

1 San Jose which closed the airport there. We had no
2 trouble getting out of Los Angeles on time.

3 Keep in mind that in California we have 20
4 percent of the nations's practicing lawyers and what
5 the American Bar Association does with respect to
6 rules of professional conduct has a substantial impact
7 on California lawyers as well as other lawyers
8 throughout the country. I am going to be focussing my
9 remarks today on the portion of your preliminary
10 report which speaks to rules of professional conduct.

11 My board of trustees has taken up the issue
12 of the corporate law recommendations as well, but as
13 of this point has not taken any position on those and
14 I don't know if it will be in the future. But we do
15 have a position with respect to proposed changes in
16 the rules of professional conduct and those I will be
17 addressing. Before doing that, though, let me point
18 out or make reference to one other matter. As you
19 probably know, the California rules of professional
20 conduct are in substantial measure from the ABA model
21 rules, in that respect are substantially different
22 from the rest of the country as well because there's
23 no other state that has either a substantially
24 different set of rules or the rules that are
25 substantially different in the respect that ours are.

1 However, we have to have a commission that is
2 studying the California rules of professional conduct,
3 and one of our speakers later this afternoon, Mark
4 Tuft from the San Francisco Bar association, is on
5 that commission. I am not. I have recommended to our
6 commission that we should give at least very serious
7 consideration to adopting the format of the ABA rules
8 and to the extent that we don't have views that are
9 substantially different from the ABA rules we should
10 adopt the ABA language as well.

11 It remains to be seen whether our commission
12 will take that advice, but I've published it in the
13 California Law Journal.

14 As to the proposed changes in the rules of
15 professional conduct, my main mandate this afternoon
16 relates to the fact that task that was assigned to
17 this task force was essentially limited to making
18 recommendations with respect to publicly owned
19 corporations. But with respect to rules of
20 professional conduct the recommendations that you have
21 in your preliminary report, if adopted, would mostly
22 impact lawyers that don't represent publicly held
23 corporations. And even for those lawyers who do, it
24 would mostly impact them with respect to the things
25 they do that don't have any effect on capital markets

1 or anything else that would be material to investors
2 in these publicly held corporations.

3 Most lawyers do most of their work outside of
4 that sphere, but the proposals that you made with
5 respect to rules or professional conduct have no such
6 limitation whatsoever, so the major impact would be on
7 lawyers whose practice has nothing to do with the
8 scope of responsibility of this task force, and that
9 is a matter of substantial importance to my bar
10 association because our lawyers in Los Angeles like
11 most of the lawyers in California, and for that matter
12 in the rest of the country, do not involve working for
13 publicly held companies on matters that would possibly
14 make any material difference to the disclosures that
15 are made to the investing public or to the capital
16 markets, generally.

17 One way of looking at this is essentially the
18 commission has taken an elephant gun to kill a mouse,
19 even indulging the assumption that the mouse should be
20 killed, the collateral damage is likely to be
21 substantial, and we think that with respect to the
22 recommendations in the preliminary report the
23 collateral damage definitely will be enormously
24 substantial, indeed substantial enough so that on at
25 least two occasions the ABA house of delegates has

1 substantially voted down some of these proposals.
2 Some of the others are new and I'll get to those.

3 Now, my bar association doesn't even indulge
4 the presumption that with respect to the
5 representation of publicly held companies on matters
6 that relate to the capital markets that there should
7 be any relaxation in the rules of confidentiality that
8 exist today. With that I'll come back to later.

9 I'm going to speak mainly on three points.
10 First of all, with respect to the proposed change
11 which would change the meaning of the language in
12 several of the rules where it says imposes
13 consequences with respect to what a lawyer should do
14 when a lawyer knows something, that the language would
15 be changed to, that would mean not only what the
16 lawyer actually knows, but what the lawyer should
17 know. And some of your speakers this morning have
18 already addressed that. Essentially, in our view as
19 well as the view of some of the others you have
20 already heard from, this would import a negligence
21 standard into that realm of conduct by a lawyer.

22 Now, as between a lawyer and client we
23 already have a negligence standard. Probably in most
24 respects the obligation of the lawyer is higher than a
25 negligent standard. Negligence constitutes

1 malpractice, but the fiduciary duties of a lawyer to a
2 client are probably higher than that. But a
3 negligence standard with respect to third parties is
4 something else, and also with respect to disciplinary
5 authorities. We think that the civil laws, civil law
6 system imposing obligations of a lawyer to a client
7 are sufficient to deal with those obligations and that
8 we don't need to impose discipline. We don't need to
9 create public liability, as the rules of professional
10 conduct surely do, for a lawyer's negligence.

11 I'm also going to be talking about whistle
12 blowing and about the proposal that whistle blowing
13 especially be provided and sometimes mandated with
14 respect to past client conduct. I think it's very
15 unfortunate with my bar association it's very
16 unfortunate that the task force has proposed to impose
17 disclosure obligations to the public, for a lawyer
18 with respect to past conduct of a client. This, if
19 anything, is what the attorney-client privilege and
20 what the duties of confidentiality protect from
21 disclosure. A lawyer cannot adequately represent a
22 client in many different contexts if the lawyer cannot
23 tell the client what you tell me about what you've
24 already done I need to know about and the protection
25 for you is my lips are sealed. I will not and cannot

1 disclose it to anybody outside the organization except
2 in the furtherance of representation of your
3 interests.

4 Here in California we take this obligation
5 especially seriously. It is not written in our rules
6 of professional conduct. Our legislature wrote it.
7 And what the legislature wrote is stark. It is the
8 lawyer shall maintain inviolate at every peril to
9 himself or herself the confidences and secrets of the
10 client, Business and Professions Code Section 6068(e).
11 Our California courts have said no exception is
12 recognized. We lawyers in California don't quite read
13 it that way. We're not sure there are no exceptions,
14 but we do think that the ABA did get it essentially
15 right in rule 1.6 as it stands today and as it has
16 stood since 1983 that when you get beyond criminal
17 conduct that will cause death or substantial bodily
18 injury, then you're outside the sphere of where public
19 disclosure should be authorized.

20 This is in our view simply not a lawyer's
21 job, not a lawyer's role, not what a lawyer should be
22 authorized or even mandated to do. Other people have
23 those responsibilities. A lawyer can't carry all the
24 responsibility. If there's imminent death or
25 substantial bodily injury and if a lawyer is the last

1 person who has the opportunity to prevent it, that's a
2 different story. But if we're not at that stage, then
3 other people should be picking up the responsibility
4 and making the appropriate disclosures or the client
5 should be making the appropriate remedial conduct to
6 prevent the harm that might otherwise develop. And we
7 think especially that the language that's proposed --
8 as I said we voted down in the house of delegates more
9 than once -- I take it back. It was only voted down
10 in the house of delegates once. The QTAC commission
11 back in the early 80s, my bar association joined with
12 other bar associations to urge that the Kutak
13 commission that had proposed the same language that it
14 be taken out of the recommendation when the ABA model
15 rules were being written.

16 The commission saw it our way and we think
17 the commission saw it rightly that that should not be
18 in the ABA model rules except to the extent that it's
19 already there.

20 The proposed language financial interest or
21 property is very vague. As I said, I sit in
22 bankruptcy court. I get 3 or 4 or 5,000 cases every
23 year and typically have more than a hundred hearings
24 in a week. Virtually every lawyer coming into my
25 court could claim that the actions being taken on the

1 other side are hindering -- are injuring his or her
2 client's financial interests or property and the
3 lawyer on the other side is engaged in misconduct by
4 not reporting it to the public. Virtually every case
5 would fall under this language.

6 And with respect to injury, injury means --
7 your injury means frequently somebody else's benefit.
8 Injury is determined at the end of the day when we
9 decide the results of the lawsuit.

10 MR. OLSON: That's not the standard. The
11 standard in 1.6 is fraud where the lawyers's services
12 are being used to further the fraud. It's not just
13 some hard bargaining or something happens on the other
14 side of the table.

15 THE WITNESS: You know what, California maybe
16 is the home of fraud claims. Virtually every one of
17 these turns out to be a fraud claim when it comes to
18 my court.

19 MR. JACOBS: What is a California lawyer to
20 do if a client says to the lawyer in the middle of a
21 proceeding that's pending before you that the
22 testimony that I gave to the good judge last week was
23 completely false? And the lawyer says I kind of wish
24 you hadn't told me that. Then what does he do in
25 California?

1 THE WITNESS: Then he has a longer talk with
2 the client about rectifying that problem.

3 MR. JACOBS: The client says take a hike.
4 Then what's the lawyer in California do?

5 THE WITNESS: Make a motion to withdraw.

6 MR. JACOBS: You say you've got to be
7 kidding. We're in the third week of this trial and I
8 only have one day to go. Why would I let you withdraw
9 now?

10 THE WITNESS: Well, judges sometimes do that.
11 I haven't had that come up in my court, but judges do
12 sometimes do that, and if that happens, you're stuck.

13 MR. JACOBS: But the lawyer, if he's stuck
14 and doesn't withdraw, does he disclose to you the fact
15 of the false testimony?

16 THE WITNESS: That would be a violation of
17 section 606(a)(d); no, sir, not in California.

18 MR. OLSON: So we can understand --

19 MR. JACOBS: The rule really is that somebody
20 appearing before the court can knowingly present a
21 client's false testimony?

22 THE WITNESS: That's not the hypothetical.

23 MR. OLSON: That's going to past conduct.
24 Say you represent a client who you know has testified
25 falsely.

1 THE WITNESS: You can, if the Court requires
2 you to. That does come under mandatory withdrawal,
3 which means you have to make the motion to withdraw
4 and try to get out.

5 MR. OLSON: So you know there's a material
6 false testimony in the record and you have no
7 obligation to inform the court that the court has been
8 defrauded, basically?

9 THE WITNESS: That's right.

10 MR. OLSON: Suppose it's fabrication of
11 documents?

12 MR. JACOBS: Let me just ask you this.
13 Living with that rule, you're urging that the ABA
14 should adopt that position as a national standard?

15 THE WITNESS: No, I'm not. What I'm urging
16 is that the ABA not change rule 1.6, 1.6(b).

17 MR. JACOBS: We just came up with one form of
18 past conduct where lawyer's services were implicated,
19 and you would say that for that kind of past conduct
20 you would not want the lawyer to be silenced as a
21 national standard, even though he may be in
22 California, and I'm asking you why you couldn't find
23 other examples of past conduct that you would think
24 were at least as worthy of allowing a lawyer to
25 disclose.

1 THE WITNESS: Well, past conduct? No, I
2 don't think so. Past conduct, rectifying past conduct
3 is one of the principle jobs for which lawyers are
4 hired. If we're going to start making exceptions,
5 then those lawyers who do that kind of work are going
6 to be -- and it's quite a lot. I have a fairly long
7 list here, not only criminal defense but environmental
8 mitigation, representing defendants in tort actions.
9 As I say, a whole lot of bankruptcy representation
10 what I see in my court would not be able -- would be
11 limited to the extent that disclosure of past conduct
12 of a client would be mandated or even permitted.

13 Let me add one other thing. I disagree with
14 the speakers that you heard this morning. I -- at
15 least some I heard that -- and my bar association
16 disagrees with the view that there's a difference
17 between mandatory disclosure and permissive
18 disclosure. Our view is that if the rules permit
19 disclosure of a certain kind of client conduct, then
20 there's going to be some other applicable legal
21 principle that's going to mandate disclosure so
22 lawyers are not normally going to be able to hide
23 behind, say, I could have disclosed but I didn't have
24 to. We just don't think that works. For that reason
25 and for several others we don't really have much to

1 say with respect to the proposed changes in rule 1.13.

2 We don't think the change from permissive to
3 mandatory disclosure really makes a difference.

4 Yes?

5 MR. MUNDHEIM: There are a lot of states in
6 which a lawyer cannot make the my lips are sealed
7 statement to the client.

8 THE WITNESS: I understand.

9 MR. MUNDHEIM: You think in those states the
10 client-lawyer relationship is significantly different
11 than the lawyer-client relationship in California?

12 THE WITNESS: We think it's at least somewhat
13 difference.

14 MR. MUNDHEIM: What do you base that belief
15 on?

16 THE WITNESS: We haven't collected evidence
17 so I can't cite you to any studies on that subject.
18 All I can give you is a seat of the pants view of the
19 subject by lawyers who practice in California and who
20 from time to time practice other places as well. It's
21 easier to get a client to tell you about the bad
22 things that the client has done, that the client needs
23 representation with respect to. If you can tell the
24 client my lips are sealed except for this very narrow
25 exception to prevent imminent death or substantial

1 bodily injury. If you're not about to do that that I
2 know about, everything you tell me will be held in
3 strict confidence.

4 On the other hand, if you have to say there
5 are all those other things that I might have to
6 disclose also, then persuading a client to tell you
7 everything gets harder. There's the experience in
8 California lawyers. That's what our members tell us.

9 MR. TENNILLE: Are the securities lawyers in
10 California not going to be in a terrible dilemma if
11 the SEC adopts a rule that in effect mandates --

12 THE WITNESS: I don't believe so, sir. The
13 reason is that they won't be in too much difficulty in
14 my court, either. It's the clause in article 6 of the
15 United States Constitution which makes federal law
16 preeminent. If the federal law requires it,
17 California says to the contrary, for better or for
18 worse, doesn't matter, that's our federal system.

19 Now, if the Sarbanes-Oxley statute can do
20 that, if SEC can do that, anybody else at a federal
21 level can do that, and the state regulators really
22 don't have any control over that except trying to
23 persuade them to do otherwise. That's the way our
24 federal system works. And we are somewhat concerned
25 about that but much less so because the Sarbanes-Oxley

1 law does have a very restricted application. It's
2 those folks who are effected by it and not all the
3 rest of the lawyers in my bar association and
4 throughout California, for that matter, the rest of
5 the country who don't do that kind of work.

6 MR. CHEEK: You might be surprised at the
7 breadth of the reading of the commission's rule, for
8 example, in your litany of votes, the way the rule
9 appears to be directed, it may cover environmental
10 lawyers. It may cover bankruptcy lawyers that touch
11 an SEC filing through a consultive fashion or
12 otherwise. So it might have been a more dramatic
13 impact than just your securities.

14 THE WITNESS: Well, our concern is that the
15 rules of professional conduct would certainly affect
16 all these other lawyers, and that's our complaint. We
17 wish you wouldn't.

18 MR. CHEEK: You mentioned in our earlier
19 discourse about past conduct and future conduct. Do
20 you find any distinction in past conduct that may have
21 an ongoing effect on the corporate client?

22 THE WITNESS: We've taken a look at that
23 argument and discussed it quite a bit in a couple of
24 different committees. I chaired the Ethics 2000
25 liaison of the LA County Bar Association, spent the

1 last five years or so working with the ABA commission
2 on that subject, and then we have -- entirely separate
3 from that we have our ethics committee of the Los
4 Angeles County Bar which has published more opinions
5 than any other ethics committees in the country,
6 including the ABA's committee.

7 The hypothetical that we're usually faced
8 with this in this context is the environmental
9 contamination that might be 10 years before it causes
10 any harm but no known way -- there is no known way of
11 dealing with it. And the harm is certain to come
12 about. We just don't believe that anything that is
13 not imminent -- that imminent to the point where
14 nobody else can take care of the problem should be
15 grounds for permitting a lawyer to disclose
16 confidential information.

17 10 years down the road, lots of things can
18 happen in 10 years. Look what's happened in the last
19 10 years. Now, if it's ongoing -- if it's ongoing bad
20 conduct in a client, in a client organization, and the
21 client organization is continuing to engage in bad
22 conduct, that's something else. Because there are
23 opportunities to give advice, to try to persuade the
24 client to stop the bad conduct, to conduct the
25 mediation, and if that doesn't work, as I said, our

1 view is that the lawyer should resign.

2 For an in-house counsel we understand this
3 means quitting your job.

4 MS. HENNESSY: To put it in a context that
5 you might see in your court, what should a California
6 lawyer do in a situation in which there's a plaintiff
7 reorganization that has been put out to vote and the
8 lawyer learns there a material fact which would make
9 the plan unsupportable has been -- the linchpin that
10 makes it appear that a plaintiff reorganization is
11 supportable is, in fact, fraudulent, that the plan has
12 not yet been confirmed.

13 THE WITNESS: Typical example might be that
14 the projections for earnings for the company for the
15 next three years that a decimal point is in the wrong
16 place.

17 If the loan's been withdrawn there are lots
18 of people that are going to tell me about that. The
19 decimal point being in the wrong place, that might get
20 overlooked if we don't have a creditor's committee
21 that's reasonably diligent, if we don't have other
22 folks that are paying enough attention.

23 MS. HENNESSY: Where there's a change in
24 business condition, like if they're lying about how
25 much oil is really in the ground.

1 THE WITNESS: If a lawyer know about that,
2 and if it's confidential information, if there's not
3 -- I would have to check. I haven't looked at the law
4 on that subject. There might be some cases that say
5 that there's an obligation to disclose that to the
6 court, but I'm not sure about that. I would think
7 that under the California rule what the lawyer is
8 supposed to do is to make a motion to withdraw, and
9 that, of course, put folks on notice there's something
10 that's not the way it's supposed to be here.

11 MR. CHEEK: We've been focussing on 1.6
12 primarily. As I read your written statement your bar
13 association is generally supportive of our 1.13
14 recommendations within the corporate entity?

15 THE WITNESS: I wouldn't put it any stronger
16 than to say generally supportive. We just, as I said
17 before, we just don't think that the change of
18 language from may to must or shall is a change of any
19 real consequence in any of these rules, and the other
20 recommendations, we generally think, yes, they're good
21 ideas. And I think your characterization is fair with
22 respect to 1.13 we do generally support. We only add
23 one caveat. There was one of the speakers this
24 morning said something about making noisy withdrawal,
25 but we do not recognize that in California. We do not

1 think that noisy withdrawal is something that should
2 be permitted.

3 One does it by making a motion to the Court.
4 If there's no pending legal proceeding, one simply
5 resigns. If there's a pending legal proceeding then
6 you have to get the judge's permission. You disclose
7 what you have to to try to persuade the judge to
8 permit the withdrawal but nothing more.

9 MR. CHEEK: If you're not in a litigation
10 context, if you simply resign and there's an
11 outstanding legal opinion that is because of your
12 resignation suggests is false because it's based on
13 facts and circumstances that are not true, there's no
14 obligation to withdraw that legal opinion?

15 THE WITNESS: I'm not sure that's correct.
16 It depends on where the legal opinion is gone.

17 MR. CHEEK: That's noisy withdraw.

18 THE WITNESS: It depends on where the legal
19 opinion is gone.

20 MR. CHEEK: Gone to third parties.

21 THE WITNESS: That's an exceptional
22 circumstance. The ordinary legal opinion only goes to
23 clients. There's lots to do, of course, but I still
24 think the vast majority don't. They're just opinions
25 and the client decides whether or not to take your

1 advice.

2 MR. OLSON: There are thousands and thousands
3 of opinions around this country every day that are
4 third parties opinions.

5 THE WITNESS: Certainly there are. I'm not
6 sure when the answer is on that. I'm no longer a
7 securities lawyer and haven't been for, God, almost 30
8 years.

9 MR. CHEEK: Thank you, Judge. We appreciate
10 you being with us today.

11 THE WITNESS: Thanks for the opportunity to
12 address the task force.

13 THE WITNESS: I'm part of Sam's group and
14 parts of the LA County Bar cadre. Today, I'm wearing
15 several other hats. I'm very, very sorry that you
16 don't have my written position, but it needs to be
17 approved. One of them needs to be approved by the
18 Beverly Hills Bar Association tomorrow, though it does
19 articulate many of the concepts that are inherit in
20 the LA County Bar's opinion. I'm also here today as
21 the representative of the Association of Professional
22 Responsibility Lawyers. That's an organization known
23 as APRIL.

24 And APRIL is a group of lawyers who
25 specialize in issues involving risk management in the