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 seismatic 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

1 key things that we ought to consider.
2 But let me first introduce myself. My name
3 is Sean SeLegue. I'm vice chair of the State Bar of
4 California committee on professional responsibility
5 and conduct. I'm also a shareholder at Vodvos Kistic
6 McGonnel & Philips in San Francisco and there I am
7 part of a group of lawyers that represent other
8 lawyers in malpractice cases, disqualification
9 motions, and give ethics advice. Just like Diane
10 Karpman was mentioning several times, we are
11 accustomed to helping employers deal with ethical
12 dilemmas such as are of concern here today.
13 It seems to me -- well, it's you who have
14 been charged with a very challenging task which is to
15 respond appropriately to the recent business scandals
16 and to ensure that our profession is taking steps that
17 it ought to take in light of these developments. It
18 seems to us that one of the first things that needs to
19 happen in the course of that study is to determine
20 whether employers were involved in substantial ways in
21 the scandals. It seems to us that while some lawyers
22 have been accused of involvement in various ways, they
23 are fundamentally accounting and business scandals and
24 not scandals in which lawyers directed the misconduct.
25 We could be wrong about that but I just don't see a

1 lot of evidence one way or another on that.
2 That's one thing we would commend to your
3 attention that the task force might undertake is some
4 more factual investigation and consideration of what
5 is the nature of the problem, if any, within our
6 profession that led to our contributed to the recent
7 business scandals.
8 One overarching concern I bring to the table
9 and others have said this in a different way, is
10 there's an old saying that bad facts make bad law.
11 And some of those tribal sayings have a lot of truth.
12 We have a lot of cases where the rules stated, the
13 doctrine stated it's not the best rule for every case
14 in the future, but it made sense based on some really
15 unappealing facts that were represented to the judge
16 at the time.
17 I think you find yourself in the same
18 situation that the judge is presented with, a set of
19 difficult facts, and needs to set out a rule of law to
20 resolve them, and I submit to you that changing
21 confidentiality is not the way to go. But let me
22 start with, posit first, which is to say like the
23 other speakers I've heard this afternoon, we support
24 in general terms your attention to model rule 1.13.
25 It seems to us that should be the focus of your work

1 based on your charge to investigate the recent
2 accounting business scandals in publicly traded
3 companies, and to the extent that rule 1.13 has
4 language in it that dissuades attorneys from
5 fulfilling their duty to their client, which is the
6 entity, to bring problematic matters to the attention
7 not only of the attorney's direct contact but to
8 higher authorities in the organization that that is a
9 commendable change, and that change ought to be made.
10 As other speakers have mentioned today, I
11 believe Professor Morgan and a number of other
12 commentators, I think you should act with caution in
13 adopting a reasonably should have known standard under
14 model rule 1.13 or any of the other rules so lawyers
15 will not have a duty to essentially vouch for the
16 complete accuracy and truth themselves of every aspect
17 of every transaction that they touch. You may not
18 this better than I, since I represent a lot of
19 corporate lawyers but I'm not, it seems to me it's
20 simply not feasible for corporate lawyers to vouch for
21 every last detail of every transaction they work on.
22 Certainly, transactional lawyers should and I
23 think are attentive to looking out for signs of fraud
24 or misconduct, because that's part of the job for the
25 client. It's also the right thing for them to do

1 under our rules of ethics and under just common sense,
2 to steer the client in a lawful and morally correct
3 course of action. I think what happens when the
4 client and the lawyer have differing views about what
5 is lawful or moral is a much more difficult question
6 and that's where the issue is joined on rule 1.6.
7 MR. CHEEK: There was an earlier question, if
8 I may interrupt just a minute, on that Mr. Mundheim
9 raised whether you see any distinction in that level
10 of triggering event on 1.6 to 1.13? In other words,
11 for mandatory or permissive disclosure outside the
12 client that it would be triggered by actual knowledge,
13 and 1.13 goes up the ladder within the client, a
14 lesser standard such as reasonably should know or some
15 modification of that would be an appropriate standard.
16 THE WITNESS: That's a very interesting
17 question. It's my view, the view of the committees I
18 represent here today, you ought not to document
19 exceptions to 1.6 at all along the lines that you've
20 adopted, but I can see the logic. If you were to do
21 that in adopting different standards allowing less
22 disclosure under 1.6 and more disclosure under 1.13.
23 But my sense is that with due respect, it's the wrong
24 question, because I don't think 1.13, as your report
25 recognizes, should impose any really substantive

1 limitation on the attorney's right from a
2 discretionary standpoint to take a matter that the
3 lawyer thinks is of serious concern to the
4 organization to higher authority, and I think that's
5 something in your report that made eminent sense to
6 me, that if there is language in the rule which
7 lawyers read to dissuade them from taking action
8 within the client thereby, and also therefore within
9 the confines of confidentiality, there should be no
10 limit on doing that.
11 So I think then that you should not worry
12 about having one standard for 1.6 and one standard for
13 1.13 because the standard for 1.13 really shouldn't be
14 there. The lawyer should be free to go up the chain
15 of command. The test is if you're looking at when
16 must the lawyer go up the chain of command, then I
17 think you have a policy question of a much less
18 magnitude than the standard for divulging confidential
19 information to third parties. The reason I say that
20 is the worst thing you're going to do if you create a
21 standard under 1.13 that requires lawyers to report
22 too much to their superiors or a higher authority in
23 the corporation is that corporations are going to
24 incur unnecessary legal costs. Higher authorities in
25 the corporations are going to be inundated with

1 details on an issue that they really may not need to
2 know, but given the current situation, that might be
3 the right way to go.
4 I guess my view is the earth will not stop
5 spinning if higher authorities in corporations get a
6 little bit more information than they might actually
7 need from an objective standpoint. We can fine tune
8 that later if it turned out to be a problem.
9 We think that the implications of modifying
10 rule 1.16 are quite a bit more substantial and more
11 difficult to fix, so I hope that answers your
12 questions. It's perhaps not quite the answer that --
13 I think you should ask a different question is what
14 I'm saying.
15 MR. MUNDHEIM: On page 7 of your testimony it
16 talks about rule 1.6. You worry that amendments would
17 require a lawyer to become an undercover informant,
18 that it would make clients hesitant to speak with
19 lawyers. Now, some of my experience is as a corporate
20 general counsel and the significant relationship in a
21 corporation is between lawyers on a general counsel
22 staff and the businesspeople in the corporation.
23 And a staff lawyer, in order to be effective,
24 tries to build a relationship with those
25 businesspeople, so in some sense, it's analogous to a

1 lawyer-client relationship, although, of course, the
2 client is the corporation. Now, many staff lawyers
3 are under an injunction to report to the general
4 counsel or to their immediate boss situations in which
5 they think the business will have the corporation
6 violated the law.
7 In other words, they will tell on the person
8 who has the analogous position to the client. That
9 seems to work in corporations without destroying the
10 relationship between the lawyers and businesspeople in
11 the corporation.
12 Why is it that you think that rule would be
13 so entirely different when you talk about going
14 outside, that that will destroy the relationship
15 whereas inside the corporate context it doesn't?
16 THE WITNESS: Well, that also is a very
17 interesting question and a good one. It seems to me
18 that the analogy is probably not as strong as the
19 question assumes. That is to say that the
20 businessperson working at the corporation should know
21 and is deemed to know that the lawyer to whom that
22 person is speaking is the corporation's lawyer. It's
23 not that individual's own lawyer. So consider that an
24 additional different hypothetical.
25 It's related to you have one employee who is

1 concerned that his business unit is violating the law,
2 so he's concerned not only that the corporation is
3 violating the law. He may also have personal
4 responsibility, both civil and criminal. So he might
5 go report the situation to the corporate counsel
6 knowing full well that the corporate lawyer is a
7 corporate agent. What if that person is very
8 concerned about his own personal liability? He wants
9 his own advice. I think then he would go to his own
10 lawyer, by the way, and would expect that lawyer would
11 honor the confidentiality.
12 So to put it another way, I think the short
13 answer to your question is the employee has no reason
14 to think that the corporate lawyer is going to respect
15 that person's confidentiality individually.
16 MR. MUNDHEIM: But the question is whether or
17 not that businessperson will be willing to take the
18 lawyers sufficiently into his or her direct confidence
19 in shaping a proposed business transaction, and it
20 would be my experience that the answer is yes, they
21 do, even though there is the risk that there may be a
22 report up.
23 THE WITNESS: Well, just seems to me that if
24 the corporate actor is truly engaged in conduct that
25 the corporate actor, that the employee knows is

1 illegal or unlawful and shouldn't be doing that, then
2 he's not likely to go to corporate counsel and
3 announce that. If the employee simply wants legal
4 advice about how to comply with the law, this person
5 is not going to be afraid to go talk to corporate
6 counsel.
7 What we're worried about is the situation in
8 between, whether it's in the situation you posit or
9 just an individual going to talk to or small privately
10 held company going to talk to a lawyer which is that
11 the client wants to do something which is illegal.
12 That's the given. And then I think there's two
13 variations of that. If the client had no intention of
14 doing something illegal, then the lawyer will advise
15 the client, hey, you can't do that because such and
16 such a law says you can't do that. Maybe it's some
17 obscure regulation that that person had no reason to
18 know about this is wrong.
19 Well, in that case the person is likely to
20 comply, because they want to comply with the law.
21 That's why they went to the lawyer in the first place.
22 Then we have a second kind of client. I think that's
23 the kind of client that we're really concerned about.
24 That's the Enron client or the WorldCom client. These
25 are people who are doing things that they know they

1 should not be doing. Now, people at WorldCom you can
2 assume knew that they should not be cooking the books
3 to present false pictures to the investors. Those
4 people, and they're often very sophisticated, educated
5 people, are not simply going to the lawyer for advice
6 about how to do the right thing or how to structure a
7 lawful transaction. I don't think it's beyond
8 imagination at all that they would try to complete the
9 transaction they want to undertake without filling in
10 the lawyer about their true intentions.
11 For example, in the Enron hypothetical with
12 the allegation that there's hundreds of thousands of
13 entities set up to pursue a fraud, it seems to me
14 quite conceivable that a client could convince a
15 lawyer to create those entities without the lawyer
16 knowing the purpose for which they're going to be
17 used. And in that event, when you have a client that
18 knows that he's either skating on the thin edge of the
19 law or is just bent on doing something illegal and
20 fraudulent, then the ability of that person to talk to
21 the employer in confidence is critical because that
22 person is not going to march into a lawyer and lay all
23 the cards on the table or even let down his guard
24 enough to let a few things slip, since that would be a
25 red flag to the lawyer, if he knows that I might as

1 well be talking to the SEC when I'm talking to this
2 attorney because someone's certainly not going to
3 march up the SEC and let down their guard, and say,
4 well, gee, I have this problem. It might be a little
5 sketchy, but gee, what do you think about it?
6 Those are the kinds of clients we want to
7 get into the law office so the lawyer has an
8 opportunity to dissuade them. The reason they will
9 come to the law offices in my estimation is because
10 they know the consultation is confidential. And if
11 you strip away that protection, you're going to push
12 the very people that most need our attention out of
13 the law.
14 MR. OLSON: The Enron based hypothetical, the
15 clients's already in the law office having the entity
16 set up and the facts that bring about some kind of
17 obligation to go up the line or report out of the line
18 beyond the corporation arise when in the course of
19 that work the lawyer receives some level of knowledge.
20 We've talked about what that ought to be. This
21 entity's being set up to no good purpose. Mr. Fastau
22 says we're going to give Mr. Fapper, who the lawyer
23 knows is an employee of the corporation, a 10 percent
24 interest for a thousand dollars or something like that
25 happens, and I don't see if this is the situation,

1 that having the rule where the client knows that a
2 lawyer may report that, at least up the line and
3 perhaps if things are not done up the line, then
4 outside the line, in any way deters the client from
5 going to that lawyer for advice, because as has been
6 pointed out by a lot of commentators in the press and
7 otherwise, you really can't set up that entity without
8 some lawyer.
9 Actually, and this is what the Corporate
10 Counsel Association survey seems to say, although
11 their representative this morning seemed uncomfortable
12 with their survey result, the in-house counselor is
13 saying if we have an obligation, at least within the
14 corporation, it's clear to report that up the line,
15 that actually strengthens our hand. I don't know that
16 the survey was precise enough to say what the reaction
17 would be to the corporation, but I think the dynamic
18 is not as you described. There is not somebody out
19 there who's not going to come into the lawyer because
20 the lawyer might have heightened professional
21 obligations. This is somebody in the corporate
22 context already there and cannot effect a transaction
23 or the filing or whatever without the lawyer's bit of
24 involvement.
25 THE WITNESS: Well, the point is well taken.

1 I was just speaking about 1.6 so I was speaking about
2 reporting outside of the client, not --
3 MR. OLSON: -- because you can't do this
4 transaction without a lawyer and you report up to the
5 level of the CEO and the CEO is a crook, too, doesn't
6 react. Then you go to the board of directors and the
7 board of directors don't react because they're afraid
8 their stock is going to go down in value and they've
9 all been required to put a minimum of $350,000 in the
10 stock of the corporation because the corporate
11 governance people said that was the right thing to do
12 to get their attention to these issues. In this
13 circumstances the lawyer does what? Stops creating
14 the entity, resigns the representation? But under no
15 circumstances even if this entity goes forward with
16 the assistance of others and the selling stock to the
17 public and tell them under no circumstances are
18 permitted to go beyond that and tell somebody to
19 prevent the fraud from going forward?
20 THE WITNESS: That's correct under California
21 law.
22 MR. OLSON: We know that California is an
23 outlier. I'm a native Californian, so I know that
24 very well. Is that the right way?
25 THE WITNESS: First of all, let me address

1 that perception that Californian is an outlier. The
2 house of delegates voted on this issue last summer and
3 two-thirds of that body voted against the Ethics 2000.
4 MR. CHEEK: 41 states.
5 MR. OLSON: We were roundly criticized by
6 people throughout the country, including lawyers and
7 law professors and the Chief Justice of Delaware, for
8 that result.
9 THE WITNESS: As a profession, lawyers are
10 not always in a position to take positions that are
11 popular. Our role over the centuries, it's government
12 power. That's especially true in the United States --
13 MR. OLSON: I bet you a buck, if we took a
14 national plebescite of all the lawyers that that would
15 come out differently. I think basically what we would
16 see is a steamroller effort by the organized members
17 of the trial bar working through the state delegates
18 is not something that represents in any fair fashion
19 the view of the American Bar Association, but that's
20 just my personal opinion.
21 THE WITNESS: I have to respectfully disagree
22 with that. Let me move back to your question. I
23 think I've forgotten what your question was.
24 MR. JACOBS: Obviously, California lawyers
25 are engaged frequently in multijurisdictional

1 practice. They're appearing on behalf of their
2 clients in courts in other jurisdictions.
3 We know that 41 of those other jurisdictions
4 either permit or require some sort of disclosure that
5 is prohibited in California. When they're appearing
6 in those other jurisdictions even California lawyers
7 are subject to the ethical rules of those other
8 jurisdictions. Do you have any basis to say that when
9 California lawyer is performing services elsewhere
10 that he has a different relationship with his client,
11 that let's having less cooperation and less
12 disclosure, more difficulty than he is when he's
13 representing that client in San Francisco?
14 MR. CHEEK: Or is subjected to more civil
15 liability or litigation.
16 THE WITNESS: I don't think so, and let me
17 tell you why. One is the technical answer which is
18 that each state's disciplinary rules have a choice of
19 law provision. And our choice of law provision here
20 in California says that a California lawyer is
21 expected to abide by the California rules no matter
22 where the lawyer might be practicing unless the lawyer
23 is expressly required to do otherwise by a
24 jurisdiction that has control over him. So, for
25 example, in a situation where lawyers have made a pro

1 hac in a court, as a condition of doing that,
2 invariably, the lawyer has to agree to abide by the
3 ethical rules of that tribunal.
4 However, there are only a very few states, as
5 you know, a very tiny minority that actually require
6 disclosure of client fraud in certain situations, and
7 therefore, under our choice of law rule in California,
8 the California lawyer would be bound by the California
9 duty of confidentiality, except in those states that
10 would require disclosure, and then we would -- the
11 lawyer would, I believe, have to comply with that
12 disclosure duty. But that is the technical answer. I
13 should have said that second because I don't think
14 that's the most important answer.
15 I think the most important answer to your
16 question, practical answer, which is I think the
17 culture on this question among practicing lawyers is
18 the same all over the country. And I hate to open
19 another sore wound, but I think that's what the house
20 of delegates vote reflects. I think the actual
21 practice of lawyers is not reflected by the hodgepodge
22 of different state rules that in difficult ways say
23 lawyers can and occasionally must reveal evidence of
24 client fraud to third parties. Lawyers don't do it.
25 There's no evidence about this one way or

1 another. Unfortunately, that doesn't simplify your
2 task. We think the reason that this has not become a
3 big issue with clients trusting lawyers is that
4 lawyers don't make these disclosures. You don't read
5 the New York Times and hear about lawyers making
6 public announcements adverse to their client. It's
7 anathema to lawyers.
8 Let me tell you about speaking at the
9 national standard and what ordinary lawyers think. I
10 participated in a panel. I believe it was earlier
11 this year. It was after the Ethics 2000 debate on
12 rule 1.6. And the format of this panel was to reenact
13 the debate. I was one of the people who argued
14 against loosening confidentiality to permit disclosure
15 of client fraud and some other people made the
16 argument in favor, and then all the environment
17 lawyers in the audience at the end voted. And both
18 came out exactly the same as the house of delegates;
19 two-thirds against change.
20 Quite a few of the environmental lawyers
21 spoke privately to me and in the open session there
22 were hundreds of them there, at least 300 lawyers.
23 And bear in mind in the Ethics 2000 proposal picked
24 environmental practice as one of the reasons why it
25 needed to change the rule to allow disclosure where

1 the third parties bodily integrity could be in
2 jeopardy. And what these lawyers said, this rule
3 makes no sense to us who actually practice
4 environmental law because there are -- the EPA's
5 business in large part is figuring out what risk is
6 acceptable to the public. What percentage of toxin in
7 water is acceptable, not perfectly safe, but an
8 acceptable risk. So what they were saying to me and
9 other people in the group was that there is a real
10 disconnect between this ethics rule that people who
11 believe themselves to be experts in ethics, and I'm
12 one of those people that hold myself out that way, but
13 the ethics experts wrote this rule, and it makes no
14 sense to us in practice because how are we to decide
15 whether to disclose what something that we believe is
16 an unsafe concentration in the water when the EPA has
17 decided that that concentration is an acceptable risk
18 and the EPA is a entity lawfully charged with making
19 those decisions.
20 MR. OLSON: How would that be these lawyers
21 permitting fraudulent -- actual crimes? It's
22 certainly not a crime to follow the EPA standards,
23 even though it's you making the decision.
24 THE WITNESS: That's correct. It wouldn't be
25 a crime. If it was under the rules now, now changed

1 last summer, permits lawyers to make disclosure of
2 confidential information to protect third parties from
3 death or serious bodily injury that's reasonably
4 likely, so the point I'm making, because the
5 environmental lawyers in this group did not agree with
6 that change. They did not think it accorded with real
7 practice, and they were very strong about the
8 necessity for attorney-client confidentiality as a
9 prerequisite to having a strong attorney-client
10 relationship where they can give good advice to
11 people, even people who want to do something that we
12 don't want them to do, because confidentiality's
13 inherent.
14 Let me back up and emphasize one thing which
15 is -- sorry, can't see the gentleman's name.
16 Mundheim. Thank you. You were asking, well, doesn't
17 the fact that a lawyer can report a potential
18 violation of law of a corporation all the way up to
19 the board of directors, and only after the board of
20 directors refuse to do anything about it, to the
21 lawyer's consternation, doesn't that cry out for
22 change, that the lawyer ought to have the ability to
23 go outside the company.
24 I think, either in the corporate context or
25 in all of the other contexts which the proposed change

1 to rule 1.6 would govern, not just big corporate
2 practice, that the assumption there is that the
3 clients feel free to confide in the lawyer. We
4 believe that if lawyers start making disclosures that
5 would be permitted by a revised 1.6 that that trust
6 will be gone. So lawyers would not have the
7 opportunity. So it's sort of a chicken or the egg
8 problem. We're not sure that lawyers will ever get to
9 the point where they have presented an issue to the
10 board of directors that gravely concerns them and have
11 the opportunity to urge action if the clients don't
12 feel free to come clean about the problem.
13 In the Enron situation I continue to believe
14 that in that transaction and in similar transactions
15 clients can seek to, and I suspect might succeed in
16 many cases, in trying to have lawyers assist with the
17 transaction based on a perfectly credible explanation
18 of what the transaction is going to accomplish or what
19 the business entity the lawyer is creating will do
20 while the clients have their own plan in mind about
21 what they're actually going to carry out. It seems to
22 us it is more likely that the client will have
23 unguarded moments that will provide the lawyer with
24 red flags about those transactions maybe not being up
25 to snuff, that if you the -- getting a little tangled

1 here -- that if you don't have confidentiality the
2 client will be more guarded with the lawyers.
3 Therefore, the lawyer is going to have more
4 troubles discerning which transactions might be
5 problematic and which are not, and that is what we
6 want the lawyers to do. We want them to be able to
7 stop those transaction and have the opportunity to
8 counsel the clients away from them.
9 MR. CHEEK: How does the hovering presence of
10 the proposed SEC rules which would mandate as a
11 federal matter for public reporting out obligation,
12 whether it's an ongoing impact of a known fraud, how
13 does that impact this issue from a professional point
14 of view?
15 THE WITNESS: I think that's something that
16 has to be addressed at the SEC. My committee hasn't
17 ruled or considered that particular motion yet because
18 it hasn't even come out. I understand there's a press
19 release. I haven't been able to see yet. But it
20 seems to me since SEC says in securities law practice
21 this is what we'll require as matter of federal law
22 and we intend to create, all states' rules to the
23 contrary, then federal government can do that, and
24 people who choose to challenge that in court may do
25 it.

1 I don't think that simply because the SEC is
2 bearing down with its view of attorney ethics that
3 that should control our efforts.
4 MR. CHEEK: It's driven by Congress and the
5 president of the country.
6 THE WITNESS: I understand, but we are
7 traditionally part of the judicial branch of
8 government, and part of our role has been to resist
9 the executive and legislative power. Lawyers are an
10 independent base of power and serve as checks on the
11 political branches. But the second point I make this
12 -- so I think there's two points. One is what is the
13 policy impact of the pending rule and that's what I
14 just addressed. The second points to keep in mind is
15 that the SEC rule either is or should be limited to
16 practice in front of the SEC which raises one of the
17 concerns that we have with your proposed changes to
18 1.6. It is not so limited in any respect. It applies
19 to the small town lawyers giving advice to a woman who
20 wants a divorce. It applies to just any sort of
21 practice. So, I think if you were looking at
22 making -- yes. Go ahead, please.
23 MR. CHEEK: With due respect, the carve out
24 we had in 1.6 was very narrow in its set of trigger
25 events. It required substantial input of a financial

1 nature as well as the use of a lawyer's service as
2 well as a crime.
3 THE WITNESS: I think the breadth of that is
4 in the eye of beholder, but if your focus in your task
5 force is on publicly traded companies, my point is
6 that the scope of changes to rules you make ought to
7 be limited to publicly traded companies, and there is
8 a credible argument to say that publicly traded
9 companies are different. And here I think you have to
10 look carefully at the changes you make to model rule
11 1.13 because if you are now saying that lawyers who
12 represent publicly traded companies must look to the
13 shareholders, stockholders, and potential stockholders
14 as their primary client, that is really a very
15 significant change in legal ethics.
16 I'm not speaking on behalf of the committee
17 here because I'm going beyond the prepared test, but I
18 think that's a credible position. I think it has a
19 lot of implication in terms of conflict of interest
20 and all sorts of other duties and rules that affect
21 lawyers, but that analysis would apply only for
22 publicly traded companies or at least very differently
23 for publicly traded companies from closely held
24 corporations and I think those distinctions are
25 important to keep in mind.

1 One of the things we have found on our
2 committee in drafting rules of professional conduct in
3 other standard is that the greatest challenge is
4 anticipating every factual context in which the rule
5 will be applied. So I would really caution you
6 against drafting a rule that emanates from publicly
7 traded company practice but will apply to all sorts of
8 practice because -- let me give you one example, a
9 family law example that would trigger the Ethics 2000
10 version of rule 1.6. And that is that a wife comes
11 into the family lawyer. The family lawyer has
12 represented the family business for many, many years
13 and the wife comes in and says, "Listen, I'm very
14 unhappy with my husband. I'm thinking of getting a
15 divorce. Furthermore, I'm very unhappy with him for
16 how he runs our business. I know I signed the tax
17 returns every year but I just do what he tells me to
18 do. The fact is he's been defrauding our customers
19 for years. He's been building housing using defective
20 materials. They're unsafe."
21 And the lawyer's opinion is that the wife has
22 personal liability for that, both civil and criminal.
23 She signed returns and maybe she's had sufficient
24 participation in the business even if she doesn't
25 perceive it to be that way. The rule that Ethics 2000

1 drafted and you are proposing to make mandatory would
2 require the lawyer in my view betray that woman and to
3 turn her over either to the people that bought houses
4 from that company or to the government authorities.
5 That's a very serious matter and we think it
6 turns --
7 MS. HENNESSY: How is the lawyer involved?
8 How is the lawyer's work product --
9 THE WITNESS: Because he's represented the
10 company so he's prepared all these transactional
11 documents. Say the company was a developer selling
12 houses to individuals. He prepared transactional
13 documents between the buyers and sellers. They had
14 representations about the house's condition. Under
15 state law sellers of homes are obligated to disclose
16 any defect and so on. You don't need to agree with
17 every aspect of my hypothetical.
18 I only mean to demonstrate that a major
19 change in the rules can have unintended consequences
20 and when you're changing confidentiality you're
21 changing something that's at the very core of the
22 attorney-client relationship, and I think that
23 counsels great caution.
24 MR. CHEEK: Thank you very much. We
25 appreciate your being with us.