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**Written Submission of Diane L. Karpman¹ to the
ABA Task Force on Corporate Responsibility**

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1. Introduction

Recent reports of corporate mismanagement, accounting fraud, and the continuing media images of CEO's in handcuffs have created economic stress reminiscent of the Great Depression. These events justify reorganization of our corporate governance structure.

Modification of the Model Rules as a response to these issues, however, absent any determination of attorney complicity or wrongdoing, is excessive, can be harmful to clients, and seriously impairs the delivery of legal services in our society. The proposals of the Preliminary Report of the ABA Task Force on Corporate Responsibility ("The Report") are radical and extreme, impact upon basic notions regarding the role of lawyers in our society, and will have unintended consequences.

We hallow the Rule of Law in our society. A lawyer's role is that of a champion, and lawyers are partisans. Lawyers protect, promote, and defend clients, in addition to dissuading questionable or illegal conduct. The proposed changes drastically alter that role. They merit reconsideration regarding their impact upon any entity representation, since the Model Rules apply in all forms of legal representation and not merely in the realm of representation of public companies.

II. Model Rule 1.13

It is well established that according to Rule 1.13, the client is the organization, corporation, or entity. Attorneys are engaged to work in the best interests of that entity-client. If the premise of the Report and Model Rules is that the organization is the client, then undivided loyalty is

¹ This report contains my personal opinions. I participated in drafting the Los Angeles County Bar Association's Report, and have been appointed as the Chair of the Corporate Responsibility and Governance Committee for the Association of Professional Responsibility Lawyers (APRL). Attached is a copy of my Curriculum Vitae.

axiomatic. Indivisible loyalty cannot be fragmented to include new duties owed to shareholders, the public or society. Such a modification would represent a profound change in entity representation, because the identity of the client is being obfuscated, therefore denying the entity- client the undivided loyalty which is a hallmark of the legal profession.

The proposed modification of Rule 1.13 muddies this clear vision by introducing duties to shareholders and echos of concern regarding the "public interest."² That would force the entity client to stand bare without legal representation, or at a minimum, share the loyalty of counsel. This raises interesting issues of other historic Anglo-American concepts of jurisprudence. For example, it is the client who holds the attorney-client privilege. If the client is the "public interest," how (in terms of logistics) is that privilege claimed?

Further, the expansive proposed duty to go "up the ladder" fails to take into consideration the number of lawyers who may be engaged by an entity-client; the scope of their representational obligations; and the need for a more refined analysis. Lawyers employed in discrete areas of practice cannot be responsible for actions extrinsic from the scope of their duties.³ The proposed modification of the phrase "or that has come to the lawyer's attention by the representation" is too broad, and the proposed narrowing factors of an officer's "crime or fraud"⁴ fail to offer reasonable boundaries. Since securities fraud is a suggested trigger, which is a substantial wrong, the officer's "crime or fraud" should be substantial or of a serious magnitude.

Concurrent representation of officers and directors should be prohibited, absent full and complete disclosure and the execution of a consent which articulates the reasonably foreseeable consequences of mutual or concurrent representation. The consent should be executed by disinterested directors or officers.

The proposed modifications apply to all entity representation. It must be remembered that these proposed modifications will not just impact upon publicly traded companies, but also upon the convenience store on the corner. Depriving the corner hardware store of its lawyer is a clear, but certainly unintended, consequence of these proposals, which appear to have been drafted with the representation of public companies in mind.

Our rules, which were designed with a vision of litigation in mind, fail to differentiate lawyers working in other capacities. Our rules suggest that "one size fits all." It is possible that the Commission should consider the development of specific rules for lawyers working in other capacities. As a profession, it is possible that we should recognize that lawyers involved in public companies should have different obligations than those involved in "individual rights"

² The Report, page 24.

³ The Report, fn. 24, appears to consider this, but fails to fully delineate the issue.

⁴ "Crime or fraud" are vast terms in our society. For example, it is a felony to cut a cactus in Arizona.

issues. Lawyers involved with regulatory agencies may have different obligations of cooperation and disclosure. However, to provide competent representation to our clients, it is the client who must be notified, if different obligations are owed or justified, at the inception of the representation, not after the fact.

III. Model Rule 1.6

The proposed modifications in the Model Rules eviscerate confidentiality and obfuscate the historic role of the lawyer. In the not too distant past, many urged creation of business entities which were generically labeled as Multidisciplinary Practices, where accountants and lawyers would form business enterprises together. These proposed entities were wisely rejected by the Bars, due to recognition of the mutually inconsistent core values of the two professions. The primary core value of the accounting profession is full and honest disclosure, whereas the primary core values of the legal profession are confidentiality and loyalty.

In effect, the proposed modification of Model Rule 1.6 strips the entity or organization of any legal representation. The entity would be denied the ability to seek counsel or advice regarding an objective or course of conduct, due to fear that the "attorney" would deem the conduct to be criminal or fraudulent. This would then trigger the newly proposed obligation of mandatory disclosure. In effect, this transforms the lawyer into the role of the watchdog or regulator.

Lawyers perform critical functions in our society, by advising clients of the benefits and detriments of a given course of conduct. Clients are encouraged to engage in full and frank discussions with their attorneys and disclose all information that may have an impact upon their circumstances, in order for a lawyer to perform competently. In exchange for full and complete disclosure, lawyers promise clients that their private confidential information will never be employed against their interest. To use private client information against a client is a betrayal of trust and represents a violation of a lawyer's promise of fidelity. This is evidenced by the fact that clients control the attorney-client privilege and can prohibit a lawyer from any future disclosures.

Confidentiality enhances the delivery of legal services, which would be useless but for full and complete disclosure. Disclosure allows a lawyer to empower the client through the reciprocal delivery of relevant advice and counsel. Therefore, the client is educated and can make fully informed decisions. The advice of counsel can only be effective if it is based upon full disclosure, to allow a lawyer to offer a client the full range of potential consequences of their possible conduct.

Lawyers are accorded a unique role in our society. They are vested with the fiduciary duty of confidentiality to permit them to use their powers of persuasion to discourage and divert wrongful or illegal client conduct. Because lawyers are duty bound to maintain confidentiality, we will never know how many attorneys successfully changed the course of corporate conduct by counseling and advising their clients to perform responsibly.

Less drastic modifications, supported by Ethics 2000, were soundly rejected by the House in August of 2001. Those amendments allowed for permissive disclosure to prevent or rectify

substantial harm to another's property or financial interests, as opposed to these radical mandatory disclosure requirements. We are merely lawyers, not clairvoyants. We cannot foresee the impact of a given deal in terms of another's financial interests. If lawyers become too cautious, then in effect they become managers and inherently will substitute their business judgment for the decisions of the corporate officers. That is not the role of an attorney.

The Report urges mandatory disclosure "to prevent client conduct known to the lawyer to involve a crime, including violations of federal securities laws and regulations."⁵ This would seem to apply where the questionable conduct is "reasonably certain to result in substantial injury to the financial interests or property of another."

The role of lawyers is effective because they can act as sounding boards for their clients' dreams or schemes. A lawyer is not an adjudicative officer but a champion who provides the client with an analysis of a particular outcome of a potential course of conduct. This proposal destroys the ability of the lawyer to counsel a client against a particular objective.

Further, the attempt to nexus the services of the lawyer to the improper or illegal goal is far too broad. Since lawyers are officers of the court, we should presume that they encourage and promote their clients' best interests in all matters, as opposed to assisting in illegality or misconduct. This is not intended to suggest that clients do not consider and evaluate conduct that would or could constitute a crime or fraud. However, those are vague terms, and clients often retain lawyers because they do not understand what is criminal or fraudulent. We cannot create a situation in which a client will become reluctant to disclose and request advice, due to fear of exposure. It is inapposite of the lawyer's counseling obligations.

Counseling appropriate corporate conduct is in lawyers' own best interests, since attorneys want to continue to be gainfully employed. We have no idea how many lawyers are living on Maalox and who have gone to the mat to dissuade improper corporate conduct. Many of the recent scandals involve conduct so egregious that obviously lawyers were not involved, because a lawyer would have advised the client that without doubt, misstatements of millions of dollars of earnings would eventually be discovered. If a corporation chooses the dark side, eventually that choice will be discovered. Cooked books, faux profits, and illegal megawatt trades eventually come to light, exposing the corporate entity to negative publicity, litigation, and bankruptcy.

The proposed modifications will have tremendous impact by increasing attorney civil liability in entity representation. Although the Rules are not intended to create new or additional civil liability, they do, since lawyers are licensed. Drivers are licensed and when they violate the driving laws, the violation results in criminal or civil liability. The road map for lawyer liability is equally clear in the civil arena.

⁵ The Report, page 32.

The potential civil liability from shareholder suits (or other third party litigation) will deprive entity-clients of the right to seek advice. Many lawyers will be far too preoccupied looking over their shoulders to determine how a particular course of conduct will appear to a jury with the benefit of hindsight. Remember that Nancy Temple's advice may not have been timely in reminding Arthur Anderson of its document retention policy, but it was typical advice lawyers deliver to clients on a daily basis. The establishment of the special purpose entities by Enron, which numbered nearly three thousand, was not inherently illegal, criminal or fraudulent.⁶ Lawyers need and must have discretion to be effective.

Mandatory disclosure is required in only four of the 51 jurisdictions.⁷ Amplified disclosure requirements appear to be suggested as a "fix-all" solution for problems that have failed to be causally related to the issues presented in the recent corporate scandals.⁸ Lawyers from "Florida, New Jersey, Virginia and Wisconsin" were involved in these matters. However, what good was accomplished by the mandatory disclosure requirements of those states?⁹

There is a popular notion, articulated in the media and engendered by notorious cases, that confidentiality is the root of all our social ills. The presumption is that confidentiality leads to collusion or some form of complicity, when that nexus has never been established. For example, during the deliberations and meeting of the Ethics 2000 Commission, the Commissioners often suggested that if the lawyer learns of a criminal conduct involving the poisoning of a municipal water supply that will not be discovered for twenty years, then disclosure ought to be mandated. This is a superb example, but has never occurred and nothing akin has. Therefore, to change Anglo-American jurisprudential concepts of confidentiality based upon this type of idle speculation is uncalled for and unsupported factually.

IV. Modification in M.R. 1.2 (d), 1.13 and 4.1 Regarding Knowledge

⁶ John C. Coffee, Jr., Understanding Enron: "It's About the Gatekeepers, Stupid," The Business Lawyer, Vol. 57, August 2002, page 1404, fn. 4.

⁷ The Report, fn. 28, "Florida, New Jersey, Virginia, and Wisconsin."

⁸ The Report, page 3. Examples include WorldCom, Adelphia, and Tyco.

⁹ The Report.

The Report seeks to "expand" the standard of knowledge involving Model Rule 1.2 (d), 1.13 and 4.1. Violations of the Model Rules are specifically intended to result in disciplinary sanction, although it would be foolish to ignore the contemporary consequences involving civil liability. Nevertheless, the expressed objective is discipline. Since discipline involves potential disbarment or loss of license, and because the right to practice law is a valuable property right, certain standards involving due process are mandatory. The present "actual knowledge" standard is consistent with due process theories, in that actual knowledge is required to trigger liability for violations.

The proposed change in the standard of knowledge from actual to "reasonably should know" is a seismic shift in the Rules. This continues the fragmentation of the attorney-client relationship, which is being chipped away with the ambiguous terms of "crime or fraud," and then further attenuated with the lawyer's obligation of "reasonably should know." To provide competent advice and not be second-guessed by clients, lawyers should be required to actually know before they remonstrate clients.

This string, stretching from crime to fraud, then to "reasonably should know," blurs the overarching goal of greater disclosure, presuming that is the goal of these proposals. The vagueness of these terms will require that lawyers constantly disclose any and all suspicious conduct, behavior or information, attempting to protect themselves from claims in the future, that they knew or inferentially should have known. Clients will no longer seek legal advice for fear that their thoughts will trigger these undefined amorphous standards. Significantly, this is a standard which involves hindsight. Juries will piece together bits of information years after the fact, and find by viewing the totality of information that "clearly" the lawyer should have known.

Corporate representation and the intricacies of legal practice have resulted in increasing specialization designed to promote competency in the delivery of legal services. Specialization breeds expertise and focus, but additionally results in lawyers no longer being generalists. For many lawyers, an analysis of a balance sheet is unnecessary for the performance of their duties, and analyzing the sophisticated GAAS would never provide an accurate evaluation of the status of a corporation anyway. The Report fails to delineate the scope of their duties. Entities retain lawyers for immigration, leases, defense in civil litigation, administrative agencies, and a plethora of other activities. Will these lawyers now be required to retain their own personal accountants to determine the validity of the statements or face the peril of a jury deciding that they should have known something was amiss?

Specialization further exacerbates this issue, because lawyers are not turning a proverbial blind eye toward the facts. It is just that they do not have the skill to stitch them all together. They are retained for discrete tasks and are not "all knowing." Remember that much of the activity involved in recent corporate scandals was perfectly legal, which again brings into play issues involving due process. The Report presumes that all lawyers are created equal, when in reality while lawyers were studying criminal law in class rooms, many of their clients were engaged in criminal law in the streets. When specialization is coupled with the duty of loyalty to believe a client, the "should have known" standard impairs that fundamental core value of loyalty.

V. Conclusion

Denying a client the right to counsel and transforming a lawyer's duty as an advocate to a policing role will result in clients not seeking counsel for fear of exposure. However, that will not result in greater corporate honesty or socially beneficial conduct. Rogue corporate managers will continue to operate, but without the cautionary advice of reason, coupled with a legal evaluation of the consequences. They will hide their intended conduct from their "lawyers." Lawyers will no longer be trusted and will become incapable of dissuading reckless and immoral corporate conduct.