

1 THE WITNESS: Thank you.

2 MR. CHEEK: Good morning. We welcome you to
3 our section of litigation to address us. We
4 appreciate your written testimony which we obviously
5 all have read. But I turn it over to you to make
6 whatever comments you may want to make before we
7 engage in discussion.

8 THE WITNESS: Thank you, and I very much
9 appreciate the opportunity to be here. I am the chair
10 of the litigation section. I practice law in
11 commercially litigation in Phoenix. I am here on
12 behalf of the section to say thank you for all of the
13 work that you've done and, in particular, to commend
14 the work that you have done on the corporate
15 governance issues to which our testimony today does
16 not address itself in large part because we think you
17 do such a good job there.

18 We do, however, have some concerns with
19 respect to the proposed amendment to the model rules.
20 That is principal reason for my being here today and
21 the principal topic we addressed in our written
22 testimony. As I reflected, coming over here this
23 morning, looking back again over some of the testimony
24 both oral and written that you've received, it
25 occurred to me that I'm not sure I have anything to

1 say to you today which is particularly novel or new
2 and I will not be as provocative as your last speaker.

3 But I do come on behalf of the section to
4 lend our voice to the concerns that have been
5 expressed by others about the proposed amendments.
6 Just so that you are all clear about it, the testimony
7 that we presented was approved in its entirety by the
8 counsel of the section which is a diverse group of
9 folks representing both the plaintiff's side, the
10 defense side, corporate counsel, and judges.

11 Let me just briefly reiterate, by that if I
12 may, the three starting point from which our comments
13 flow. The first is that while it is clear that there
14 have been a number of instances in which there's been
15 a failure of corporate responsibilities, it is not
16 clear to us that it has been in every instance or even
17 in most instances, it has been a failure of lawyering
18 and we think that's a significant and important
19 starting point as we think about changing the model
20 rules.

21 And that is particularly true it seems to us
22 in those instances in which the underlying conduct is
23 in the issue involve really dizzyingly complex
24 accounting issues that had been determined by auditors
25 to be in compliance with GAAP. We think those

1 instances particularly do not self-evidently get us to
2 the place of saying that the lawyers in the picture
3 have failed.

4 The second starting point is that to the
5 extent that lawyers in any of those instances were
6 aware of the wrongful conduct, it goes without saying
7 to our mind that the model rule in their present form
8 provide more than sufficient mechanism for addressing
9 that from a disciplinary standpoint. And I guess the
10 third starting point for us is that we believe that
11 the lawyer's ethical duty to maintain the confidences
12 of the client is in fact good public policy.

13 So from those three starting points we would
14 like to take a moment to address both the issues of
15 mandatory disclosure and the proposed change in the
16 knowledge standard.

17 A number of other speakers have spoken to you
18 about the mandatory disclosure proposal and I will not
19 repeat what others have said. But I will simply refer
20 to the testimony of ALAS and I gather they will be
21 testifying again today, and also Professor Morgan and
22 their concerns expressed by all of them about a
23 mandatory disclosure requirement.

24 The label in these circumstances are just not
25 as clear, I think, in the real world as we might like.

1 What is and what is not illegal conduct, what is and
2 what is not reasonably certain to result in
3 substantial injury, these are things which are simply
4 not as clear to lawyers on the front line as we would
5 like for them perhaps to be, and the concern, and I
6 think it's a very real concern, is that the lawyer
7 finds himself or herself in quite a fix when the area
8 is gray.

9 To make disclosure is to risk being sued by
10 the client. If you're wrong that it falls within the
11 mandatory disclosure requirement to not disclose is to
12 risk being sued by third parties, and we think,
13 strongly think, that the mandatory disclosure
14 requirements are very problematic for just that
15 reason.

16 The proposal in certain respects to the model
17 rule change the standard from what the lawyer knows to
18 what the lawyer reasonably should know or should have
19 known we submit is not good for the client. It's not
20 good for lawyers. And it's not good for the public.
21 The smart, ethical, risk averse lawyer under that
22 standard we think is going to inevitably become
23 focussed on avoiding her own potential liability
24 instead of being focussed on representation of the
25 client, which should always be the lawyer's principal

1 responsibility.

2 We think it will either increase the costs to
3 clients and to customers of clients as the lawyer
4 rejects and reviews increasingly large quantities of
5 information in order to avoid an after the fact
6 determination by a fact finder that the lawyer should
7 have known more or should have taken further steps.
8 Or it's going to result in overdisclosure which has
9 all kinds of consequences to the fundamental
10 attorney-client relationship.

11 We think that a should have known standard,
12 by definition, changes the relationship between the
13 lawyer and the client because it put the lawyer in the
14 position of having to second-guess, ask again, probe,
15 be skeptical of his or her clients in a way that is
16 potentially harmful to that relationship. Lawyers are
17 not internal auditors, and this change in standard
18 effectively makes them that.

19 And the ultimate concern, of course, would be
20 that the client simply stops bringing these kinds of
21 legal issues to the lawyer for fear that disclosure
22 would be made. It also seems to us that there can be
23 no doubt that this change in the standard will
24 increase the risk of civil liability for lawyers.

25 Hindsight is perfect vision for a reason. It

1 is very easy once the result is known to be able to go
2 back and sift through the facts and circumstances that
3 presented themselves six months earlier, a year
4 earlier, two years earlier, and armed with certain
5 knowledge of what the result is. Go back and find
6 flags of whatever color, and your witnesses have
7 described them as red and yellow, but flags of
8 whatever color, that can then be gathered together to
9 be used in the context of a civil case against the
10 lawyer.

11 And that is a very real reality in terms of
12 changing the model rules because as we all know, the
13 interplay between the model rules and the civil
14 liability standards are pretty significant.

15 So, in brief those are the issues that the
16 litigation section is in particular concerned about.
17 They have been addressed, as I said, by a number of
18 your other witnesses as well, and while we are very
19 appreciative of the task force's work and, in
20 particular, on the corporate governance issues, we
21 urge and hope that you will reconsider your
22 preliminary position with respect to both of those
23 matters.

24 MR. CHEEK: Thank you. It's unclear to me
25 from both your comments today and from your written

1 testimony where you are on the permissive disclosure.
2 It seems at least from your written comments you're
3 encouraging us not even to go to the permissive box
4 and yet there are, as you know, a number of studies in
5 their model rules which have that already baked into
6 the model rules without apparently either increasing
7 civil liability for the lawyers practicing in those
8 states or discouraging the client discussions within
9 those states. Does the litigation section have any
10 view on the permissive quality, recognizing the
11 history?

12 THE WITNESS: We did not instruct our section
13 delegate on that issue on the Ethics 2000 report. And
14 I cannot predict for you what the section would do if
15 presented with the Ethics 2000 rule again. So I
16 expect there to be a lively debate about that and how
17 it would turn out I don't know. So as I sit here
18 today since that's not the recommendation of your task
19 force I can't answer the question.

20 MR. CHEEK: So the position that's being
21 expressed both in writing and by your comments does
22 not take a position on the permissive side.

23 THE WITNESS: I think that's a fair --

24 MR. CHEEK: I think there's really a
25 misunderstanding. That is one of the recommendations

1 of the task force. Very clear. The task force does
2 recommend reconsideration and favorable action on the
3 1.6 recommendations of Ethics 2000. So it really is a
4 recommendation.

5 THE WITNESS: I mispoke. The focus of our
6 comments and testimony concerns for the mandatory
7 disclosure --

8 MR. CHEEK: You haven't taken a position on
9 all that, have you?

10 THE WITNESS: Correct.

11 MR. CHEEK: Maybe it's better to address this
12 to ALAS, but on the permissive disclosure is there a
13 concern that the permissiveness of that becomes a
14 standard of care by which lawyers will be measured in
15 terms of imposing liability on lawyers?

16 THE WITNESS: Certainly, as a lawyer who
17 represents lawyers, that is certainly a concern, that
18 even anytime in which you place a permissive standard
19 of disclosure someone has to explain how come he or
20 she didn't avail himself of that permissive
21 disclosure.

22 MR. OLSON: But you have 1.13 now. Are you
23 suggesting that we step backward and revise or repeal
24 1.13? I can imagine if the bar does that we'd really
25 look jackasses to the public.

1 THE WITNESS: But I am not making that
2 suggestion and I'm trying to be careful here in what
3 it is, what the counsel of this actions has acted on
4 and what it is they have not. I'm happy to discuss
5 with you my personal views on this topic. I think
6 there would be a debate on the original Ethics 2000
7 rule, and how this counsel would come out or choose
8 not to come out, which is what it did last time. It
9 took no position and the delegates were free to vote
10 as they chose.

11 MR. OLSON: Could I ask you about the two
12 brief paragraphs that I see addressing 1.13 as opposed
13 to 1.6 and you observed there that something that we
14 would all be sensitive to, that effectively going over
15 someone's head you say, is much easier said than done.
16 And then you say that you asked us to consider the
17 reality that the vast majority face when considering
18 what steps are appropriate to prevent misconduct or
19 avoid harm to the entity client.

20 But I don't understand whether those comments
21 are suggesting that the mandate to go over someone's
22 head is so difficult and so unpleasant, that we should
23 remove that mandate or whether you're saying that
24 because it's so difficult we should make it even more
25 clear that it's a requirement so that people will say

1 I have no alternative.

2 THE WITNESS: There is no suggestion that
3 that requirement be removed. I think it's simply a
4 reminder on behalf of a group of a lot of lawyers who
5 aren't talking to the general counsel and the CEO
6 every day, that in evaluating what those going up the
7 ladder requirements are, let's just be mindful that
8 not everyone has an easy route to go one step up or
9 two steps up or three steps up.

10 MR. OLSON: Would it help those lawyers
11 assuming they are litigators who are handling all
12 kinds of different matters for the company, would it
13 help those lawyers if the language of the rule and/or
14 the commentary was even more compelling that it is
15 necessary to go through this process. Would that give
16 them more ground for dealing with their clients, that
17 it may be uncomfortable for me and it may be
18 uncomfortable for you, but there's no alternative?

19 THE WITNESS: Perhaps. Although I guess the
20 comment in the testimony was really directed toward
21 assisting mechanisms to be in place for a lawyer to do
22 that.

23 There's sort of an assumption here that every
24 lawyer representing every company knows the chain of
25 command of the legal department, and who reports

1 exactly to who, and the point to be made was simply
2 that sometimes a lawyer is a long way down in the
3 reporting chain from anybody who could get the ear of
4 the general counsel and simply to be mindful of that
5 in constructing the processes.

6 MR. CHEEK: I think one of the issues that we
7 spent a lot of time thinking about and it goes to your
8 original comment about there being a lack of evidence
9 that lawyer "was sort of involved" in a lot of the
10 situations that have been the focus of media coverage.
11 Lawyering has a lot of components to it. Lawyering is
12 representing a specific client on a specific issue,
13 lawyering is giving specific advice. But lawyering in
14 the context of what we're trying to review and
15 consider is a broader role that a lawyer plays in a
16 structure in a corporate structure whether you're
17 inside or outside and the dynamics that reinforce or
18 enhance the opportunity for corporate responsibility,
19 and to follow up on Les' point, a lot of what we were
20 trying to articulate is an opportunity for the lawyer
21 to improve the lawyer's own empowerment within that
22 structure, to be able to create change as opposed to
23 being subjected to such a mandate either from the
24 employer to the employee, or from the CEO, CEO who's
25 hired the outside counsel and have all the dynamics

1 associated with so that -- I mean do you have any
2 thoughts about how one's position as a lawyer within
3 that can be enhanced and still remain within the kinds
4 of protecting the privilege issues?

5 THE WITNESS: Well, I guess the concern that
6 I have is that -- what we're talking about at least in
7 the testimony of the litigation section is presenting
8 is applicable. And disciplinary ruling, and to my
9 mind there is very different role for disciplinary
10 rules on one hand. That is, you violate this and you
11 will be sanctioned by bar in some fashion and
12 potentially could lose your right to be a lawyer
13 versus aspirational standards, civil liability
14 standards, how we would like for lawyers to behave, if
15 we were starting from scratch to write a statute. And
16 it seems to me those are different things.

17 And I would encourage you and I think the
18 litigation section fairly would encourage you to keep
19 the disciplinary roles disciplinary roles, as opposed
20 to attempting to use them to solve all of the
21 permutations of lawyer conduct in the corporate
22 setting. I don't know if that's responsive to your
23 questions but I think that's part of what's driving a
24 number of concerns that have been expressed to the
25 task force is what do we do in the disciplinary rules,

1 and what do we do elsewhere to create incentivized
2 conduct for lawyers.

3 MR. OLSON: As you may have heard this
4 morning or read about Sarbanes-Oxley proposing the
5 rule which clearly goes further than 1.13, to some
6 extent impacts 1.6. To what extent do you think that
7 factors into what the bar ought to be doing in that
8 area? We got understanding that the commission's rule
9 is only setting professional standards for purposes of
10 attorneys practicing before the commission and model
11 rules are generally applicable to all lawyers, but
12 it's a large segment of the bar that will have
13 potentially this level of mandate, and should that
14 impact our consideration at all, or should we just
15 ignore that?

16 THE WITNESS: It would be easier to just
17 ignore it. But no. Obviously, you can't do that.
18 But I also don't think we should be pushed by the SEC
19 into a position with respect to lawyer conduct that we
20 don't think is the right standard for lawyer conduct.
21 It is unclear at least to me what the relationship is
22 going to be between the rules that the SEC ultimately
23 settles upon and the state disciplinary system. And
24 it may well be that we're going to have to live with a
25 different standard for those who practice in front of

1 the commission because the commission is going to
2 exercise its authority to regulate those lawyers who
3 practice in front of it in a particular way.

4 I don't think that -- that alone should drive
5 the decision of either this task force or the house.
6 When the house finally acts on the model rules.
7 Because --

8 MR. OLSON: Following up on that, though, it
9 seems me there's a risk, and I understand what you're
10 saying and I'm sympathetic to it, that we will end up
11 in a position that the accounting profession finds
12 itself in where the public and political perception
13 very strongly is that our profession is more concerned
14 with self-protection and limitation of what the
15 liability than with public interest and therefore
16 needs to be regulated by some kind of a governmental
17 entity beyond the courts that now regulate us on a
18 state by state basis, at least to the extent we've
19 worked for public companies we're going to see if we
20 don't act in a way that's perceived as responsible to
21 the public interest we're going to be regulated
22 pervasively by the federal agency just as accountants
23 are because we'll be viewed as having some aspect of a
24 function somewhat similar to the officer of the court
25 function with respect to public companies and their

1 filings, disclosures, and response to their
2 obligations and the law that they have.

3 Interesting communication with very senior
4 people in the accounting profession, this may have
5 been said, don't make the mistake we made of burying
6 your head in the sand and thinking that this ain't
7 going to happen because if you do, you will find that
8 you will be subject at some point in the not too
9 distance future to pervasive federal regulation to
10 your profession and you're not going to like it.

11 MR. CHEEK: And in that connection the
12 Sarbanes-Oxley Act obviously has a power that has
13 been created to set minimum standards including this
14 1.13 but it doesn't limit it.

15 MR. OLSON: Let's stop it.

16 THE WITNESS: Let me answer it by anecdote I
17 guess. We had an incident in Arizona where I practice
18 about four years ago where a bill was seriously
19 introduced in the state legislature to abolish the
20 state bar and to create a citizen commission that
21 would take over responsibility for the regulation of
22 lawyers in the state of Arizona. The lawyers in
23 Arizona took it upon themselves to do a better job of
24 educating the legislators in our state about why that
25 was a bad idea. I recognized the circumstances are

1 different but it seems to me that we as a bar need to
2 raised to the challenge and do our job both of
3 policing our lawyers when they do commit disciplinary
4 infractions, number one, and of educating our
5 legislators and others about the importance of the
6 core values that stand behind some of the things I'm
7 speaking about. I think we can do better at
8 explaining the importance of the attorney-client
9 privileges, for example, and some of the other things
10 which underlie and inform our opposition to your
11 proposed recommendations and I think we ought not
12 simply give up and say it's too late, it's too hard,
13 and we can never achieve it, because I think we can.

14 MR. CHEEK: Thank you very much.

15 THE WITNESS: Thank you.

16 MR. CHEEK: I appreciate you being with us.

17 Professor Wald, good morning. We're
18 delighted to have you with us from Denver. We have,
19 as I mentioned earlier, distributed your testimony to
20 everyone so we turn the floor over to you to make
21 whatever comments you may have.

22 THE WITNESS: First of all, I thank the task
23 force for permitting me comment. My name Eli Wald.
24 I teach legal ethics, legal professions, comparative
25 professions at the University of Denver. Prior to