

American Bar Association Task Force on Corporate Responsibility

Testimony of Patricia Lee Refo

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I. Introduction

I appreciate the chance to offer testimony before this important ABA Task Force on Corporate Responsibility. As you may know, I am the Chair-Elect of the ABA's Litigation Section, and present this testimony here to you today on behalf of my more than 60,000 colleagues within that Section. My testimony has been approved by the Council of our Section which considered your Preliminary Report of July 16, 2002 and voted at its Fall meeting to take action consistent with these remarks. First, I want to thank each of you for the time and effort that you have given to the work of this Task Force. I think it is significant that the ABA is proactively out in front at this time on what the role of lawyers is, and should be, within the public dialogue on corporate responsibility.

At the ABA Litigation Section, we often ask ourselves "who more than litigators has the responsibility to secure the vitality of the American system of justice and equal justice for all?"¹ The Section of Litigation's mission is to dedicate its efforts to accomplishing these critical objectives while, at the same time, providing our members the resources and opportunities to help them be effective and ethical advocates on behalf of their clients. It is in direct fulfillment of this mission that I appear before you today.

I will focus my remarks today on the Preliminary Report's recommended changes to the Model Rules of Professional Conduct, rather than the Report's corporate governance

¹ See Section of Litigation Strategic Plan.

recommendations. I do this because, for one, I think you got the corporate governance things right. It is important to note that the Preliminary Report, released on July 16th, predates Congress' rapid-fire adoption of the Sarbanes-Oxley Act and the SEC rulemaking which continues to follow in its wake. Much of that legislation and rulemaking clearly affects some of the Preliminary Report's recommendations, but I think, for the most part, the Task Force's work correctly anticipated the scope and tenor of these later rules. But, more importantly, for my remarks today, I want to focus on your Model Rule proposals because, as right as you were on corporate governance, you are just plain wrong in your approach to the Model Rules. While the conclusions and recommendations set forth in your Preliminary Report indicate a profound concern for showing that lawyers understand that public trust has been lost in the wake of the many "Enronesque" corporate scandals, your recommended changes fundamentally disturb the lawyer-client relationship as well as the way, I expect, lawyers will deliver their professional services going forward. This may sound somewhat alarmist, but it is not hyperbole, and the testimony given at both of your Task Force's public hearings indicate that the ABA Litigation Section is not alone in its concern over your Preliminary Report.

II. Nature of Problem Being Solved By Task Force.

The Preliminary Report does a good job of citing the aptly named failures of corporate responsibility involved with Enron, WorldCom, Tyco, Adelphia and Global Crossing, among others. What is lacking, however, and what one would expect to find in spades, given the Task Force's spectrum shifting changes to the Model Rules, is *any* mention that these spectacular corporate flame-outs were, in fact, failures of lawyering, even in part. Now, I certainly do not want to be on the record saying the lawyers were perfectly innocent in all of this, but, on the

other hand, I am also not prepared to assert, without evidence, like the Task Force has, that there has been a failure of corporate responsibility by the lawyers. The Preliminary Report seems to follow a “where there is smoke, there is fire” logic in lumping lawyers with the corporate directors and auditors, and then proposing revolutionary changes to the Model Rules governing a lawyer’s fundamental duties to his clients. That approach is certainly not rigorous, and as I will explain in a moment, is exceptionally dangerous.

A. Find the Failure of Lawyering in Enron or WorldCom.

Let’s unpack a few of the high-profile corporate responsibility failures a bit, as the first step in determining where, or whether, the lawyers went wrong, and whether the proposed changes in the Preliminary Report are appropriate. We should start with Enron, as it is the most famous of such failures, and as its name evokes images of craven greed and indifference by all associated with it.

As I understand the facts, Enron represented a colossal failure of independent auditing coupled with, or perhaps caused by, a calculated fraud by senior management. In fact, the Assistant United States Attorneys prosecuting members of Enron’s senior management have charged them with fraud on both the Company itself as well as the investing public. I also realize the facts of Enron will be sorted out over the next several years, but the first wave of criminal actions against senior management and the auditors support my current understanding.

The Preliminary Report suggests that there was a “clear failure of corporate responsibility when outside directors, auditors and lawyers, who have important roles in our system of independent checks on corporate management, fail to avert or even discover-and sometimes actually condone or contribute toward the creation of-the grossest of financial manipulation and

fraud.” What role did the lawyers have in Enron to avert or even discover the frauds implicit in Enron?

Again, as I understand it, and I do not profess to be anything close to an “expert” on Enron, Enron’s auditors initially certified the Byzantine array of off balance sheet special purpose entities and their relationships with Enron as fairly presenting Enron’s financial condition in accordance with generally accepted accounting principles. The problems publicly arose when these same auditors first claimed that a handful of these relationships were not GAAP compliant, thereby triggering a huge earnings restatement. Another restatement followed when these auditors began kicking the tires a bit and determined that they had been misled with respect to another set of transactions. Yet, as far as anyone knew, until the initial self-assessment that the financials were not actually in accordance with GAAP, Enron was in strict compliance with the federal securities laws.

A similar phenomena existed in the case of WorldCom. In that situation, WorldCom’s auditors allowed the company to capitalize items which per GAAP should have been expensed. The auditors again certified WorldCom’s financials as being in compliance with GAAP. Understanding that this brief recitation of facts is surely incomplete, I still fail to see how there was a failure of lawyering. Yet, for the sake of argument, let’s assume that the lawyers to these companies had *actual* knowledge of the frauds being committed (even though the auditors themselves now claim to have not known), are the existing Model Rules of Professional Conduct inadequate to deal with these situations? The answer to this question necessarily must be a resounding “YES,” to warrant the changes suggested by the Task Force. Otherwise, we may be guilty of fixing something that is not really broken.

III. Are the Model Rules Now Inadequate?

Before being able to evaluate if the existing Model Rules are inadequate, I first want to briefly consider the Task Force's proposals to contextualize the *status quo*.

A. Model Rule 1.13

I am sure that every lawyer already acknowledges that when a lawyer represents an organization, the lawyer's client is the organization, and not its officers or other agents. Model Rule 1.13 is quite clear on this point, and sufficiently, I believe, provides the lawyer facing intra-organization misconduct with avenues to remedy this misconduct. Nevertheless, the Task Force's proposals regarding Rule 1.13 seem merely to emphasize the scope of the lawyer's representation and responsibility to the actual client. In that vein, these suggestions are salutary, and should be adopted. Yet, I cannot resist to make the point that effectively "going over someone's head" to more senior management or the board itself, is much easier said than done.

Many of us in the Litigation Section often deal with a very narrow band of in-house personnel completely beyond the view of senior management. My sense is that the Task Force members have long enjoyed access to those in the boardroom and the executive suite, and therefore may consider it as a procedural non-event to get attention at those levels. As you redraft Model Rule 1.13, I simply ask that you consider the reality that the vast majority of us face when considering what steps are appropriate to prevent misconduct and avoid harm to our entity clients.

B. Model Rule 1.2 and Model Rule 1.6.

Existing Model Rule 1.2 relates to the scope of a lawyer's representation of a client. The rule states that a lawyer shall abide by a client's decisions concerning the objectives of representation, except as otherwise provided. One important carve-out to the lawyer's duty to abide by a client's decisions is found in subparagraph (d) which provides:

“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”

The commentary to this rule further states that a lawyer may not knowingly assist a client in criminal or fraudulent conduct. This commentary notes, practically, that when a client has already undertaken a course of conduct, the lawyer’s responsibility is especially delicate. The dilemma is that the lawyer is forbidden under existing Rule 1.6 to reveal the wrongdoing, but he is also required to avoid furthering the criminal or fraudulent conduct. The commentary also notes that these obligations apply such that a lawyer may not participate in a sham transaction: exactly the charge being leveled at Enron.

The Preliminary Report seems to resolve this “especially difficult” situation for a lawyer facing a client engaged in a crime or fraud of the likes of Enron, WorldCom, et. al. by seeking to amend Rule 1.6 to relieve the lawyer from the traditional duty of client confidentiality to permit disclosure to prevent or rectify the consequences of a crime or fraud that is reasonably certain to result, or had resulted in substantial injury to the financial interests or property of another. This is a squishy standard (e.g. substantial injury to whom, etc.), but in the context of the Preliminary Report, I assume the Task Force was considering a big drop in the stock price.

The Task Force then goes further to suggest that, after adding this “economic harm” permissive exclusion to confidentiality, that all such disclosure should be mandatory. Simply put, when the lawyer knows about conduct that could result in “economic harm,” the lawyer **must** make outside disclose of this fact to someone. Again, in the context of the Preliminary Report, I assume the Task Force was considering the SEC, Department of Justice or the press.

C. *“Knowledge” Standard*

But, it doesn't stop there. The Task Force further recommends clarifying the fact that references to the term "knowing" in the Model Rules (e.g. 1.2, 1.13 and 4.1), should now be understood to mean knowledge "that a lawyer of reasonable prudence and competence would ascertain in the matter in question." I make particular note of the language on Page 35 of the Preliminary Report stating:

"The Task Force believes that, while lawyers should not be subject to discipline for simple negligence, they should not be permitted to ignore the obvious. Instead, lawyers should be held to the "reasonably should know" standard, defined in the Model Rules as denoting "that a lawyer of reasonable prudence and competence would ascertain in the matter in question." [emphasis added]

Of course, the "reasonably should know" standard is nothing more than simple negligence, and, if adopted by the ABA, will force lawyers to adopt self-protective countermeasures.² In a moment, I will talk about why the proposed changes to the Model Rules undermine the lawyer-client relationship and achieve nothing more than emblazoning lawyers with a liability bulls-eye. But before that, I want to go back and consider whether the existing rules are inadequate, and whether adoption of the Task Force's proposals could reasonably be expected to avert the noted corporate responsibility failures.

D. Existing Rules.

Quickly, the existing rules require a lawyer to not participate in any criminal or fraudulent client representation which the lawyer actually knows about; to take steps to protect

² §283 of the Restatement of Torts discusses the standard of conduct of an actor to avoid being negligent. §283 is the home of the law student's familiar acquaintance: the "reasonable man." The words "reasonable man" denote a person exercising those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others. Negligence, of course, is a departure from the standard of conduct required to protect against unreasonable risk. The Restatement also asserts that any such standard must be objective and external, rather than an *ad-hoc* judgment of individual conduct good or bad. It seems clear that the Task Force, although it professes no intention to do so, is establishing such a negligence based objective and external standard with reference to the "lawyer of reasonable prudence and competence." The Task Force intends that this standard be used to evaluate whether a lawyer's failure to disclose information about potential

the interests of entity clients by, at times, referring the matter to the highest authority that can act in behalf of the organization; and to protect client-confidences in all cases except where there is risk to life or limb or in self-defense against allegations of malpractice. Where are these ethical rules lacking, in anything other than, perhaps, execution?

I can imagine five reasonable factual permutations here:

- (i) Lawyer co-opted by management;
- (ii) Management engaged in pure fraud and financial alchemy;
- (iii) Lawyer was not diligent in smoking out fraud;
- (iv) Lawyer up to his ears in fraud and duplicity; and
- (v) Lawyer was truly innocent.

(i) Co-opted by Management. I can easily imagine that an individual lawyer, or law firm, could have been co-opted by the senior management of Enron, WorldCom, etc., and consequently may not have protected the interests of his real client: the entity and its shareholders. That is a crystal-clear break down of that lawyer's duties to his client per Model Rule 1.13, and the Task Force has already concluded that the existing rule is adequate, with minor modifications in the Commentary.

(ii) Management Fraud or Financial Shenanigans. I can also just as easily imagine that senior management was engaged in either (i) systematic fraud or (ii) pushing the bounds of GAAP beyond its metaphysical limits, with auditor assistance. The facts that exist today, indicate that one or both of these is at the core of Enron, WorldCom, Tyco, etc. How would the existing Model Rules overlay a situation like these?

This exegesis would require understanding what the lawyer actually knew, and when. Assuming the lawyer knew of the systematic fraud, Rule 1.2 and 1.13 would dictate remedial intra-corporate action commensurate to the risk to his client. And, assuming the lawyer was in a

“economic harm” was in fact a breach of that lawyer's duty to his client and its shareholders. This is simply a negligence test, despite the Task Force's statements to the contrary.

position to understand that the GAAP presentation certified by the auditors was misleading *per se*, existing Rules 1.2 and 1.13 again hold a sufficient answer for us.

Parenthetically, when is a lawyer ever in a position to second-guess an auditor willing to certify complex consolidated financials as GAAP compliant? It has been said by GAAP experts, that GAAP is a “black-box.” I suggest here, that it is rarely, if ever, the lawyer’s black-box. Sorry for the digression.

(iii) Lawyer Failed to be Diligent. One criticism that appears throughout the Preliminary Report is the notion that lawyers failed to adequately police management, and therefore allowed their ultimate clients to be defrauded. Again, a rule already exists for this: Rule 1.3. This rule states that:

“A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.”

This ethical duty puts the burden on the lawyer to be a “bulldog” for his client’s interests both internally and vis-à-vis third parties. Rule 1.13 explains who the client is, in fact. The dictates of Rule 1.3 are more than sufficient to cause each individual lawyer to exercise real diligence in his client representations. I fear, however, that the exercise of diligence within the proscribed attorney-client relationship is not exactly what the Task Force is seeking. The Task Force’s introduction of the “reasonably should know” standard of knowledge in the Model Rules seems to be purposeful for reasons beyond preventing lawyers from “ignor[ing] the obvious.” Other statements in the Preliminary Report which criticize lawyers, along with the directors and auditors, from failing to “avert or even discover” client wrongdoing, provide evidence that the Task Force considers it appropriate for lawyers to act as a new species of internal client auditor, and it is in this light that its disappointment over lawyer diligence should be viewed. In a

moment, I will talk about why recasting lawyers as internal-auditors and then whistle-blowers for the clients savages the lawyer-client relationship. However, if anyone ever had a concern that lawyers do not have an ethical duty to be zealous and diligent in their client representations, please note that such a rule already exists: Rule 1.3.

(iv) Lawyer Was Crooked. This one is the most simple, I think. If all the factual development currently being undertaken by various state and federal prosecutors as well as the plaintiff's bar uncovers evidence that the lawyers themselves were actually and affirmatively fraudulent in the corporate responsibility scandals, no amount of tinkering with the thresholds of responsibility in the ABA Model Rules could be expected to remedy that conduct. If that is the situation, those lawyers already crossed the lines of the existing rules, and it would be unrealistic to believe that rules with more broad aspirations would reign them in. Furthermore, if the lawyers at issue were, in fact, crooked, in some sense, that is the most powerful argument for not changing the Model Rules at all. The implication would be that the Model Rules are sufficient to cover the conduct of all but true scoff-law attorneys, for whom existing law has other remedies.

(v) Lawyer Was Innocent. This needs to be thrown into the mix as the counterpoint to the "lawyer was crooked" possibility. If the facts bear out that the truth was kept from the lawyers to perpetuate the misconduct and fraud, that would also be a strong argument for leaving the Model Rules untouched.

Now, I suspect that the real answers to these questions will not be so simple as "the lawyers were crooks" or the "lawyers were angels." It is more likely that lawyers were either (i) reluctant to go over the head of their day-to-day contact and source of business or (ii) in no real position to evaluate the conduct of senior management or the auditors. Assuming such is the case, the existing Model Rules should not be changed, and the Task Force's suggested

amendments propose to fix something that is not broken, and at the same time will invariably break something which can thereafter never be fixed.

IV. What Are the Consequences of Adoption of the Task Force's Proposals?

A. Harm to the Lawyer-Client Relationship

We are now at the crux of it all. The Task Force's proposed changes to the Model Rules are bad for the so-called "lawyer-client" relationship. We can all stipulate to the fact that the wealth destruction caused by the scandals being discussed is terrible and not in the public's interest. Yet, let's not let these circumstances, which are clearly against the public interest, erode other important aspects of the "public interest."

In 1975, the ABA drafters of the *Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information* wrote, "the public interest in protecting the confidentiality of lawyer-client communications is fundamental." The attorney-client privilege purportedly has its roots in Roman law. Whether it does go back that far, it is indisputably "the oldest of the privileges for confidential communications known to the common law."³ As one judge stated over 50 years ago:

"In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite. To induce clients to make such communications, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity. The social good derived from the proper performance of the functions of lawyers acting for the clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases."⁴

³ United States v. United Shoe Mach. Corp., 89 F.Supp 357, 358-59 (D. Mass. 1950).

⁴ Id. At 358 (citations and internal quotations omitted).

In the famous Upjohn case, the United States Supreme Court wrote that the purpose of the attorney-client privilege is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”⁵ We could go on like this for quite some time more. Suffice it to say, that for centuries it has been a postulate of the bench and the bar that lawyers and their clients enjoy a special relationship in support of which the confidentiality of communication is required. My use of the term “special” tends to cheapen the status of this relationship. The ABA itself has used quasi-religious terminology in this area.

In the notes to Ethical Consideration 4-1 of the ABA Model Rules, the lawyer’s obligation to preserve that confidentiality is called a “sacred trust.”⁶ Indeed, recognizing the broader scope of the lawyer’s obligation to fulfill this “sacred trust,” Ethical Consideration 4-4 notes that its scope exceeds the reach of the privilege against disclosure:

“The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, **exists without regard to the nature or source of information or the fact that others share the knowledge.**”⁷ [emphasis added]

I only engaged in this brief recitation to underscore the fact that the weight of history and public policy (at least from the ABA’s point of view) falls squarely on the side of protecting the attorney-client relationship and its attendant confidentiality. The Task Force’s proposed changes to the Model Rules need to be understood in this broader context.

B. Permissive and Mandatory Disclosure.

⁵ Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

⁶ Model Code of Responsibility EC 4-1 (2000) (quoting ABA Comm. On Ethics and Professional Responsibility, Formal Op. 250 (1943)).

⁷ Model Code of Responsibility EC 4-4.

The Task Force seeks to relieve the lawyer from the traditional duty of client confidentiality to permit disclosure to prevent or rectify the consequences of a crime or fraud that is reasonably certain to result, or had resulted in substantial injury to the financial interests or property of another. Yet, in the blink of an eye, the Task Force then suggests that when the lawyer knows about conduct that will result in “economic harm,” the lawyer **must** make outside disclose this fact to someone. Mandatory disclosure in any context is a sea-change to the lawyer-client relationship. I note the previous testimony of Attorney’s Liability Assurance Society, Inc. (“ALAS”) and Professor Tom Morgan given at the September 20, 2002 public hearing on this point. Both ALAS and Professor Morgan convincingly argue against adoption of any mandatory disclosure standard as being against the weight of history and previous ABA deliberation on this topic as well as for the harm it would cause the attorney-client relationship. I will not rehash the arguments made by these and other commentators on this point. I simply add the support of the ABA Litigation Section to urging the Task Force to abandon this proposal.

C. Reasonably Should Know Standard. If the inclusion of a mandatory disclosure requirement were not scary enough, the Task Force’s also proposed to define “knowledge” in the Model Rules as knowledge “that a lawyer of reasonable prudence and competence would ascertain in the matter in question.” Despite the Task Force’s statements that attorneys should not be held to a negligence standard, this formulation of “knowledge” is nothing more than such a negligence standard. So what? Well, deeming that lawyers “know” all that a colleague of reasonable prudence would know should cause the lawyer to take precautions against being found wanting in a final judicial assessment of his conduct.

Under negligence liability, potential defendants minimize their exposure by taking all economically feasible precautions. In the context of corporate lawyering, how might this

manifest itself? Possibly, the lawyer will require access to information covering the client's full range of operations, rather than within the exact scope of representation. The Task Force looks favorably upon this conduct in the very narrow circumstance of lawyers who have "accept[ed] management's instructions and limit[ed] their advice and/or services to a narrowly defined scope, ignoring the context or implications of the advice they are giving." However much sense it would make for lawyers rendering tax opinions, or being called in on an *ad-hoc* basis to review a specific set of complex financial transactions, to contextualize their representation, it makes almost no sense to apply a negligence standard of care to all other lawyer activity.

The vast majority of lawyers representing entity clients do not provide the type of "general counsel" representation that would provide them a global familiarity with their client's operations. Lawyers handling employment litigation, for instance, may know nothing about their client's commercial activities, even though they may have occasional access to business people responsible for those decisions. Does it make any sense for this lawyer to seek information about the client's non-employment litigation activities just to satisfy himself that he has all of the "knowledge" that a reasonably prudent lawyer would have? Does it make any sense for the client to pay his lawyers of specific expertise to inform themselves about his entire operation? More importantly, should the "sacred trust" of the attorney-client relationship be subject to lawyers second guessing their clients about what information is being shared with the lawyer?

Each of these questions must be answered in the affirmative if we are to accept the Task Force's proposal on the "reasonably should know" standard. This standard will necessarily turn the lawyer into an internal-auditor of his client's compliance with law, rather than the client's confidante. Now, I admit that in these recent high profile scandals, more internal audit would likely have been a good thing. But, I certainly can't say that it is in the public interest for all

lawyers representing entity clients to convert themselves into internal-auditors, and abandon the historical attorney-client trust.

Incentivizing lawyers to become familiar with the entire breadth of their client's operations in order to satisfy the "reasonably should know" standard is not necessarily a bad thing in and of itself. If we are able to assume that the client is willing and able to bear the costs of such representation, and is in turn willing and able to pass those additional costs along to its customers, then we may conclude that the administration of justice and the public interest is well served. What simply cannot be concluded, however, is that the lawyer will ever gain such a comprehensive understanding of his client, if the client is fearful that the lawyer **may** or **must** publicly disclose any information that, in the opinion of the lawyer, would lead to economic harm.

The entire reason that our clients confide in us, is the fact that they know we will hold their secrets inviolate. If the assurance of confidentiality is lessened, clients will necessarily treat their lawyers in a more arm's length manner: much like how auditors are treated by their clients. This is not a new point by me; it is the point that jurists and commentators have made time and again, but one that the Task Force seems to have forgotten.

D. Added Liability for Legal Advice. Lest my protestations against the Task Force's proposals be criticized as originating too much from the ivory-tower of the sanctity of the attorney-client relationship, etc., let me point out that these proposals are simply bad for lawyers by increasing their liability exposure. The critical problem with any large-scale scandal, be it financial, political, moral, etc., is that everyone seems to have a "knew-it-all-along" feeling after the fact. Many other people testifying before the Task Force have cautioned that in hindsight everything seems clear, and have warned against the belief that the catastrophe could have been

easily averted if only a few things had been different. Despite the well-known bias of evaluating past failures with 20/20 hindsight, the law generally, and the Task Force's proposals specifically, require courts to assess what the lawyers should have known and what they should have done in the moment of decision.

What makes the Task Force's proposals so dangerous is that a lawyer facing a claim from an upset shareholder, (or even a cross-claim from an auditor) will be subject to the heightened outrage that comes following a high-profile meltdown. If the Task Force chooses to drop the mandatory disclosure change to Rule 1.6, leaving lawyers with "permissive" authority to disclose conduct likely to lead to economic harm, the lawyer will actually be left with no defense to a claim based on non-disclosure. Post-hoc, the underlying facts will appear material, the loss will be significant, and the lawyer will be naked. This circumstance will be true no matter how reasonable the lawyer thought he was at the time. Knowledge of this possibility should lead lawyers to over-disclose in an abundance of caution whenever they feel like they are in a potentially dangerous area. As we all know, however, this self-directed over-disclosure, while perhaps nice in the short term, will simply lead to clients not bringing their most difficult legal judgments to their lawyers. Instead of confidantes, lawyers will be regarded as the interrogating police officer who says to the suspect, "trust me."

Hyperbole aside, permissive disclosure undermines the attorney-client relationship insofar as it will push lawyers toward over disclosure to avoid their own liability. In this sense, "mandatory" disclosure would be preferable because the lawyer would not have to agonize between alienating his client and handicapping a liability claim: he would have a duty to disclose and thereby truncate the liability claim. This perverse result demonstrates the frailties of the

even the Task Force’s “permissive” disclosure proposal. The frailty of “mandatory” disclosure has already been fully covered by me as well as other commentators.

E. Eliminates Any Type of Business Judgment Deference for Lawyers. The Task Force’s proposed changes to Model Rules reject the historical immunity lawyers have enjoyed to the extent they keep their client’s confidences in favor of being able to use a negligence standard of care to judge the conduct of lawyers post-hoc. This lawyer immunity is akin to the “business judgment rule” which protects corporate officers and directors from liability against claims that their business decisions were negligent. The policy rationale for the business judgment rule is, at least in part, that adverse outcomes of business decisions are inevitable. The law prefers to allow business people to make risky business decisions without being second guessed by plaintiffs and courts. The alternative is to significantly increase the costs of doing business (e.g. insurance premiums, fairness opinions, lost opportunities, etc.) without such business judgment immunity. Ironically, the Task Force is proposing a standard of conduct and corresponding standard of care that is less forgiving to the lawyer than the business judgment rule enjoyed by that lawyer’s clients: a lawyer would be liable for a non-disclosure of conduct likely to lead to substantial economic harm, without any deference to the lawyer’s judgment at the time.

I hope the Task Force elects to drop its support of a “mandatory” disclosure proposal as being invasive to the attorney-client privilege. However, I, also, hope the Task Force takes into account that even the “permissive” carve-out for economic harm and the “reasonably should know” standard pit lawyers against their clients when determining what disclosures are required to avoid third-party liability precisely because the lawyers would no longer enjoy protections similar to the business judgment rule.

V. Conclusion.

In conclusion, I wish to reiterate that I appreciate the work that the Task Force has done. It is important for lawyers to be self-aware of our responsibilities in the world. In an August 12, 2002 speech, SEC Chairman Harvey Pitt mentioned that if accounting professionals believe that certain aspects of Congress' recent Sarbanes-Oxley legislation are unduly onerous, that those professionals "need to look inward to understand why the legislation is the way it is." He also encouraged the legal profession to not overlook the object lesson that this legislation holds out for it. The Task Force's work, I believe, should cause us, as lawyers, to look inward and evaluate our professional responsibilities. The Task Force has been appropriately convened by the ABA to do just that.

Nevertheless, the Task Force's proposed amendments to the Model Rules just go too far. The existing Model Rules already tell lawyers to diligently represent their clients, corporate or otherwise, to redress perceived misconduct through progressively dramatic internal disclosures, while all at the same time as protecting the "sacred trust" of the attorney-client relationship. I believe that upon deliberation, you will conclude that the stupendous failures of corporate responsibility are not attributable to failures of the text of the ABA's Model Rules. If that is true, it behooves the Task Force to be exceptionally careful in the areas of expanding the scope of these rules in ways that could ultimately undermine the trust of our clients and expose professionals to extra liability. The Task Force's work should cause us all to look inward, but it should not seek to fundamentally alter the way in which we lawyers interact with our clients.

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