

1 THE WITNESS: Since I was toward the end of
2 your afternoon, a long day of hearing comments about
3 your report, take a slightly different tack. I'm
4 appearing on behalf of the Bar Association of San
5 Francisco which is a local bar association made up of
6 many active practitioner in many fields of law,
7 including securities law. This is sort of the
8 centrum, if you will, of innovation, invention, IPOs,
9 public offerings for many years in the 1990s, and so
10 our bar association has many members who practices
11 with the SEC. However, it's also made up of many
12 other practitioners, many of whom serve in the public
13 sector.

14 I'm appearing on their behalf to present the
15 views that we have in our written materials. Rather
16 than focus on those, I thought I would simply take a
17 small piece of the concerns that we've expressed to
18 you and try to build on that a little bit rather than
19 repeat much of what has already been said by others
20 today. It seems to me in listening to your comments
21 that you are legitimately concerned, as am I, as are
22 all serious minded lawyers in our profession, with the
23 prospect that lawyers representing publicly held
24 companies have turned a blind eye to clear fraud and
25 legal and law violations, and I think that is a very

1 legitimate and important concern, and our association
2 supports this task force inquiry into that and its
3 work. There's no doubt about.

4 I would also like to take a moment and tell
5 you that there are solutions other than those which
6 you proposed in your report, some which you've touched
7 on, but I don't -- you can tell from the report that I
8 am prepared on behalf of our association in San
9 Francisco, we don't think that the dramatic changes to
10 the rules that you proposed is the only solution.

11 I want to say two things. First of all, my
12 experience, many of the people in my field are very
13 familiar with the rules. We're very familiar with the
14 ABA rules. We're very familiar with the California
15 rules. We know the differences. We debate them with
16 you, and we can debate them with you today. But the
17 average practitioner, even those who represent very
18 sophisticated publicly held companies, in my
19 experience are not nearly familiar enough with the
20 existing principles in our rules.

21 This profession, and I'm speaking of the
22 profession as a whole, not just the ABA, needs to do a
23 great deal more in the field of explaining first
24 principles, first principles to our lawyers. We don't
25 have enough consensus among the practicing bar. On

1 just the most basic fundamental principles, that if
2 they were abided, we won't be talking about changing
3 rules. We'd be talking about enforcing the principles
4 that we already have which have come to us through
5 decades of experience and dialogue and debates.

6 In support of one of those, and you've
7 addressed this in this report, but frankly not well
8 enough, is rule 1.2(d). And I have to tell you as
9 someone who practices in this field and who represents
10 many lawyers in many different lawyer and gets many
11 phone calls and many inquiries and who teaches law
12 school at USF, University of San Francisco Law, I
13 would venture to guess, and you could take a poll, I
14 would venture to guess that a lot of lawyers don't
15 know where to find 1.2(d). Where is it? Well, it's in
16 a rule that relates to the scope of the attorney's
17 representation. That's where it is.

18 It appears, if you read it the way it's
19 currently crafted, to be a carve out of the general
20 principle that clients dictate the objective
21 representation and clients set out the scope pretty
22 much of the lawyer's representation. 1.2(d) which, by
23 the way, in California we have as a separate rule, we
24 have part of it in our state bar act and we have part
25 of it in our rules of professional conduct, deserves

1 its own place because it is a cardinal principle of
2 professional responsibility. It goes hand in hand
3 with confidentiality.

4 And many of the questions you've asked today,
5 which are legitimate questions in my humble opinion,
6 can be answered in the context of the fact that no
7 lawyer, no lawyer in any capacity, whether they are
8 representing the regulatory -- a client with
9 regulatory obligations, or an individual charged with
10 a public offense, no lawyer can advise, counsel,
11 assist in the violation of law. Nobody can do that.
12 And that is -- if you tell lawyers that they say oh,
13 of course, I understand that, but they don't see it in
14 the way that you are now concerned about it.

15 And so we talk about lawyers turning a blind
16 eye or lawyers engaged in what I refer to in the paper
17 as conscience -- conscious avoidance. We need to do
18 more than simply debate among ourselves whether our
19 version of confidentiality is better than yours or
20 whether 1.3 which, by the way, parallels our rule in
21 California and needs to be changed to the degree that
22 you are proposing. Rather, I think that your
23 recommendations raise basic questions about the
24 ability of lawyers to abide by the existing and
25 cardinal principles of professional responsibility.

1 Let give you a couple of examples. In the
2 Enron situation, assuming as I do that many of the
3 lawyers who had professional responsibilities were
4 members of the Texas Bar, their rules would give them
5 a great deal more license to make the disclosures than
6 perhaps lawyers can in California under our existing
7 rules. But I venture to tell you that empirically, I
8 don't think California lawyers are any less able to
9 counsel their clients effectively, honestly, legally,
10 and competently than lawyers in jurisdictions that
11 perhaps have a more flexible rule.

12 So I would rather than not waste your time
13 and my time debating whether this scope of
14 confidentiality should be absolute, which it is not in
15 California and never has been, or whether it should
16 give lawyers either discretion or mandate disclosures
17 because in the end I predict that unless lawyers are
18 educated, counselled, reminded, trained, and
19 experienced in the area of just abiding by first
20 principles, that rule changes are not going to solve
21 the problem.

22 I mentioned in the paper from a point of view
23 of historical interest that we've had situations in
24 the past that involved rather egregious corporate
25 failings in the S&L crisis. OCAM Leasing, you can go

1 back to the days of National Student Marketing if you
2 wish to, and you would find, if you were a student of
3 the rules, that the rules were somewhat different at
4 those times. The ABA has gone back and forth over
5 time in terms of the scope of confidentiality. And I
6 venture to guess that it's not the rule. It's the
7 inability of the lawyer to exercise a degree of
8 independence of professional judgment to have that
9 detachment from the fray, from the particular dilemma
10 that is facing the lawyer in that instance to know
11 when to take this matter to the highest authority,
12 when to remonstrate, when to go back, and when to the
13 that what lawyers are trained to do best, persuade.

14 Our view in California which is frankly not
15 much different, I don't think, than the view of the
16 great majority of lawyers in this country, is
17 basically that any lawyer worth their salt who is
18 going to take on someone as a client, be it a
19 corporation, be it an individual, is going to work
20 like the devil to make sure that relationship works,
21 and to have that effective working relationship is
22 going to be in a position of trust and confidence as
23 we've talked about here, and to make sure the client
24 listens to them.

25 When the clients doesn't listen to them

1 they're going to go back again. When that client
2 fails to abide by the learned advice of counsel who
3 knows that the organization is about to commit an act
4 that to be a violation of law or substantial injury to
5 the corporate interest, the lawyer is going to do
6 everything in their power to convince the client to
7 obey the law, and if fails, then there has been a
8 failure of the attorney-client relationship; may be
9 the lawyer's fault, may be the client's fault, maybe
10 both their faults. But the paradigm that is in
11 contrast to this seems to me to be this, that in those
12 type situations, those difficult situations where a
13 client just isn't going to abide by this learned
14 advice by counsel, that it's better that the lawyer be
15 given this additional weapon and, in fact, a threat to
16 the client that if you don't abide by my advice, I'm
17 either going to have the flexibility or I'm going to
18 be mandated to report this.

19 And not to repeat ourselves what we said in
20 the paper, we respectfully have a difference in views
21 of those in the ABA who promote that type of logic,
22 and I don't think I need to say more unless you have
23 questions about that.

24 I do think that there are better answers.
25 Others here have said that the reach of these rules is

1 quite far and for someone as myself, I'm on the
2 California commission, we're in the process of looking
3 at our rules. What are we doing? Our charge in
4 trying to bring greater harmony between the standards
5 in California and standards in our jurisdiction. Why
6 are we doing this? We are doing this because modern
7 practice necessitates this. And I know the members of
8 the ABA Ethics 2000 commission have this as a goal.
9 They didn't take the extreme positions. They wanted
10 to take a more measured position to try to create more
11 harmony because, frankly, ABA model rules are not
12 adopted in uniformity across the country, even though
13 we have so many ABA model rule states.

14 So in response to the question I heard you
15 ask this morning, what about these 41 states who have
16 either a mandatory or permissive disclosure rule? I
17 suggest, as has been done in articles and charts and I
18 know in Professor Morgan's book, for example, you look
19 at all those rules in those 41 states. They're not
20 the same. They all have different permutations,
21 different language, different provisions.

22 The fact of the matter is in the United
23 States, this is kind of an irony, confidentiality is
24 probably the most fundamental core value of our
25 professional, and yet at the same time is probably the

1 most confused and least understood and one for which
2 we do not have any consensus among the various
3 jurisdictions in this country. So I don't think one
4 can say we are going to move to the majority rule. I
5 don't think there's a majority rule. What we need to
6 do --

7 MS. HENNESSY: Having just gone through this
8 exercise to create my own chart, I can tell you that
9 that's factually not correct in the sense that 27
10 states permit or require disclosure to prevent a
11 crime. In some cases they also include fraudulent
12 acts. But there's a great deal of uniformity on the
13 question of disclosing a crime having nothing to do
14 with whether it's limited to bodily harm or financial
15 damage.

16 THE WITNESS: Rather than get way off into a
17 debate with you, ALAS prepared a chart that went to
18 every one of those jurisdictions word by word even
19 among those in which there was permission to report a
20 crime they found significant differences. Professor
21 Morgan does the same thing in his book. I'm not
22 disagree with you that there aren't so many number of
23 states that allow you to report a crime, but if you
24 read each one of them, they don't match up line by
25 line, word by word, because each state for their own

1 policy reasons have made a decision as to what the
2 scope of their duty confidentiality should be, what
3 exceptions should be permitted.

4 Many of the states simply adopted the old
5 original model code without thinking it through.

6 MS. HENNESSY: In the last 20 years they
7 haven't changed it.

8 THE WITNESS: That's right. And some have
9 and some have not. But my point is this, in an era
10 where you have an increase in multijurisdictional
11 practice, which we will have in California as we have
12 in your jurisdiction, in an era where we have a lot
13 more E-lawyering, a much more global economy, this
14 profession needs to work closer together to find
15 harmony to the extent we can on some of these
16 fundamental principles.

17 I'm afraid that because of these scandalous
18 and momentous failures, such as Enron, which it does
19 involves the question that's been asked historically
20 at the end of every major crisis, what were the
21 lawyers doing? We're going to move more in one
22 direction than another, and I'm suggesting to you that
23 that is not necessarily in the public interest. It's
24 not in the public interest because there are many
25 other applications of that rule. And I understand you

1 try to narrow your exception. We can argue about
2 whether or not the use of the lawyer services is
3 really going to be that meaningful or not.

4 But the fact -- let me tell you a couple of
5 things that we're talking about in terms of rule
6 drafting in California. There's a concept in the
7 practice of law called unbundling. This is going in
8 exactly the opposite direction where you're going.
9 This is an access to justice issue. This is where
10 litigants or nonlitigants who cannot afford a lawyer
11 or who do not want a lawyer, who want less in the way
12 of services, not more, so rather than imposing on
13 lawyers greater reporting requirements, rather than
14 imposing on them this need to know or reasonably
15 should know standard, the axis of justice movement is
16 going in just the opposite direction.

17 So when you draft rules of professional
18 conduct which basically apply across the board to all
19 practitioners, all practice settings, you have to take
20 these type of considerations into mind.

21 Now, another question you asked this morning
22 which I would like to respond to, what about the SEC?
23 They seem to be coming out with rules that would
24 mandate certain disclosures in certain instances. I
25 have two responses for that. Normally, I would say

1 that there are occasions in the past where the federal
2 government or some other governmental agency has
3 passed a law that, depending upon the role of the
4 lawyer, may mandate certain disclosures.

5 This is not the first time this has come up.
6 In the banking industry, for example, certain lawyers
7 have certain professional responsibilities, certain
8 rules, certain responsibilities where it is their
9 responsibility to help their entity meet their
10 reporting obligations, so it's not that unusual. But
11 this is unusual in that these appear to be ethics
12 rules. This is the first time in my experience where
13 we do have a federal agency promulgating where rules
14 of professional conduct for those who practice before
15 that agency. That is troublesome.

16 I do not have the answers for you as to how
17 that is going to impact the regulatory rules of each
18 state irrespective of the preemption will apply,
19 whether there will be certain constitutional issues.
20 I have no idea. But I do believe those are very
21 important issues that we need to take into account. I
22 know the ABA wants to be in the forefront of this
23 issue, as well you should. But may I suggest to you
24 your report should include some fundamental findings.
25 I think, as I suggested, that we have a problem in not

1 having enough peer pressure, I suppose is the right
2 word, in addition to education on our existing first
3 principles of ethics.

4 I think 1.2(d is such an important principle.
5 I would not like to have to have my students search
6 for it in the middle of 1.12. I think it deserves
7 equal dignity with confidentiality, because in my
8 State of California there is no doubt the degree of
9 confidentiality is impacted by the duty of all lawyers
10 to obey the law. And I think that's true in every
11 single jurisdiction, and so in our report we try to
12 lay out some of the concerns we've heard here. But
13 we're not trying to do it in a negative way. We think
14 there's a real serious problem here. We think it's
15 true in states that have more liberal rules as we do
16 in states that have much more strict rules.

17 So the rule drafting is not going to be the
18 problem. I'm fearful that if we pass these rules as
19 you propose, and let's assume states adopt them, will
20 they be followed? If they are not followed, as I
21 think they are probably not in some of the
22 jurisdictions that have them, what does that say for
23 our profession? Much better that we work harder at
24 the local level, state level, and at the ABA level in
25 getting the members of this profession to sign on to

1 simple, pretty basic, fundamental rights and
2 obligations of all lawyers.

3 You do not counsel any client to violate the
4 law. You don't participate in it and you don't permit
5 it, and you find yourself in that situation, you
6 exercise that degree of professional judgment that you
7 were given with the right to practice law to get the
8 client to do the right thing. There may come a time
9 when you have to withdraw, but that's your last
10 option. And I think those are the things that we have
11 to say is more stringently together in a chorus, if
12 you will, to get the word across. Those are my
13 comments. Thank you.

14 MR. MUNDHEIM: Your comment on peer pressure
15 is interesting. I just wonder how do you think in a
16 highly competitive legal world one creates the kind of
17 peer pressure that you would hope to achieve?

18 THE WITNESS: I don't have all the answers
19 but let me give you some suggestions. As you know,
20 the field of litigation, we've been worried for a long
21 time about the image of lawyers involved in hardball
22 litigation tactics. And there have been rules, not
23 rules of professional conduct but there have been
24 rules of bar associations of practice. Some courts
25 have adopted them. Some have not. But there's an

1 effort afoot to make the Rambo style of litigation
2 tactics no longer the rule.

3 How is that happening? Can we pass a rule of
4 professional conduct that says you will return every
5 phone call before the end of the day or you will be
6 nice to your opposing counsel or you'll give an
7 extension when he asks to? I don't think so. It
8 takes a professional standard of practice. It's a
9 standard of practice issue. This is how I'm going to
10 practice. This is how the bar association is going to
11 practice and we expect that's the way you're going to
12 practice.

13 Now, is that going to be the only way? Of
14 course not. You are also going to get lawyers that
15 are influenced by their own personal interests or
16 other interests. Sadly, regulatory authorities in
17 California, and I speak to California about this, the
18 lack of resources, monetary or otherwise, to
19 discipline every single law firm that engaged, let's
20 say, in conscious avoidance of known crime or fraud by
21 clients. It's not likely that our state bar funded by
22 lawyer dues is going to have the resources to do that.
23 So enforcement of rules by itself may not be enough.

24 Education, MCOE, a dialogue. I can tell you
25 there's no exception for engaging lawyers in dialogue

1 about these issues. Every corporate lawyer that's
2 called me about an ethics question or every in-house
3 program I've done, it's been good. Lights go on.
4 It's not as if they don't know. It's just they
5 forgot. They don't remember. Oh, yes, and it's that
6 continual dialogue.

7 In the old days this was a profession where
8 you had a lot more of that. We have less and less of
9 that now. We have to find ways to make that work
10 more. Now, is everything I said going to solve the
11 problem? Of course not, of course not. There's a
12 personal ethical standard that everyone has to abide
13 by, and I can't make that happen and neither can you,
14 but I'm not so sure rule drafting the way you want to
15 do it, which is quite dramatic, and which you've heard
16 other people talk about some of the consequences is
17 necessarily the right answer.

18 MR. OLSON: What you're arguing for, I think,
19 is the same thing Professor Bundy is arguing for.
20 Maybe that's not your intention, and that is there
21 really aren't the resources, and if you're right, that
22 the 41 states that have permissive disclosure in some
23 circumstance or another and 20 something that haven't
24 in the case of fraud or any other crime hasn't really
25 promoted awareness of the obligations of lawyers not

1 to be involved in forwarding fraud as you pointed out
2 in 1.2, Professor Bundy's assertion is give the SEC
3 more money. Let the fed do it which is very much the
4 rule that was expressed in Washington when these ideas
5 were pending at the time of Sarbanes-Oxley. The
6 American Bar Association made a valiant effort to make
7 exactly the argument you're making, and they fell on
8 very deaf ears for some of the same reasons that
9 you're suggesting. Our concern has been, and I agree
10 with you, that just changing the rules won't solve the
11 problem.

12 A lot of things need to be done including
13 education and better enforcement. If we don't act and
14 act decisively, and just say, well, the rules are fine
15 and nothing needs to change, but let's educate people
16 a little bit better, and wasn't it great 40 years ago
17 and we all had mentors and we were more conscious of
18 these things. We are going to have federal regulation
19 of the profession within the next few years, and we're
20 going to say, gee, we really missed an opportunity to
21 do something so if we don't change the rules, if we
22 can't appropriate money. California happens to be
23 about the highest bar dues of any bar in the country
24 and still, according to you, and I wouldn't disagree,
25 doesn't have money to operate. What's the solution?

1 THE WITNESS: Let me be careful about what I
2 said. I didn't say they didn't have enough money to
3 operate. They do.

4 MR. OLSON: Then the disciplinary program is
5 not effective.

6 THE WITNESS: No, it is effective. They -- I
7 don't have the statistics, but it's quite effective.
8 But about five cents of that bar dues goes to what I
9 call the education compliant side. In other words --

10 MR. OLSON: Where does the other \$495 go?

11 THE WITNESS: A lot of --

12 MR. OLSON: Isn't that part of the discipline
13 system the center of enforcing these ethical rules or
14 is it somebody else?

15 THE WITNESS: There is a very active
16 enforcement system in place in California.

17 MR. OLSON: Not in these rules, I guess.

18 THE WITNESS: Let me answer your question
19 this way. If you feel that there's a need to change
20 the rules to demonstrate that the association can in
21 effect cure or do a better job in curing this
22 phenomenon I have which I call conscious avoidance of
23 known crime or fraud, there's going to be a trade-off.
24 And that's what I'm here to comment about.

25 It seems to me, and you've heard some of

1 these comments here already today, that it is not the
2 majority of lawyers who are not effective in
3 counseling their organization clients to obey the law.
4 There is no statistical evidence that there is a large
5 number or high percentage of or majority of lawyers
6 who need this corrective action in the rules. In
7 fact, I've heard people say the SEC rules won't do
8 that much damage because they're only going to deal
9 with those few corporations that are out of
10 compliance.

11 MR. OLSON: Professor Wald was saying if we
12 really study the evidence, we would find that these
13 problems are widespread in large law firms.

14 THE WITNESS: I think the best we can go on
15 is what is in the public press, which is lawyers are
16 effective working within the established relationship
17 of trust and confidence to get the client to obey the
18 law. So we're going to make drastic changes to rules
19 to deal with a very important issue which is you have
20 some major corporate failings with some major
21 consequences. But there's going to be a trade-off.
22 You heard both sides of that debate so I'm not going
23 to bore you with repeating them, but there's going to
24 be a trade-off, and I'm suggesting to you that as
25 opposed to taking sides in what is frankly a very old

1 debate, long-standing, decades old about what is the
2 proper scope of confidentiality, I think there are
3 other alternatives.

4 I tried to address those in my paper and
5 present them here in my comments as opposed to taking
6 one side or the other in a very old debate.

7 MR. IDE: I think the American Bar agrees
8 with you. It tries very hard on many fronts to bring
9 lawyers up, if you will, mandatory CLE. We're not
10 just talking about this rule is going to solve all the
11 problems of lawyers. I think the Keller case heard
12 here in California is you really don't have the
13 ability as a bar association to bring lawyers together
14 into court for these kinds of things.

15 THE WITNESS: We do now. Keller, as you
16 probably seen here today, California is very active
17 not just in California affairs but the ABA affairs.
18 We were very active in Ethics 2000. We care a great
19 deal because we need to strive toward greater harmony
20 and clarity. That's the work of the commission of
21 California and that's the work, I think of the ABA.
22 We need to get closer to get to a better understanding
23 of some of these core principles.

24 I think that the comments I've left you with
25 I hope you will take into account.

1 MR. CHEEK: We certainly will. And we very
2 much appreciate you being here. We're going to take a
3 quick break for our reporter friend.

4 (Break taken.)

5 MR. CHEEK: We welcome you, appreciate you
6 being here late in the afternoon.

7 THE WITNESS: I'm delighted to be here, and I
8 have to say I'm delighted that the American bar has
9 taken this problem so seriously. It's got a tradition
10 of going around the country getting the views of
11 lawyers and others about what are our profession
12 responsibilities and obligations, because I think that
13 it's essential that at times like this that the
14 organized bar do this.

15 I have a couple of general comments. I have
16 been asked by the organization of which I'm a member
17 to give the organization's position which I will give
18 in a couple of pages and then I'm available to ask
19 questions of my position while reflected there extends
20 a little bit broader than the matters talked about. I
21 was remarking to somebody earlier there's a wonderful
22 historic moment a hundred or so years ago when Prime
23 Minister Gladstone was faced with an extraordinary
24 constitutional question and the empire of the country
25 was sort of at stake, and there was this great, great