

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

1 profession. They defend lawyers at the state bar.
2 They teach. They represent law firms. Their concern
3 and activity involves members of the legal profession.
4 They were very active in the MJP debate and assisted
5 with the development of the multijurisdictional
6 practice. They assisted with the development of the
7 ABA rule and right now, in fact, we're working on GATT
8 compliance and dealing with the trade secretary and
9 that type of activity.

10 I've just been appointed as of Friday the
11 chair of the APRIL corporate governance and compliance
12 committee. It's a new subcommittee, and that's why
13 I'm here today for APRIL. I'm a former president of
14 APRIL and ALI and a former chair of the LA County Bar
15 ethics committee and fairly well-known ethics person
16 from California. So APRIL will probably be bringing
17 you a more detailed policy that we have to get
18 everyone to agree.

19 There has been some hot dialogue, but one of
20 the things I do want to bring to your attention, and
21 that is the fact that they're sort of a presumption
22 here that lawyers do not blow the whistle or resign or
23 bring these issues to the attention of other parties,
24 and they do call us. I get the calls in the middle of
25 the night from lawyers who are troubled and concerned

1 about the conduct of their boards or troubled and
2 concerned about the conduct of the highest authorized
3 officer. So there seems to be sort of a belief that
4 those lawyers didn't do anything, didn't try to
5 dissuade improper corporate conduct. I would suggest
6 to you that that's not necessarily true and it clearly
7 has not been proven by any evidence that's been
8 brought forward. And I think other people in APRIL
9 will also agree with me on that particular issue.

10 The reason is you have to remember that
11 lawyers, like everyone else, are adverse to change,
12 we'll say. Therefore, they don't really want to
13 change their employment. It's in their personal
14 better interest for the corporation to abide by the
15 law, to be successful, and that everyone will prosper.
16 These are the types of issues that cause them to be
17 living on Maalox, Gelusil, and Tums. But you really
18 have no evidence that they didn't go to the mat, and
19 that seems to be a presumption or a predicate theory
20 in your deliberations and in the deliberations of the
21 SEC that I don't believe have actually been borne out.

22 In fact, Enron even in a sense illustrates
23 this. As you recall, the lawyers in Enron were told
24 not to talk to the accountants. Gee whiz, I wonder
25 why. Probably presumptively, because of the fact had

1 they talked to the accountants, then they would have
2 disclosed what was occurring.

3 So I think that's something that would be
4 wise to take into consideration. One of the other
5 issues that I'm a little concerned about in terms of
6 the proposed report and this has to do with the broad
7 scope of reporting. A few minutes ago you mentioned
8 to my good friend Sam Bufford that lawyers who were
9 doing environmental work would also be required to
10 disclose and lawyers in all other capacities would
11 have these obligations. I think that's eliminating
12 the idea of an attorney being retained for a limited
13 scope engagement and I don't know if that's how far
14 you really want to go with your provisions.

15 MR. CHEEK: I was referring to the proposed
16 SEC rule that is broader than the common perceived
17 application of that just security lawyers. It applies
18 to any lawyer who may be involved in the preparation
19 of a filing at the SEC which could be an environmental
20 lawyer reviewing a 10(k). It could be a litigation
21 lawyer. That was my only point.

22 THE WITNESS: I watched the videocast the
23 other day. I would also suggest that there are
24 significant problems with the SEC in terms of their
25 concept of disclosure to the SEC shall not be a

1 violation of attorney-client privilege. There is a
2 plethora of cases that indicate that disclosure to one
3 agency isn't disclosure to all and, in fact, if any of
4 you are interested, this is a PLI, not that I think
5 you don't have enough reading already. This is a PLI
6 course that was offered about a month ago in New York.
7 I would be more than willing to get you each a copy of
8 this.

9 This is a book called Ethics After Enron, and
10 it was done by lawyers who are in my area of practice.
11 And I have an article in here which discusses the S&L
12 debacle, how it was deja vu in terms of Enron and how
13 California lawyers have a different duty of
14 confidentiality, and it points to the Symbio cited
15 case. And it explores those issues, so if you'd like
16 a copy, please contact Sue, and it would be my
17 pleasure to get you one. It looks at these front
18 things from an ethical bent. And there are a
19 tremendous number of people from APRIL in that
20 particular program.

21 One other issue I do want to discuss with you
22 in terms of APRIL because we are lawyers who defend
23 lawyers in the disciplinary system, and that is that
24 the standard for -- rules of discipline -- sorry. The
25 rule of professional conduct are designed to impose

1 discipline. Discipline is quasi-criminal. If it is
2 quasi-criminal, it requires that there be due process.
3 Due process requires notice, not knew or should have
4 known. That is the importation of ideas that resonate
5 in the area of negligence into the area of discipline.
6 Discipline is again device criminal. If you want to
7 be successful, it should be actual knowledge. That's
8 the only way that you can really be effective in that
9 particular goal.

10 Those are my comments from APRIL. I have
11 other comments from the Beverly Hills Bar.

12 MR. CHEEK: Could I ask you a resource
13 question from the experience of APRIL. The chairman
14 of the SEC, Harvey Pitt, in a speech that referred to
15 the proposal that has just been discussed last week
16 indicated a severe disappointment in the actions taken
17 by state disciplinary committees on referrals that the
18 commission had made to those state disciplinary bar
19 associations of egregious conduct from the
20 commission's point of view of lawyers involved in the
21 securities practice, and that was one of the policy
22 reasons why the Chairman thought that 307 got put into
23 the act and why the commission felt compelled to put
24 forth a rule proposal.

25 Do you have any evidence or help or resource

1 to confirm or deny that?

2 THE WITNESS: Yes, I do, but let me
3 backtrack. The Chairman had written an article in or
4 about 1990 that was cited in Richard Painter's article
5 that was the reason that Richard wrote to Sarbanes
6 just so we go back. The Chairman has had these
7 concerns about the SEC becoming more aggressive for a
8 considerable period of time. They weren't just
9 engendered by these particular controversies that are
10 occurring right now.

11 But I do have an indirect or negative way of
12 establishing that what you're saying is true. In
13 California year before last speaker pro tem John Burl
14 caused there to be study, an official study by the
15 State Bar of California to determine whether or not
16 small and solo lawyers are prosecuted or inquired
17 against, complained about, and prosecuted more.
18 That's sort of the inverse of what you're suggesting,
19 and that study indicated that unequivocally it's true
20 that small or solo practitioners are disciplined and
21 become more of the subjects for disciplinary
22 proceedings.

23 And it does also, however, have to do with
24 limited resources and small and solo tend to represent
25 individuals that have been in a personal injury

1 accident that may be medicated. They tend to
2 represent individuals in family law issues. They
3 don't have carriers for clients. So there's sort of
4 the great propensity, but if you look at the numbers,
5 the number show yes, it is true, which is an indirect
6 method of establishing what you see.

7 Now, speaking to you from this other hat,
8 which is the Beverly Hills Bar Association, the
9 accounting fraud and the continuing media blitz of
10 CEOs going off in handcuffs and the tremendous losses
11 sustained by so many citizens of the United States is
12 something that justifiably we must be very concerned
13 about. The proposals you're suggesting, however, are
14 radical and extreme in terms of the role of lawyers in
15 society, and that is because the lawyer's role in
16 society is to act as the champion and as a bipartisan.

17 Lawyers protect, promote, and defend clients,
18 in addition to dissuading from illegal conduct. Your
19 proposals would drastically alter the critical role
20 that lawyer play in society, and most importantly,
21 they wouldn't just be limited to the context of public
22 offering or representing negative corporations. They
23 would translate down to the mama and papa convenience
24 store on the corner and it would impact upon all
25 corporate representation.

1 You just asked my friend Sam Bufford a few
2 minutes ago questions about 1.13. We also support
3 1.13. In fact, we believe in great internal
4 discussions of anything that's suspicious or anything
5 that's quizzical or anything that's of concern. The
6 lawyers's obligation is to represent the entity. In
7 terms of representing the entity, it's like a family
8 representation. In a family everybody talks to each
9 other, whereas when it goes outside there's a
10 different barrier or wall developed.

11 So I fully support -- I know the Beverly
12 Hills Bar is going to fully support wide disclosure --
13 wide discussion within -- in-house and within the
14 entity. One of my concerns, though, regarding 1.13,
15 it seems to muddy the identity of the client. The
16 shareholders have a tremendous interest, but the
17 identity of the client is the entity. If you muddy
18 the identity of the client, it creates problems in
19 terms of attorney-client privilege. Surely, the
20 shareholders could not claim that privilege, so I
21 would suggest that you keep a clear, transparent
22 vision of who the client is in terms of orders
23 obligation.

24 I'm also a little concerned about the issue
25 of crime and fraud. Some of your earlier speakers

1 also indicated crime might be too broad, that there
2 are so many types of crime. It's my understanding
3 that cutting a cactus in Arizona is a criminal act.
4 Young lawyers working in a corporate context will not
5 be able to differentiate and, in fact, recently I get
6 calls from corporate lawyers who are absolutely taken
7 aback and shocked by the fact that their corporation
8 or people that they're involved with might be engaging
9 in criminal conduct.

10 On the other hand, I would say that's why
11 they need a lawyer. So you don't want to have it be
12 so broad that it will deny good lawyers from working
13 with a group.

14 I'm most concerned, because I'm from
15 California, with the modifications in 1.6. You may
16 recall from a few years ago multidisciplinary practice
17 was the topic du jour among the ABA and we rejected
18 that soundly, and one of the basic reasons we rejected
19 that was because the core value of the accounting
20 profession is full disclosure. The core value of the
21 legal profession is confidentiality. This change that
22 you're suggesting tremendously changes that core
23 value.

24 Businesspeople in businesses and corporations
25 are successful because they explore. They research.

1 They evaluate different considerations. Some of the
2 considerations they may be evaluating or seeking
3 advice on may not be legal; may be illegal, in fact,
4 may be criminal, could be fraudulent. If they don't
5 feel they can trust their attorney and rely on their
6 attorney to explore those ideas, the lawyer will be
7 prohibited from exercising the art of persuasion that
8 we're all known to have.

9 If you eliminate that from a potential
10 business or place fear in the mind of a business
11 board, then you'll have a circumstance when they
12 become rogue businesses or criminal businesses.
13 They'll never seek legal advice. I think it would
14 have like sort of -- it would be an opposite effect
15 that you're intending. People will be afraid to talk
16 to the lawyer. They'll isolate the lawyer. The
17 lawyer will be eliminated from the dialogue. I would
18 be very troubled and concerned about that potentiality
19 which others are referring to as a chilling effect. I
20 think it's a little more grave than even chilling.

21 I think that, also, if clients are concerned
22 about disclosure to the client -- I mean to the lawyer
23 then it's going to have an impact, and I don't know if
24 you've thought about this, on the idea that advice of
25 counsel defense in a future legal case. I don't think

1 that a corporate board would quite be able to rely
2 upon the advice of counsel if they're frightened about
3 disclosing everything, so that might be a tangential
4 impact that you want to think about. I think I'm
5 almost done.

6 See, the recent events involve conduct so
7 egregious and so reprehensible that I would suggest to
8 you that, obviously, lawyers weren't involved. Media
9 would suggest that they were but lawyers are officers
10 of the court. As officers of the court, if they knew
11 that those things were occurring, then they clearly
12 have to resign or take some sort of remedial conduct.
13 If a lawyer advised a client to misstate their
14 earnings -- let's talk about it. If a corporation is
15 going to misstate their earnings by millions of
16 dollars, what did they think, no one would know? That
17 in my mind almost clearly establishes that lawyers
18 were not in the loop on those misstatements or lawyers
19 would have said something.

20 Cooked books foul profits in a legal megawatt
21 trade eventually come to light. We're learning that
22 in California. Exposing the corporation in negative
23 publicity, litigation, and bankruptcy is not the way
24 for a lawyer to achieve success in retirement. I
25 would suggest the lawyers did not know and therefore,

1 this is sort of an overreaction to these things.

2 One of the final, most troubling, issues to
3 me, and this is discussed in the article, this is
4 going to open up lawyers to third party liability
5 based upon opinions, and there are thousands of
6 opinion letters out there floating, third party
7 investors will go after those opinion letters, and it
8 is true that the lawyers paid the price of the S&L
9 debacle. It is true that the law firms paid those
10 prices, and I really worry about these that this is
11 going to result in third party liability.

12 And there's another issue here, and that's
13 Nancy Temple's advice to her clients regarding the
14 document retention policy is the type of advice
15 lawyers give to their clients all the time. There's
16 nothing inherently illegal about that advice. Enron
17 creating 3,000 special purpose entities or small
18 corporations called SPEs was not in itself illegal
19 activity, and you have to remember that.

20 So some of the things that are now being
21 looked at as being questionable would not even fall
22 within the penumbra of the goals you are seeking to
23 achieve.

24 One last thing. At this point in time four
25 states have absolutely mandatory disclosure, and those

1 states are Florida, New Jersey, Virginia, and
2 Wisconsin. Clearly, lawyers from those states were
3 involved in these activities. It stands to reason
4 that a lawyer from Florida was involved in some of
5 this activity. I don't see that lawyer disclosing
6 everything that they knew. Those states have
7 mandatory disclosure obligations and apparently, it
8 had no impact. You might want to think about that.

9 Do you have any questions?

10 MR. CHEEK: The converse of that, you have 41
11 states that have permissive or mandatory, and there
12 doesn't, at least to us, appear to be any significant
13 evidence in the attorney-client relationship has been
14 significantly impeded in those states by virtue of the
15 chilling impact of those provisions of those states.

16 THE WITNESS: See, what you don't know is how
17 often or how successfully the lawyers dissuade the
18 client from engaging in something that was
19 questionable. In my practice what we find out is that
20 someone has decided to make a lifestyle -- in-house
21 counsel is making a lifestyle change, or they've left
22 the corporation because they're going to spend more
23 time with the kids. There's sort of vague issues, and
24 in terms of what Judge Bufford was discussing with you
25 before, you never know the reason why someone withdrew

1 or the reason why someone left a particular job,
2 though it will have some sort of a glaze over it.

3 So that's what happens when you're in court
4 when you have to withdraw in terms of the California
5 rule. Do you have any other questions?

6 Regarding the idea of contextual lawyering, I
7 don't think that's a bad idea. We have a foundational
8 belief that one size fits all. We have these rules
9 that were developed in a litigation context. Maybe
10 they don't work in a regulatory context. Maybe
11 lawyering is a little bit different when an attorney
12 is working in a cooperative position with a
13 governmental regulation board. This was illustrated
14 to you in the Kaye Scholer shutdown during the S&L
15 debacle. Jeffrey Hazard took the position that Kaye
16 Scholer was operating and he did this in a
17 declaration. He took the position they were operating
18 as litigators. The court said no, they were operating
19 in a regulatory capacity, and lawyers in a regulatory
20 capacity have greater obligations of disclosure.

21 Maybe it's time that we pulled the covers
22 from this idea that one size fits all.

23 I have one final comment unless you have
24 questions, and that is at the time of the SEC
25 videocast commission member Glassen at the end of the

1 discussion after an hour and a half she said, "Now if
2 we had changed all these things, how many -- what kind
3 of a difference would it have made?" And I think it
4 was Giovini Presioso who stated maybe 14. So you're
5 creating a seismic shift in the Anglo-American
6 jurisprudential concept of what it means to be an
7 lawyer, and it would have had a beneficial impact on
8 maybe 14. Thanks so much.

9 MR. CHEEK: Thank you, Ms. Karpman.
10 Mr. SeLegue.

11 THE WITNESS: Good afternoon. Let me welcome
12 you to California. I'm sure you're not the first. I
13 didn't have the pleasure of sitting on your session
14 this morning. But having sat and heard just the last
15 few speakers I can see that a number of my prepared
16 remarks would be repetitive, not only of my paper, but
17 also what some of the other folks said. So I hate to
18 repeat myself.

19 MR. CHEEK: You can assume that we have
20 received your comments.

21 THE WITNESS: I know you have, and so I hate
22 to waste your time with repeating that. I'll just
23 make a few points and I'd be delighted to answer
24 questions that you might have because I think that the
25 dialogue on this issue in our profession is one of the