

1 today? I am worried that it would not. I think this  
2 is part of a larger problem. I think what you're  
3 doing is wonderful. You're dealing with such  
4 intractable problems.

5 But we have fundamental professional problems  
6 that need to be addressed as well as this  
7 confidentiality, and I think to address the  
8 professional problems I say great and God speed. I'm  
9 all in favor of it.

10 MR. CHEEK: Thank you, Judge, for being with  
11 us today.

12 THE WITNESS: Thank you very much.

13 MR. CHEEK: We do appreciate it.

14 Mr. Lampport?

15 THE WITNESS: This is something that was so  
16 important to me I had to beg and plead to get out of  
17 matters I was tied up in just to get up here this  
18 afternoon.

19 My name is Stanley Lampport. I'm here in my  
20 individual capacity. I am a former chair of the state  
21 bar standing committee on professional responsibility  
22 in California. I am a former chair of the LA County  
23 Bar's professional responsibility and ethics  
24 committee. I serve currently as a member of the  
25 revision commission of the rules of profession conduct

1 in California. My day job is as a land use  
2 development lawyer but I also spend a fair amount of  
3 my time counseling lawyers, law firms, and clients, on  
4 what are special responsibility and ethics issues in  
5 America's second largest city.

6 I came here and the reason I was concerned is  
7 I read the task force report and I saw essentially  
8 what I read as two different conclusions. One is a  
9 recommendation which talks about proposed changes to  
10 the rules that say extend permissible disclosure under  
11 rule 1.6 to reach conduct that has resulted or is  
12 reasonably certain to result in substantial injury to  
13 the financial interest or property of another and  
14 require disclosure under 1.6 to prevent felonies or  
15 other serious crimes, including federal securities law  
16 when the conduct involves a lawyer, and I saw how in  
17 the body of your report there is a desire to go back  
18 to the limited, more limited but still broad in my  
19 opinion exception of the lawyer's participation in  
20 furthering a client's fraud and whether that should be  
21 made mandatory.

22 I'm not sure which in the end of the day is  
23 the formal recommendation of the commission, but it's  
24 certainly the first recommendation that I read that  
25 made me sit up, take notice, and realize that

1 something needed to be said here. My concern is that  
2 you are talking about a recommendation, an exception  
3 to lawyer confidentiality that throws the baby out  
4 with the bath water.

5 Now, I heard about when I came in here this  
6 afternoon about California and its rules versus the  
7 rules in other states. I frankly am proud of the  
8 tradition we have in California zealously guarding  
9 client confidentiality in the lawyer-client  
10 relationship, and I'm somewhat concerned when I  
11 listened to ABA debate that suggested we are somehow  
12 out of step, as if ethics can be decided by prevailing  
13 public opinion or what is fashionable rather than what  
14 core values and principles about the nature of the  
15 lawyer-client relationship drive the rules because  
16 fundamentally, when we were talking about these kinds  
17 of rules, we're talking about the fundamental  
18 mechanics of a lawyer-client relationship.

19 Ethics is driven by function at this level,  
20 and it's a question of what our function is as lawyers  
21 that drives these rules. Before you buy into the  
22 conclusion that our tradition in California is the  
23 product of some kind of misguided thinking, let me  
24 explain to you in practical terms why we hold these  
25 principles so dearly, and why the recommendation in

1 your report is something that we think is wrong for  
2 the profession at either level.

3 I don't represent large corporate clients in  
4 general except when they want to come in and redevelop  
5 their real estate. I tend to represent  
6 entrepreneurial folks in all walks of life. And maybe  
7 it's different in practice areas, but in my world it  
8 is the rare day that anyone calls me up and says, "You  
9 know, things are going just great so I thought I'd  
10 hire a lawyer." In my world people come to lawyers  
11 with problems, sometimes very serious problems, and  
12 they come to us in the moment of need.

13 The preamble to the ABA model rules, as well  
14 as the contents of 1.6, recognize that our role as  
15 lawyers is to be the one safe harbor where anyone can  
16 receive counseling and advice about how our laws  
17 affect their lives without fear of consequence. We  
18 serve in that capacity for both sinner and saint. And  
19 we cannot fulfill that role unless a client can fairly  
20 and frankly communicate with us. We cannot advise a  
21 client on those matters the client is afraid to tell  
22 us about. As our California Supreme Court once  
23 observed, adequate legal representation in  
24 ascertainment and enforcement of rights for the  
25 prosecution or defense of litigation compels full

1 disclosure of the facts by the client to his attorney.

2           Unless he makes known to the lawyer all of  
3 the facts, the advice that follows will be useless, if  
4 not misleading. For that reason we promote candor in  
5 the lawyer-client relationship and we invite that  
6 candor by promising the higher level of  
7 confidentiality found in any profession. Our ethics  
8 rules embody the promise that we will hold what we  
9 learned from our clients in confidence and that we  
10 will not reveal that information to anyone else unless  
11 compelled by law to do so, and then only after  
12 exhausting reasonable measures to protect the  
13 information from disclosure.

14           When the client reveals to us the most  
15 embarrassing and legally damaging aspects of their  
16 lives in reliance on that promise, we, as lawyers, as  
17 a profession, must accept the consequence of that  
18 promise, for better or for worse. But we cannot  
19 expect to receive the trust that we invite the public  
20 to repose in us if we create exceptions that allow us  
21 to break that promise and therefore create doubt about  
22 whether we will keep the promise in the first place.

23           When we lose that trust we lose candor, and  
24 with it the ability to fulfill our role in our system  
25 of laws. The exceptions you're proposing at either

1 level does violence to those principles. Under your  
2 recommendation there is no promise of confidentiality  
3 in the broad sense of your recommendation at the end  
4 of your report. To the client that comes to us with  
5 problems about how they've injured someone's property  
6 or there's issues about hindering people's financial  
7 interests, and in my world that's a lot of clients,  
8 those are people who are involved in environmental  
9 issues. Those are people who face bankruptcy issues.  
10 They are people who are involved in contractual  
11 issues.

12           This comes up a lot in my world. With your  
13 exception in the report that I've read there's no  
14 promise of confidentiality for the wrongdoer that  
15 comes to us for advice. In fact, for the hapless  
16 person who comes in having already committed the wrong  
17 and now trying to figure out how to go forward, we  
18 essentially close the door to being able to advise  
19 them if we leave them in fear if what they tell us  
20 will be revealed to others.

21           Most of us believe that we can dissuade a  
22 client from engaging in wrongful conduct and we can  
23 help the client that is already engaged in wrongful  
24 conduct reach the right result. But I cannot and I  
25 don't think we as a profession can fulfill that

1 function if the clients fear the consequence of  
2 talking to us. Did we learn nothing from the AIDS  
3 epidemic where disease was spread because people were  
4 afraid to be tested because of fears of quarantine or  
5 other consequences that would come from the disclosure  
6 of those results.

7           We weren't able to get a handle on that  
8 problem until we instituted anonymous testing and  
9 until we put the concerns about disclosure aside and  
10 that's how we treated the problem. It is no different  
11 here. Unless our intention to turn the legal process  
12 into a service for those who do not need us, we cannot  
13 rescind our promise of confidentiality that we offer  
14 in exchange for candor. What we are -- what are you  
15 proposing is completely disconnected from the  
16 fundamental mechanics of every lawyer-client  
17 relationship.

18           The question that was posed earlier is a  
19 lawyer has to withdraw and not reveal the information.  
20 Is that the right result? The answer in my opinion is  
21 unequivocally yes. Because at the end of the day what  
22 we serve to do is provide that one place where at  
23 least the way of the law of resolving the problem or  
24 avoiding the problem could be attained in the privacy  
25 of the lawyer-client relationship. We do more

1 violence to our service as lawyers and society by  
2 abandoning that principle than for one second, for one  
3 problem, for one moment, than holding dearly to it for  
4 the vast majority of circumstances where we lawyers  
5 can effectively do our job.

6           Unfortunately, it is a all or nothing  
7 proposition. I don't think you can look at it as  
8 something that can be handled in one situation  
9 differently than another. I don't think the practice  
10 in California is so different from elsewhere. I think  
11 all of us cherish our profession's commitment to  
12 preserving client confidential information. That's  
13 the reason why rule 1.6 exists in the first place.  
14 And I think we all appreciate the reasons for that  
15 commitment. But I think that when we focus on the end  
16 result in what is essentially a small percentage of  
17 the overall number of representations that exist  
18 throughout America, we do ourselves a disservice. And  
19 I urge you all to honor the tradition that we have of  
20 maintaining confidentiality, reminding ourselves of  
21 the core function that we provide as lawyers in  
22 society and withdraw the recommendations to modify  
23 rule 1.6. Thank you.

24           MR. CHEEK: Thank you. Do you see any either  
25 practical or theoretical distinction with a corporate

1 entity where the client clearly is the entity and you  
2 have sometimes pressures within that entity,  
3 individuals who would want for their own purposes,  
4 their own self-interests to take the corporate entity  
5 in a direction that is not in the best interest of  
6 that entity, versus an individual such as the ones  
7 that call you every day and have these issues of  
8 disclosure.

9 THE WITNESS: I represent -- by the way I  
10 tend to not represent publicly traded companies per  
11 se, but I do represent corporate entities and  
12 partnerships frequently. There is the starting point  
13 to your question is yes. They are different in the  
14 sense that the organization's not a human being. It's  
15 a collection of people, and the individual is one  
16 person. That, therefore, mandates that we have some  
17 principle for how we conduct ourselves with the  
18 organization. And that's what rule 1.13 is about. I  
19 think, however, an important thing to keep in mind  
20 that we as lawyers are not the client, and when we  
21 start to slip in the discussion of what is in the best  
22 interest of the organization we have to recognize at  
23 the end of the day the decision as to what that is the  
24 organization's decision, not the lawyers's decision.

25 Where you are representing the organization

1 and the organization is moving in a direction that you  
2 think may not be appreciated by the people who are  
3 responsible for the day-to-day affairs of the  
4 organization, I think that that's something that you  
5 handle within the structure of the organization.  
6 There are a number of ways in which to do it. One of  
7 the problems that I have, and I've been writing rules  
8 in California for a while, is that we end up being  
9 legends in our own mind. If you go around the table,  
10 everybody's got a little pop-up image in their head of  
11 what it is this rule is going to handle, and if you  
12 ask everybody at that table to write out what it was  
13 they thought they were regulating with the rule, you  
14 would get as many different answers -- actually, you  
15 would get more answers than the number of people at  
16 the table is what I discovered.

17           So what happens is that when we start  
18 creating these very specific responses to problems  
19 without recognizing that the world is far broader than  
20 our imagination of it and we say you have to do one  
21 thing. You have to go up the chain because I'm  
22 thinking about Enron or I'm thinking about this or I'm  
23 thinking about that. I think you need to leave with  
24 the lawyer the discretion to exercise what he or she  
25 thinks is the best way for the organization to

1 confront this. There are as many different kinds of  
2 organizations as there are many different kinds of  
3 problems. I think we need to leave lawyers with the  
4 flexibility to use good judgment in that situation.

5           One questions that was posed earlier was  
6 should the standard of information be lower for  
7 purposes of going up the chain? I think the answer is  
8 no. I think the lower the level of knowledge the more  
9 discretion should be left to the lawyer, not the less  
10 discretion. I'm late here today for perfectly --  
11 perfect example of this. Something that I'm dealing  
12 with in a setting with an incomplete set of facts  
13 decided to run something over to someone in a great  
14 state of alarm as to the consequence of the  
15 information. I spent half the morning figuring out  
16 that what we were all reacting to was not the right  
17 set of facts.

18           I don't know about you, but in running a  
19 business, I certainly would like to focus on things  
20 people know about and spend a lot less of my time  
21 trying to handle rumor. I think the standard should  
22 be something that doesn't burden the organization with  
23 incomplete information and make every little piece of  
24 information that someone is somewhat nervous about  
25 suddenly an issue for the board of directors or the

1 president of the company. So I think the standard  
2 that you use should, with less knowledge if you're  
3 going to go in that direction, should afford more  
4 discretion, not less discretion.

5           But I also think we need to account for the  
6 fact that the world is not Enron or anyone of Global  
7 Crossing or any of those companies, but they're more  
8 than that, and if we trust lawyers to exercise  
9 professional judgment, then we ought to recognize in  
10 our rules that's what the lawyers should do in these  
11 kinds of situations, exercise professional judgment.  
12 If we need to break out of 1.2 the idea that a client  
13 cannot assist a client -- I mean a lawyer cannot  
14 assist a client in engaging in a criminal act or a  
15 fraud, I'm in favor of it.

16           Maybe we add at the end of the sentence, and  
17 we mean it, or if you want to roll into 1.13 a  
18 statement that reinforces that concept in the  
19 representation of an organization, more power to us.  
20 But I am concerned that the tip of the iceberg is not  
21 the iceberg, that the iceberg is not the problem. The  
22 tip may be the problem and that we need to focus our  
23 rules so that we can all operate in the vast panoply  
24 of situations effectively.

25           MR. MUNDHEIM: Is there any circumstance

1 under California law under which the confidentiality  
2 provision can be breached?

3 THE WITNESS: There are. There is one  
4 statutory and then there is the exception in the  
5 evidence code to the proceedings involving a dispute  
6 between the lawyer and client involving a breach of  
7 rights and out of the professional relationship.  
8 There is codified in our evidence code the former ABA  
9 exception for future criminal acts likely to result in  
10 death or substantial bodily harm, what you get is an  
11 evidentiary exception and not yet recognized as a  
12 broader exception to reveal information. There was  
13 court of appeal decision on that a year ago that  
14 looked at it solely as an evidentiary issue.

15 MR. OLSON: What does that mean?

16 THE WITNESS: That means a lawyer may reveal  
17 the information if compelled to do so but does not  
18 have the -- is not permitted to voluntarily reveal the  
19 information. There are many kinds of -- remember, the  
20 duty of confidentiality --

21 MR. OLSON: What if the lawyer giving  
22 testimony is asked a question which she can answer  
23 truthfully, but the lawyer can't go down to the police  
24 department and say my client's just bought a gun and  
25 said he's going to kill --

1 THE WITNESS: Correct, correct.

2 MR. MUNDHEIM: Do you feel that you would  
3 have to tell your client that although you may think I  
4 always will keep your conversations inviolate, I have  
5 to warn you that there are limited circumstances in  
6 which I may not do that.

7 THE WITNESS: I have on occasion because, not  
8 as a regular -- most people aren't coming to me with  
9 any problem anywhere near the kind of problems. It's  
10 just not frequently coming up, but the reality is I  
11 have dealt with clients in the environmental setting  
12 where I have had that discussion and I have indicated  
13 that because clients would come to me and say, "I need  
14 to talk to you. This is in confidence, right?"

15 If I don't know what's coming at me but I  
16 have some idea of the subject matter I'm dealing with,  
17 I will sometimes say, "Maybe, and I will explain to  
18 you where the limit is. Are we going there?"

19 MR. MUNDHEIM: Is it that need to disclose  
20 the client in the states that have a permissive  
21 exception, not mandatory, but permissive is that what  
22 you think alters lawyers-client relationships in those  
23 states which you seem to think must be different?

24 THE WITNESS: I think that these rules tend  
25 to be honored in other states in their breach in my

1 discussion with lawyers, because most lawyers that I  
2 talk to from other jurisdictions recognize in a minute  
3 that you don't rat on your client, but the answer to  
4 your question is what happens in my world where this  
5 issue comes up, is my comment that what you're about  
6 to say to me, if it's going to hit this issue, may not  
7 be privileged and understand that there will be  
8 limitations where this comes up. I have to deal with  
9 it in those terms.

10           From a state where there's permissive  
11 disclosure the issue probably comes up in a  
12 contractual sense, in the sense of the client seeking  
13 some reassurance from the lawyer that they will not  
14 exercise the permissive option to reveal the  
15 information in those circumstances where they're  
16 actually thinking about this. The worst nightmare is  
17 where you haven't thought about it and you find  
18 yourself now where you may be required to reveal the  
19 information. But in those instances where I've heard  
20 about it and I haven't seen -- the field is small.  
21 It's usually handled on a contractual basis with the  
22 client and lawyer agreeing as to how the lawyer will  
23 handle the information.

24           MR. McCALLUM: Your concern about adopting  
25 the 1.6(b2 and 3 that were proposed and voted down at

1 the house of delegates in February, your concern --  
2 let's take your practice. Give me an example. You  
3 said somebody comes to you. People come to you.  
4 Somebody -- give me a little hypothetical. Somebody  
5 comes to you with trouble and this would be a problem.  
6 They've come to you and described some criminal  
7 conduct that as you hear it described as criminal  
8 conduct and it's caused financial injury. That's kind  
9 of where --

10 MS. HENNESSY: Like illegal dumping.

11 THE WITNESS: Let me divorce myself from my  
12 practice for a moment because I don't really think  
13 it's a good idea to be too close to home on this one  
14 for reasons that have to do with the work I do, but if  
15 someone has come to me and has said to me -- the toxin  
16 is a good example. We put something in an  
17 inconspicuous location on someone else's property.  
18 What do I do about it?

19 MR. McCALLUM: What part of 1.6(b)(2) would  
20 give you the ability to disclose that?

21 THE WITNESS: Well, (b)(2) would require you to  
22 somehow assist the client in -- I've always saw a  
23 disconnect, by the way, between the language of (b)(2)  
24 and the discussion, the comment on (b)(2). The language  
25 doesn't require, necessarily, the lawyer further the

1 fraudulent act or the criminal act.

2           There is enough of a disconnect where those  
3 two could exist independently where you could be in a  
4 chain but not the person who brought about the fraud  
5 it may be broader than the commentary suggests.

6           The situation that you come up with is the  
7 guy who you're drafting documentation for, for  
8 example, who is using your documentation, your  
9 product, to engage in some fraud on people and over  
10 the course of the engagement or at the end of  
11 engagement you find out some information where they  
12 asked you a little bit more than you were asked to do  
13 when you were drafting the documentation and now you  
14 find yourself in a place where you're in the chain of  
15 fraud for the crime. That does come up.

16           I don't know that I can quantify the number  
17 of times that it comes up but it does come up where  
18 the lawyer gets in and is doing a particular part of  
19 the transaction. He's getting information from the  
20 client. He's not the auditor of the company so  
21 there's certain information that's going to come out  
22 that you're not in a position to audit. There's no  
23 reason to know that that information is incorrect and  
24 at the end of that engagement or somewhere in the  
25 course of that something comes up, either because the



1 client has asked you a new question that wasn't on the  
2 table before or in some other manner suddenly you find  
3 yourself in this ugly place.

4 MR. McCALLUM: I understand that point. What  
5 I was concerned about was I thought you were reading  
6 it more broadly. I thought you were saying the  
7 clients think if they come to me and tell me about  
8 something they've done wrong you have to be afraid, as  
9 you put the term, rat on them, and as my understanding  
10 at least 1.6(b(2 and 3 was that the ratting would be  
11 what you've have to tell them don't use my services in  
12 committing your crime. And then help me find out --

13 THE WITNESS: Your advice, first of all, (b(2  
14 and 3 I see in the body of your report that you're  
15 recommending going back to (b(2 and 3 and let me  
16 respond to that and then I'll answer the broader  
17 question we're asking. My concern is that (b(2 and 3  
18 isn't just the hypothetical -- what was Professor  
19 Haggerd's reference to it, that the client's a rat.  
20 The lawyer's not the rat. The client's the rat. So  
21 we're debating about rats and not -- the issue is even  
22 in the course of the lawyer-client relationship in  
23 that setting, that issue comes about frequently in the  
24 times where it occurs because the client expected  
25 candor in the lawyer-client relationship and revealed

1 information that created or raised the existence of a  
2 bigger problem. And the lawyer in that situation is  
3 usually advising the client you can't do this. Here  
4 are the ramifications of doing it. You're likely to  
5 get caught. Dealing with it now is 10 times better  
6 than -- those are the kinds of things that occur in  
7 that conversation as opposed to the I was fat, dumb,  
8 and happy. Then I read in the paper that this was a  
9 fraud.

10           It's usually as a result of candor in the  
11 lawyer-client relationship that these things can come  
12 up, not always but frequently, but what I'm reacting  
13 to on the broader level is the recommendation that  
14 says, and this is number 2 in your summary of  
15 recommendations, it says, "Extend permissible  
16 disclosure under rule 1.6 to reach conduct that has  
17 resulted or is reasonably certain to result in  
18 substantial injury to financial interest or property  
19 of another."

20           Reading that on its face, that says to me --  
21 the client comes to me and says, "I've done something  
22 that has resulted in injury to property or financial  
23 interests of another. How do I get out of this  
24 problem?" My concern is when it comes out they get  
25 the whole of the thing. The first thing people look

1 to is the recommendations. What concerns me about  
2 this whole path, where you go broad as was intended  
3 here or didn't intend here versus what you have in  
4 (b(2 and 3 of 1.6 it still reflects -- there's never a  
5 discussion in any of these reports about why  
6 confidentiality exists in the first place. What is  
7 the role of confidentiality in the lawyer-client  
8 relationship and what function was served as lawyers  
9 and how that duty relates to that core function.

10 So we end up in a discussion of end results.  
11 Gee, if anybody everybody knew about X, the world  
12 would be better. What I am concerned about in this  
13 broader statement really alarmed me, but (b(1 and (b(2  
14 also seriously trouble me is the lack of connection  
15 between what these rules, these exceptions, and  
16 underlying principles and I've never seen in any of  
17 this discussion a thoughtful discussion of how this  
18 affects the mechanics of the lawyer-client  
19 relationship and the reasons for confidentiality in  
20 the first place, other than wouldn't it good if this  
21 bad person were ratted on or somehow this thing was  
22 revealed and 1.2(d(2 and 3 as I understood it, and  
23 Seth Rosner tried to explain this to me a few years  
24 ago and I hope I'm characterizing it correctly, one of  
25 them came out of OPM which was the lawyer unable to

1 defend themselves having been in the chain of the  
2 fraud. So we really ought to let the lawyer out of  
3 the situation where they're unable to defend  
4 themselves in the third party proceeding.

5           That exception is somehow now being crafted  
6 here to a corporate setting that wasn't really the  
7 issue. Somehow it's being used as way of fixing the  
8 lawyer's inability to act as a watchdog of corporate  
9 responsibility which the rule was never intended to  
10 address in its inception as it was crafted, if I  
11 understand Mr. Rosner's characterization of it. And I  
12 am troubled with the principles that underlie the idea  
13 that we should have that kind of role for a lawyer in  
14 a lawyer-client relationship, and I am troubled by the  
15 absence of any thoughtful discussion of that in these  
16 reports, not just yours but at every level that this  
17 tends to show up.

18           MR. JACOBS: You and several other witnesses  
19 today have suggested that because there is a concern  
20 that we not inhibit clients from seeking legal advice  
21 including clients that may be involved in highly  
22 problematic things or have genuine dilemmas that they  
23 face, that you feel that these clients are not going  
24 to make a disclosure to you if they believe either may  
25 or must tell someone else. But if, in fact, they

1 clearly understood I've taken away to be California's  
2 exclusive remedy, namely, that you have an obligation  
3 in the most problematic circumstances to withdraw from  
4 the representation, if that same client knows that if  
5 I tell you, you're going to quit, if he really  
6 understands that, isn't the same thing going the  
7 happen? Namely, they're not going to tell you.

8 THE WITNESS: The answer is in some instances  
9 it could. I reflect back what I heard as well that  
10 there was certain legal work that cannot be done  
11 without a lawyer, and that a lawyer --

12 MR. JACOBS: They're just going to go to the  
13 next person.

14 THE WITNESS: They may, and it is always  
15 possible, it is always possible that someone will not  
16 reveal information to you and the consequence is you  
17 would do the work and will not reveal the information  
18 to you on that basis. It is also possible that the  
19 only way you'll be able to deal with the issue of a  
20 client who has a problem is if there's candor in the  
21 lawyer-client relationship. If the rule were decided  
22 solely on the basis of those people whose concern that  
23 a lawyer would not help in the fraud if I just don't  
24 tell him about the fraud, and we base the rule solely  
25 on that basis, we would be ignoring the other half of

1 the equation, which are those people who come to you  
2 with problems and would only reveal those problems if  
3 there was an expectation of confidentiality.

4 That risk exists. It exists whether you have  
5 a rule or don't have a rule, but the risk of losing  
6 the ability to advise those people who come to you  
7 with problems out of concern about the consequence of  
8 revealing confidential information means a more  
9 significant ramification and is unique to this rule,  
10 whereas the situation you're positing exists in both  
11 scenarios.

12 MR. KELLER: Can I take you back to the  
13 example that we had? Before I do, just to tell you  
14 that, in fact, we're not unmindful in the context of  
15 the SEC's proposal, while reporting out requirements  
16 may appear to protect investors in a particular  
17 situation, investor interest may be broadly served by  
18 avoiding counsel being in a position to counsel  
19 compliance. There's awareness of this balance in what  
20 I'll call the shimmer of the immediate fix as opposed  
21 to the broader policy consequences. But let's take it  
22 in its worst case back to the example we had before.

23 I'll switch it a little bit to my world. You  
24 render an opinion on a transaction based on  
25 information provided to you by the client that goes to

1 third parties that have invested. You learn that you  
2 were defrauded. The client lied, gave you  
3 misinformation. Let's just say -- past completed  
4 transaction there's an additional funding obligation  
5 that's to be made by the investors. So you're in an  
6 incomplete transaction. What's the California lawyer  
7 do in that situation?

8 THE WITNESS: The California lawyer does not  
9 reveal fraud. That's two things. Number one, I  
10 observed the hypothetical is the lawyer didn't know  
11 that they are conveying an opinion that was  
12 misleading.

13 MR. KELLER: The lawyers services are  
14 directly being used and it is a continuing use.

15 THE WITNESS: I assume that your opinion  
16 didn't have some of the standard caveats that indicate  
17 the predicate assumptions and the reliance issues so  
18 that the lawyer is not acting as a guarantor of the  
19 information on which the opinion is predicated.

20 MR. KELLER: That's a lawyer liability.

21 THE WITNESS: Correct. In many of the  
22 funding transactions I get involved in, one way we  
23 deal with that is to separate what it is we're opining  
24 about versus the source of the information. Put that  
25 aside. Put those things aside. The answer is the

1 lawyer does not reveal the fraud but the lawyer cannot  
2 continue to engage in it. The client may get the next  
3 installment of the payment but the duty says in no  
4 circumstances you don't reveal the informational.

5           Again, if it were solely based on the end  
6 result, if you could pick and choose the end result we  
7 wanted to deal with an exception, we could create a  
8 small pool of end results that really aren't as  
9 satisfying as other end results, but if we go back to  
10 the core premise which is how do we insure that people  
11 come to us and we can serve the role we serve in  
12 society, we have to accept the good and the bad.

13           MR. JACOBS: Let me ask you, Mr. Lamport,  
14 just taking the same example, what is, in fact, the  
15 information that came to the lawyer that revealed the  
16 underlying fraud didn't come from the client? In  
17 other words, there were no breach of client  
18 confidentiality but rather the client's former partner  
19 calls up or ex-wife calls up the lawyer and says, "You  
20 know something? You have been allowing my husband to  
21 steal millions of dollars from people and he's about  
22 to get one more check."

23           THE WITNESS: Assuming for sake of discussion  
24 that that was correct information, which is another  
25 issue that comes up in this world, as to who you rely

1 on, and when the ex-wife calls, sometimes you want to  
2 -- not necessarily -- but without impugning ex-wives  
3 here.

4 MR. JACOBS: No breach of confidentiality.

5 THE WITNESS: Duty in California includes  
6 information from any source which a client wants the  
7 lawyer to hold inviolate or the disclosure of which is  
8 likely to be embarrassing or detrimental to the  
9 client. That definition says that you are the trustee  
10 of any information that comes within your purview  
11 because you are dealing with a client's issue because  
12 the clients has put you there. That trust the client  
13 has in you is not related solely to the communications  
14 that had with you, but the fact that they can have you  
15 occupy a place in their world where they can trust  
16 what happens -- they can trust that are you not going  
17 to do something --

18 MR. JACOBS: That goes well beyond the scope  
19 of attorney-client privilege.

20 THE WITNESS: That's correct. That's  
21 correct. As a result, the universe of confidential  
22 information that is subject to a lawyer's ethical duty  
23 and a lawyer's duty of liability is part of the  
24 privilege. It may mean in certain circumstances that  
25 a lawyer may be compelled to testify on matters which

1 are not privileged, but it doesn't turn the lawyer  
2 into someone who can go out and report the client.

3 MR. BRIAN: If the client and the lawyer got  
4 indicted for fraud in that circumstance, could the  
5 lawyer reveal confidential communications to defend  
6 himself. Assumed you have severance at the trial.

7 THE WITNESS: There's a somewhat tortured  
8 body of law in California on this.

9 MR. BRIAN: I think the answer is maybe.

10 THE WITNESS: I think the answer is maybe.  
11 There are two cases that came out within a couple  
12 months of each other that seems to suggest different  
13 answers based on the evidence code and the ethical  
14 duties. I think in California that's an unanswered  
15 question and that can be problematic. The question is  
16 whether or not a lawyer -- more people think a lawyer  
17 should be afforded a defense but the proceedings  
18 should be conducted in a manner that protects  
19 confidentiality. That's a very difficult situation.

20 MR. CHEEK: Thank you very much. We  
21 appreciate your coming and ending our day.

22 (Whereupon, the hearing was adjourned at 4:30  
23 p.m. this date.)

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