mandates to be  
17 inclined to avoid them where they are not  
18 necessary.

19 My personal sense is that making a  
20 proposed (b)2 and (b)3 mandatory will be a  
21 very nice bow to the public outcry  
22 following the corporate disasters that  
23 called the task force into being and a nice  
24 bow to the Congress and to the Securities  
25 and Exchange Commission, but they don't

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2           write our rules, we do and your  
3           recommendations will be very, very  
4           carefully considered I'm sure by the House  
5           of Delegates and by the state on ethics, as  
6           and when you turn to them to craft whatever  
7           language to implement the substantive  
8           recommendations you're making.

9           I shy away from mandatory in many  
10          aspects of life and I'm thinking actually  
11          if one aspect dealing with your corporate  
12          governance issues added something that Mike  
13          Josephson in many of his programs hammers  
14          on. Ethics, Mike says, is doing more than  
15          you're required to and less than you're  
16          permitted to and I think that's exactly the  
17          kind of corporate culture, if you will,  
18          that will lead to American businesses  
19          learning to do the right thing. It's not a  
20          question of simply obeying the letter of  
21          the law and not transgressing the line, but  
22          you can go as close to it as possible.  
23          It's much more a matter of doing the right  
24          thing and doing the right thing, as Mike  
25          frequently says in his programs, is doing

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2                   more than you're required to but less than  
3                   you're permitted to.

4                   A SPEAKER: The right thing now is  
5                   to take lunch.

6                   (Lunch taken at 12:35.)

7                   (Resumed at 1:10 p.m.)

8                   CHAIRMAN CHEEK: We will reconvene  
9                   our task force meeting this afternoon.  
10                  Elaine Mittleman, we appreciate you being  
11                  here.

12                  MS. MITTLEMAN: I'm very honored to  
13                  be here today and I looked at all of your  
14                  bios on the web site and I was very awe  
15                  struck by the experience and education you  
16                  all have, so I'm pleased to be in front of  
17                  you. When I walked in this room 110, it  
18                  reminded me a little bit of room 100 in the  
19                  Hutchins Hall.

20                  I wanted to appear before you, it  
21                  was very important to me and I thought I  
22                  could just throw something up together in  
23                  ten minutes or something, and then I read  
24                  the statements from the September hearing  
25                  off the web site and I went through the