

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

1 joining the faculty, I spent several years working on  
2 dissertation dealing with the decline of values and  
3 the rise of commercialism in the American bar. Having  
4 spent years reading about the history of our  
5 profession, I'm here today, all the way from Denver,  
6 because of an alarming sense of deja vu.

7 I do have one immediate correction to my  
8 written testimony. My testimony, the first paragraph  
9 I urge you to withdraw the report. As I rethink it  
10 because as I've said I think the report fails to  
11 identify and address some of the fundamental concerns  
12 facing our profession. Having spent a few hours with  
13 you this morning, obviously, members of the task force  
14 identified the question, and yet, in my mind fails to  
15 address them in the report.

16 I want to start by stating what I think is  
17 the fundamental analytical flaw in your report. And  
18 if you will, a quick expression will help me do so. I  
19 took the chair's suggestions we depart from the  
20 written testimony.

21 The first year of law school, as I'm sure we  
22 all recall, we tell our students in coming to  
23 address a legal problem, it's always useful to start  
24 with the facts, here at the ground of this pyramid.  
25 Because they contextualize and inform always our

1 discussions, then deal with the rules. In the  
2 appropriate circumstances, maybe in the second year --  
3 third year student, with what we call policy  
4 considerations or principles. Now, what I think what  
5 essentially your report is doing, your report is zooms  
6 on and deals with the rules. In our case the model  
7 rules.

8           It fails to deal with the essential  
9 underlying facts. They also fail to deal with policy  
10 considerations. If you will, this is what I think  
11 President Carlton called the 30 view position. That's  
12 the policies consideration. The facts as what I call  
13 in my written testimony, is the three foot reviews.

14           I'm not here to lecture you about how to  
15 address the problems. I think that specifically  
16 speaking, because the reports fails to address both  
17 the facts level and the policy level, it fails to deal  
18 with several very important questions that I'd like to  
19 briefly identify or comment on right now.

20           So what are the underlying facts? Why do I  
21 think a careful review of even the allegations leveled  
22 against some of our colleagues all over the country,  
23 what do they reveal? I think they reveal, as I  
24 indicated in the written testimony, first, an industry  
25 wide failure. So we are not dealing -- perhaps with

1 one exception is the type of international case.  
2 Other than that, we are really not dealing with  
3 efluvia. What We are talking is at Enron alone the  
4 company, so we are told, dealt with more than 400 law  
5 firms, some of the most respected and reputable law  
6 firms in the country.

7 We're dealing with allegations leveled  
8 against dozens and dozens of law firms. We should  
9 keep that in mind. That's one of the relevant facts  
10 here. Second, we're dealing for the facts and views  
11 to us that there is enforcement failure that is not  
12 just certain dozen of law firms have allegedly  
13 participating in violation of ethic against the rule.  
14 But there is no mechanism in place. That so far --  
15 there was a mechanism it failed to prevent. And  
16 finally, I think even if we are disagreeing over the  
17 facts, the relevant facts, the allegations, suggests  
18 to us that this disagreement, ambiguity about the  
19 rules and duties of corporate attorneys and securities  
20 attorneys to the organization of the plan concerns the  
21 view that you have expressed here today. And truth be  
22 told what I understand the limitation of the  
23 reluctance of the task force to pass judgment on some  
24 of these allegations. I really don't think we need to  
25 do so.

1           The writing has been on the wall. There is a  
2 sense of difficult -- the writing has been on the  
3 wall before. It's not just the S&L contest. We  
4 should have known better. We should have seen it  
5 coming. Why? What I think is essentially going on is  
6 a model rule, not just the model rule, the entire  
7 framework of regular and ethical rules, they build on  
8 the canons of ethics that David Hoffmann and Justice  
9 George Shirkswood in the 18th century gave us a first  
10 book or case book for legal ethics. Then we had the  
11 canons of legal evident. Now we have the model rules.  
12 They embody what? They embody the reality of where we  
13 assume the attorney is an individual attorney often  
14 ties that's in the background because of an underlying  
15 assumption.

16           We have a set of assumptions about the client  
17 usually an individual client, vulnerable client, and  
18 we assume a lot about care of legal practice, the law  
19 practice. And we're dealing with I think the chair  
20 has called before the changing field of legal ethics.  
21 What I think is really going on is Enron scandal is an  
22 example of. What we're dealing with is the analytical  
23 framework of legal professionalism, failing to follow  
24 up, or live up to changing realities.

25           So in the past 100 years we see the growth of

1 corporations. We see a changing paradigm from the  
2 great litigator of the time to corporate legal advice.  
3 We see new challenges to legal practices and yet the  
4 model rules and the entire framework fail to follow.  
5 And we now give them ample empirical evidence from our  
6 affiliate, our distant relative the American bar  
7 Foundation about the realities of the two hemispheres  
8 of litigation of law practise.

9           On the one hand, big corporate practice with  
10 lawyers handling cases and advising big corporations,  
11 and on the other hand, what the reports that I  
12 actually site in my testimony cite called  
13 individual hemisphere. We have a different practice  
14 we have and what I urge -- what I think that is  
15 unfortunate, corporation, string of corporate  
16 disasters allowed us to do, and indeed is our  
17 responsibility to take advantage to actually meet,  
18 identify, and then clarify some of the ambiguity that  
19 corporate and securities lawyers face on a daily  
20 basis.

21           Some of these are model rule to the entire  
22 structure. And what I want to do just briefly is just  
23 identify a few of the questions that I think that you  
24 alluded to today, but I have not seen the test where I  
25 deal with it in the report. If we really think that

1 there is an industry wide failure, and by the way when  
2 I say failure, I mean failure given the model rules  
3 given the analytical framework that we have today.  
4 What are some of the policy considerations? Well, the  
5 first is who should regulate lawyers? Specifically,  
6 who should regulate corporate securities lawyers?

7 Now, as of last Wednesday we are dealing  
8 with, I dare not call it threat, but the reality for  
9 the federalization of legal ethics. The ABA has this  
10 task force should actually consider the questions, try  
11 to explain again revisit the issue of why is it we  
12 think that profession and society benefits from  
13 self-regulation. We need to explain why it is if we  
14 think so that lawyers should continue to have the  
15 authority as in the part to self-regulate, in essence  
16 to meet some of the challenges that we now heading our  
17 way from the same questions and other legislations.

18 It's not obvious to me that the model rules  
19 of the entire framework that we are dealing with. In  
20 the back of their mind we have what zealous advocacy,  
21 loyalty to client, concept of developing within the  
22 historical perspective in the criminal context, and we  
23 still use them. We take them for granted today and  
24 some of the criticism and the resistance that I  
25 suspect if you indeed follow through on the interim

1 report you will receive contrast to what people have  
2 in mind that cultural environment of litigation. It's  
3 no longer applicable in my mind to the current  
4 realities of corporate practice and yet we are still  
5 stuck with this underlying model.

6           So the first question we should really  
7 identify in our recommendation and we should think  
8 quite seriously like who should regulate corporate and  
9 securities lawyers? If we think the bar should hold  
10 that responsibility, then we have the duty to explain  
11 why.

12           Just to give you another example, if we think  
13 that there's an industry wide failure, if we think  
14 there's a deep ambiguity about what are the rules and  
15 duties of corporate lawyers, if we need one quick  
16 event an example that is evident from the Enron  
17 litigation, what are the responsibilities of corporate  
18 lawyers in regard to opinion matters? Well, it seems  
19 to me that we should talk about the content of the  
20 rules, not just who should regulate the content,  
21 specifically, what should the content be.

22 Specifically, it seems to me, we have to go beyond the  
23 model rules and address this one example, the holding  
24 in which the Supreme Court said no aiding and abetting  
25 in the context of security violations or lawyers will

1 not be held, not liable for aiding and abetting  
2 securities violation. It's part of the rules, the  
3 rules of the game for corporate lawyers. We have to  
4 address that.

5           We have to consider whether or not the notion  
6 of loyalty to client, called loyalty to client, is the  
7 concept that we find useful the concept of corporate  
8 presentation as opposed to the underlying model rule  
9 litigation. You heard some people in their testimony  
10 and characterize your effort as being a slim chance in  
11 the model rules. It seemed to me that we should  
12 explicitly consider whether or not we think that  
13 loyalty, the underlying notion of loyalty and what  
14 follows, for example, confidentiality is a good idea  
15 in this particular context.

16           Maybe we should seriously think about  
17 gatekeeping role for lawyers explicitly in this  
18 particular context, i.e., the corporate hemisphere.  
19 We shouldn't shy away from the question. Some of the  
20 questions of the chair and another members of the task  
21 force asked some of my federal witnesses today went in  
22 that direction asking explicitly why do you think  
23 ought -- should be the rules and duties of lawyers for  
24 corporation?

25           Perhaps one final example, the model rules

1 systematically fail to deal, again, because they are  
2 in the back of their mind, they deal with the  
3 individual context. They failed to deal with firm  
4 wide responsibility. By firm I mean law firms. So we  
5 have few rules. We have 1.10. We have infutation  
6 rules, but overall, the model rule fails to address  
7 systematically some of the questions that we have to  
8 deal with when we thinking about the daily reality in  
9 the corporate context, i.e., lawyers work in teams.

10 Where is the locus of responsibility when you  
11 work, when the lawyers, the concept of lawyer means a  
12 law firm, and what should conflict rules should be.

13 To give you a specific example from your  
14 report, you are talking about either actual knowledge,  
15 or the should have known standard, and in one of the  
16 testimony someone urge you to add the word personal  
17 knowledge. This is exactly the substantive questions  
18 that derive from what I think is the biggest question,  
19 how do we come to regulate the law firm, as opposed to  
20 individual attorneys?

21 So I would like to add by suggesting what I  
22 think is really at stake. I said deja vu in my  
23 testimony. I give you one reference that I'm not  
24 going to repeat, as you have in front of you from the  
25 S&L context. I remember we do have in fact an

1 opportunity to address some of the more meaningful  
2 challenges, meaningful ambiguity about the roles and  
3 duties of lawyers in the corporate context, something  
4 we haven't done today.

5 I suspected if we fail to do so, ten or  
6 fifteen years down the road we're going to be here  
7 again as we were ten or fifteen years ago trying to  
8 deal with the S&L problem asking ourselves how could  
9 this have happened, what's going on? Here's what's  
10 going on. We have a set of rules, not just a model  
11 rule, the entire framework to deal with realities that  
12 are no longer the daily realities for lawyers at a  
13 corporate sphere. And we need to rethink the entire  
14 structure, not just the particular rules. What's at  
15 stake, probably struck in the profession,  
16 self-regulation, the monopoly of the power of the  
17 process of legal services.

18 What we really must do in my mind, is try to  
19 take some of these concerns, as to who should  
20 regulation the law and what should be the content of  
21 the rules explicitly. Otherwise, we shouldn't really  
22 be surprised with what we continue to see. We'll  
23 continue to see market pressures driving corporate  
24 attorneys and securities attorneys in a particular  
25 direction and such lawyers will come to us again,

1 perhaps in fifteen years, and say that the model rules  
2 offer very little guidance to us. They fail to  
3 address some of the meaningful concerns. Law firms  
4 will continue to experiment in response to demand by  
5 corporate clients.

6 We are bound to in my mind face just a few  
7 years another disaster. I wish to stop here and  
8 perhaps address any questions and, if not, I left a  
9 few points that I am only allowed to accept any  
10 questions you have at this point.

11 MR. OLSON: Would regularity regime would you  
12 recommend if you do you have a recommendation at this  
13 stage for corporation securities practitioners. Are  
14 you suggesting that the state bars should not be the  
15 primary regulator and somebody else should be, or are  
16 you open -- have you not made up your mind on that?

17 THE WITNESS: I think that we are dealing  
18 with -- there's an empirical evidence to suggest that  
19 state bar associations have been doing very poor job  
20 in enforcing and regulating the corporate bar. We're  
21 talking about specifically the securities lawyers.

22 MR. OLSON: The Chairman of the SEC agrees  
23 with you. He said that.

24 THE WITNESS: Not in the context --

25 MR. OLSON: Not that he could give us any

1 cold hard facts that we could put our hands around,  
2 and you've alluded to the same thing. I think we are  
3 dealing with a dearth of knowledge here that we can  
4 identify if there has been a failure. At this point I  
5 haven't seen the evidence yet.

6 THE WITNESS: Again, I use the word failure,  
7 I thought alluded to that it's important to me to be  
8 explicitly clear. When I say failure I mean a  
9 failure given the current state of the model rules and  
10 the entire ethical structure that guides the conduct  
11 of lawyers. What I mean specifically is, what I refer  
12 to is empirical work, when I'm talking about is  
13 there's very little communication, or very little  
14 actual enforcement measures communication between the  
15 SEC and state bar associations, very little  
16 enforcement effort on behalf of state bar associations  
17 when its comes to the conduct of corporate and  
18 securities lawyers.

19 Now, of course. There could be two  
20 explanations for that. One is there are no meaningful  
21 failures, i.e., state bar associations, we don't have  
22 evidence of state bar associations investigating  
23 because there's very little abuse of the rule by  
24 lawyers, or we can speculate there that there is  
25 failure, there is abuse, and really what's going on is

1 that the state bar associations fail to investigate.

2 MR. OLSON: Or that the rules don't reach  
3 conduct that's relevant to the situation so the  
4 decision is dealt with in some other forum.

5 THE WITNESS: Exactly my point. What I  
6 recommend is that this task force take upon itself to  
7 have an explicit articulation of what are the kind  
8 of -- what are the rules, duty and conduct, which we  
9 expect corporate lawyers to -- what of kind of  
10 services we would think corporate lawyers should  
11 provide to their clients.

12 MR. OLSON: What kind of -- assuming that we  
13 want to finish this report in one year and not eight  
14 years, what kinds of factual inquiry should we conduct  
15 to respond to the first part of your criticism but we  
16 are not going to be able without lot of time, lot of  
17 money, subpoenaed power and so forth to be able to  
18 determine what the facts were in those cases so what  
19 kind of empirical study we should do that would give  
20 you a better basis for whatever conclusion you reach?

21 THE WITNESS: Well, in footnote 4 on page 9  
22 of my witness testimony I am actually suggesting --  
23 this is not a scholarly paper -- draws the attention  
24 of the task force to one instance on page 9 as the  
25 famous John Hines, study of Chicago lawyers. When I

1 talking about the two hemispheres of litigations, that  
2 term is drawn from that paper.

3           There is actually a follow-up paper already  
4 done by -- in conjunction with the American bar  
5 Foundation's work by same author. It's a group audit.  
6 Following up on the same research, one of the  
7 conclusions and, again, that's what I mean when I make  
8 references to existing literature, and of course  
9 there's more than -- and I'm more than happy if the  
10 task force find appropriate to actually direct their  
11 attention of the task force to some of the existing  
12 literature, but the bottom line is this paper suggests  
13 a reality in which we're dealing with two different  
14 kinds of worlds when we talk about law practice. We  
15 have the corporate sphere. What is that spheres?  
16 We're talking about very large law firms dealing with  
17 very large corporations responding to market pressures  
18 and moving the shift or the locus of decision-making  
19 processes from the general counsel to -- well, the  
20 bottom line is the report is trying to suggest that  
21 lawyers are no longer in a position to offer the kind  
22 of advice they used to offer before.

23           And I'm suggesting that the model rule and  
24 the entire framework of legal eithics as we know is  
25 suitable, continues to be suitable to deal with

1 representation and law practice in the individual  
2 hemisphere, and so to finally come to answer your  
3 question, I think that there is existing literature  
4 that the task force can refer to and what I would  
5 suggest, if there's one question that we should  
6 consider, is whether or not we'd like lawyers who work  
7 for big corporations to fill a gatekeeping role,  
8 specifically, oftentimes a deal will not go through  
9 unless a lawyer is at least nominally gives it the  
10 kosher mark.

11           It's important to know from a legal  
12 perspective it's okay. Some of the unattended and  
13 unfortunately consequence of this report is we are now  
14 engaged already in a battle over confidentiality. The  
15 problem of confidentiality that the task force  
16 endorsed in 1.6, I'm fearful that even if the task  
17 force is able to win the battle we would lose the war.  
18 We should open, for example, one question, in a few  
19 months we should open it up for discussion, what do we  
20 think is the entire notion of confidentiality and the  
21 Upjohn decision by the Supreme Court is a good notion  
22 or a good idea given that it's in the corporate  
23 context and not where all of the justifications come  
24 from, the individual rights and the criminal context.

25           It is something we should address

1 specifically why is it we think that corporations  
2 entities as opposed to individuals should benefit from  
3 confidentiality. I don't think -- it's not an obvious  
4 argument, perhaps shocking to lawyers, but there's no  
5 obvious justification why it is corporations as  
6 opposed to individuals should benefit from  
7 confidentiality at all. I think even if the task  
8 force takes the brave position and sends this report  
9 to the house of delegates, history teaches us that  
10 either the report will be voted down, the  
11 recommendations will be voted down, or the if even if  
12 they are passed, the resistance from the corporate bar  
13 will be such that in reality there recommendations are  
14 not going to be followed.

15 Part of the reason why we face such  
16 resistance is the entrenched notion of loyalty, of  
17 zealous advocacy. And these are exactly the kind of  
18 notions that we should tackle directly. Otherwise,  
19 the report as was the predecessor in the S&L problem  
20 will have very little actual effect in years to come.

21 MR. IDE: I would just going to observe that  
22 going back to Bob Kutak in the 80s, Bob Kutak was a  
23 bond lawyer, and he argued for one lawyer per  
24 transaction which drove the litigators crazy. And  
25 back then is when we tightened the rule on disclosure

1 on 1.6. But we have had in the American bar debates  
2 on these issues you're talking about, ancillary  
3 business practice was again the tention between office  
4 practitioners and the litigators and the  
5 multidisciplinary practice debates which recently --  
6 so the issues you raise, maybe we have haven't done a  
7 good enough job of reflecting that in the report, that  
8 there's been a lot of thought about should there be  
9 two bars.

10 Just to reflect that history, but on the  
11 facts as they've been presented from my prespective,  
12 we're focussed on the system. You mentioned industry.  
13 I assume you meant our profession. When we seem to be  
14 really tied down to this question of disclosure  
15 because that's the one that's been an ongoing  
16 situation. But to my knowledge, other than the Tyco  
17 lawyer who acted from his own personal fraud, not as a  
18 lawyer, and some other lawyers, that we have no  
19 evidence today of lawyers individually in their legal  
20 duties of creating a whoe new system that's creating  
21 problems for us, but the questions's been raised about  
22 disclosure.

23 So that's where I am on the facts unless you  
24 have facts that I don't know of.

25 THE WITNESS: It seems to me instead of



1 focussing about disclosure and the interplay between  
2 disclosure and confidentiality, we can talk a lot  
3 about gatekeeping. What do I mean by that  
4 specifically? We should have passed a rule that  
5 explicitly tells lawyers that they should not -- they  
6 have a more stringent duty to investigate and  
7 supervisor, but if they find something that they  
8 reasonably believe that is misleading or fraudulent,  
9 the duty would be not to disclose, certainly not  
10 outside of the corporation, maybe not even within the  
11 corporation, but simply refuse to participate.

12           So here's one questions that we fail to  
13 address, specifically, a model rule could specify that  
14 a lawyer has a heightened standard of investigation,  
15 investigating your clients perhaps, not relying, not  
16 taking for granted representations by accountants and  
17 corporate officers conducting some sort of independent  
18 investigation. However, independent of what you find,  
19 you are not obligated to share the information outside  
20 of the corporation. Instead, that's the gatekeeping  
21 role. You stand at the door.

22           What you do if if you find troubling evidence  
23 you refuse to participate. The image in mind is not a  
24 whistle-blower, but perhaps the bouncer at the door of  
25 a pub. We don't necessarily tell the bouncer to ask

1 the teenager, the underage teenager, we don't tell the  
2 bouncer to convince the teenager not to enter other  
3 bars, but we tell the bouncer just don't let that  
4 person in. We can conceive of a system where lawyers  
5 have responsibilities, ethical responsibilities, even  
6 legal responsibilities to investigate and act in a  
7 gatekeeping role with a totally different set of  
8 standards, where the bottom line is refuse to  
9 participate, because in certain transactions, without  
10 your participation the transaction will not go  
11 through.

12           So you're telling me we're now dealing with  
13 disclosure, and I'm saying in response maybe in  
14 addition to disclosure we should at least deal with  
15 the notion of gatekeeping with a strong sense of  
16 refusing to participate, not just noisy withdrawal  
17 from it, but rather you have an affirmative duty to  
18 investigate more, educate more, and then refuse to  
19 participate if you find something troubling.

20           MR. CHEEK: Thank you very much. We  
21 appreciate you traveling from Denver to be with us  
22 today and we're appreciative of your input.

23           (Break taken.)

24           MR. CHEEK: All right. Professor Bundy, I  
25 think we can start and others will catch up with us.