

October 30, 2002

James H. Cheek, Chair
Task Force on Corporate Responsibility
c/o Sue Daly
Section on Business Law
American Bar Association
750 N Lake Shore Dr
Chicago IL 60611

Re: **Preliminary Report of ABA Task Force on Corporate Responsibility**

Dear Mr. Cheek:

We are writing on behalf of the Los Angeles County Bar Association (“LACBA”) to express our Association’s comments, adopted by our Board of Trustees, on the Preliminary Report of the ABA Task Force on Corporate Responsibility. We greatly appreciate your affording us the opportunity to comment on the Preliminary Report.

LACBA has studied the Preliminary Report and acknowledges the tremendous thought and time that went into this effort. We do, however, have concerns about a few of the recommendations--proposals 2 and 3 on pages 45-46--which propose changes to the ABA Model Rules of Professional Conduct (“Model Rules”).

While the proposed changes were designed to address concerns arising from practice in securities law, the changes, if adopted by the states, would govern the conduct of lawyers in all areas of legal practice specialties. It is our view that these broad-brush changes are unnecessary and unwise, and would lead to adverse consequences. When the ABA Ethics 2000 Commission proposed similar changes two or three years ago, LACBA joined with others in opposing these changes to ethics rules. Those concerns led to the ABA House of Delegates declining to adopt these changes. In our view there is no good reason to revisit that determination.

The proposed changes are based on an incorrect view of the role of a lawyer in the legal system and the nature of the attorney-client relationship. Lawyers have a special and unique role in our society: they are vested with the fiduciary duty of confidentiality to enable them to discourage and divert wrongful or illegal client conduct. Because lawyers are duty-bound to maintain the confidentiality of client information, we will never know when or how many attorneys successfully change the course of corporate conduct by counseling and advising their clients to perform responsibly.

The rules that protect confidential client information are based on a careful balance between the need to provide effective representation of the interests of clients and the need for public disclosure of such information. In the Model Rules, that balance has traditionally been struck in favor of prohibiting disclosure absent a serious threat to life or limb.¹ Under the traditional balance, an attorney may advise a client, “tell me everything that I should know about representing you – my lips are sealed, and no information will be made public except to represent your interests.” Thus the client can have confidence when disclosing to a lawyer all relevant information without fear that the lawyer will disclose it to third parties. This information is invaluable as the lawyer seeks to counsel a client on legal options. We think that this balance is based on sound and enduring public policy, and is one of the core principles of the practice of law.

The Preliminary Report proposes dramatically to change that balance. With the recommended changes, a lawyer could no longer legitimately promise to guard a client’s secrets and confidences in a wide variety of situations. In consequence, clients may well lose confidence in the lawyer’s ability to maintain information in confidence. As a result, clients and the system of justice as a whole will suffer.

Denying a client the right to counsel and transforming a lawyer into a policeman would result in many clients not seeking counsel for fear of exposure. That course of action, in turn, would undermine the Task Force's desire to ensure greater corporate honesty, responsibility, and socially beneficial conduct. Rogue corporate managers would continue to function, but without the cautionary advice of reason, coupled with a legal evaluation of the legal consequences. Such managers would simply hide their intended conduct from their lawyers, because lawyers could no longer be trusted.

In addition, the proposed changes would make the attorney-client relationship much more adversarial, and would corrupt the duty of loyalty to a client. The proposed revisions would impose on a lawyer a duty of due diligence in determining what a client is planning to do, and would make the lawyer both judge and jury as to whether public disclosure should be made. We think that the reasons given to alter the traditional balance are insufficient, and should be rejected.

Furthermore, the expanded range of permitted disclosure of confidential client information would set very uncertain standards for when disclosure of such information is authorized. The uncertainty of these standards is particularly hazardous because they will expose an attorney to malpractice liability (where the issue will be decided by a jury) and disciplinary action based on an assessment of attorney decision-making made in hindsight.

Even in the securities law context, LACBA does not agree with the proposed amendments to the Model Rules of Professional Responsibility. However, section 307 of the recent Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, and implementing regulations to be adopted thereunder, will likely preempt this issue. Outside that context, we think it even more imprudent and unwise to impose such obligations.

The Preliminary Report proposes changes to three Model Rules, Rule 1.2(d), Rule 1.6(b) and Rule 1.13. We discuss these in turn.

¹The “life or limb” exception does not appear in the California rule, which is codified in California Business & Professions Code § 6068(e), but it does appear in ABA Model Rule 1.6(b).

Rules 1.2(d), 1.13 and 4.1 – Lawyer Knowledge (Task Force Preliminary Report Section III.B., pages 27-30 and 33-36 [Recommendation 3 in Summary of Recommendations, page 46])

Rule 1.2(d) prohibits a lawyer from counseling a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. Rule 1.13 prescribes a procedure for a lawyer to ascend the organizational structure to object to client conduct where “a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization” Rule 4.1 prohibits a lawyer from knowingly making a false statement of material fact or law to a third person or failing to disclose a material fact to a third person when necessary to avoid assisting a criminal or fraudulent act by a client (unless disclosure is prohibited by Rule 1.6).

These rules now apply only where the lawyer has actual knowledge relevant to the issue. The Preliminary Report proposes to expand the scope of Rules 1.2(d), 1.13 and 4.1 to apply also where the lawyer reasonably should know of the crime or fraud. In effect, this imposes a negligence standard on attorneys in these contexts. This is a dramatic change from the present standards relating to attorney conduct under the Model Rules.

LACBA opposes these changes because the changes, if adopted by the states, necessarily would impose on a lawyer a duty to investigate the client’s conduct. We believe that such an obligation would corrupt the duty of loyalty of a lawyer to the client, and would turn the lawyer into a watchdog and an adversary of the client. At the same time, it would vastly expand the liability of a lawyer for client conduct as to which the lawyer traditionally has no direct knowledge and may not even be aware, and which the lawyer may be powerless to prevent. Furthermore, we think it entirely improper to authorize disciplinary action against a lawyer in such a context.

In addition, if an attorney is sued by a third party for failure to disclose under such a rule, the attorney may be required to disclose confidential information in order to defend against the allegation that the attorney “should have known” of the client’s conduct. Such a disclosure, however, may not be authorized by other rules of professional conduct.

Rule 1.6(b) (Task Force Preliminary Report Section III.B., pages 30-33 [Recommendation 2 in Summary of Recommendations, page 45])

Rule 1.6 is the Model Rule that generally imposes an obligation on an attorney to preserve the confidentiality of client information. Rule 1.6(b) provides several circumstances where a lawyer may disclose such confidential information, which include the disclosure of “information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm”

Proposal III.B. of the Preliminary Report (pp. 30-33) suggests two changes to this rule. First, it proposes to extend permissible disclosure to reach conduct that has resulted or is reasonably certain to result in substantial injury to the financial interests or property of another. Second, it proposes to require disclosure to prevent felonies or other serious crimes, including violations of the federal

securities laws, where such misconduct is known to the lawyer.

LACBA opposes the first change because we believe that authorization to disclose prospective harm to “financial interests” and “property” would permit and perhaps require far too much disclosure of confidential client information. The terms “financial interest” and “property” are simply too vague. There is much client conduct which may result in substantial injury to property or to the financial interests of another. Such client conduct in many contexts is entirely proper. We believe that this language loosens a lawyer’s lips in far too many circumstances where the lawyer’s lips should be sealed.

Application of the rule to past client conduct is particularly pernicious. It would prevent an attorney from providing any sort of adequate representation to a client with respect to past conduct that has caused substantial financial or property injury. The protection of confidential client information in this context lies at the very heart of the role of a lawyer in providing legal representation to a client.

In addition, such a rule would require very extensive disclosure to a client of the circumstances where a lawyer may disclose confidential client information, and would likely lead to nondisclosure of information that may be essential to the effective representation of the client. The benefit of permitting such disclosure is at best marginal in most circumstances. We think that the traditional balancing of the interests in favor of nondisclosure to permit more effective client representation should be preserved.

The ABA House of Delegates rejected a similar proposal in 2001 by a large margin, based in part on the opposition of LACBA. We continue to oppose this proposal.

The second proposal, to require an attorney to disclose “felonies or other serious crimes,” is narrower. This proposal was also rejected by the ABA House of Delegates in 2001. LACBA also opposed this proposal successfully in 1983 when the Model Rules were initially drafted and adopted by the ABA. We continue to oppose this change.

LACBA also opposes the second change because it is too broad. It proposes to mandate the disclosure of confidential information to prevent a client from committing a “felony or other serious crime.” As stated above, we think that the ABA Model Rule should be restricted (as it is now) to client actions that are likely to cause either death or substantial bodily injury that is imminent. “Felony or other serious crime” covers a wide range of conduct, which may be difficult to define. For example, wholly innocent conduct, such as telephone calls, letters or emails, may be criminal if they are a larger part of a wire fraud, mail fraud or conspiracy.

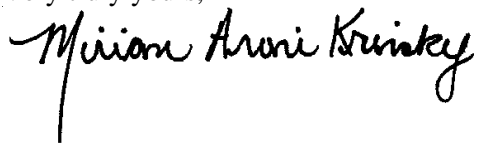
Rule 1.13 (Task Force Preliminary Report Section III.B., pages 27-30 [Recommendation 1 in Summary of Recommendations, page 45])

The Preliminary Report also recommends the revision of Rule 1.13 (which is essentially similar to California Rule 3-600) to require an organization’s lawyer with knowledge of client misconduct to pursue remedial measures up the organizational ladder, and to revise language that discourages lawyers from communicating with higher corporate authorities.

Our understanding of this proposal is that it would not permit public disclosure of confidential client information. We assume also that it would not authorize a “noisy” withdrawal from representing the client, which would be inconsistent with California Rules of Professional Conduct, Rule 3-600. Based on those assumptions, we do not oppose this change.

Thank you again for the opportunity to comment on the Preliminary Report. Please feel free to contact us if we can be of any further assistance.

Very truly yours,



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President



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