

WRITTEN SUBMISSION BY CHARLES B. RENFREW
ON BEHALF OF THE AMERICAN COLLEGE OF TRIAL LAWYERS
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In our constitutional system, the judiciary and the bar are charged with upholding fundamental legal rights and political ideals even when popular passions demand extreme remedies for dramatic problems. The Preliminary Report of the ABA Task Force on Corporate Responsibility acknowledges that its impetus came from the public outcry that resulted from the unique corporate excesses of the 1990s. No one can deny the importance of preventing Enron-type abuses in the future. However, it is both unwise and unnecessary to make the extreme changes in our American legal system that have been recommended by the Task Force because they would undermine its foundational premises and impede its proper functioning.

First, the Task Force recommends amending Model Rule of Professional Conduct 1.6 to permit attorneys to decide for themselves whether to disclose confidential communications involving a client's misconduct if it could substantially injure financial interests or property. Historically, this permissive exception to the attorney-client privilege has been limited to misconduct that risks death or severe physical injury to another, in accordance with the special protections the common-law has always afforded to those unique interests. The ABA has previously rejected three similar attempts over the last two decades to further abrogate the attorney-client privilege for the sake of monetary interests. It should reject the Task Force recommendation for reasons that are no less important now, in the post-Enron era, than they have been for centuries. Our system of justice is based on the premise that an attorney represents clients and advocates for their interests. The Task Force recommendation changes the

role of the attorney from a representative and advocate of the client to a representative and advocate for the financial interests of others. This would necessarily restrict the free flow of information between attorney and client, thereby degrading the quality and appropriateness of the attorney's advice while decreasing any meaningful opportunity to deter client misconduct. It will also accomplish nothing; a client will not reveal misconduct to an attorney who is free to disclose it to others.

Second, the Task Force also recommends amending Model Rule 1.6 to require an attorney to disclose criminal conduct of clients if the attorney "reasonably should know" of the conduct. Once again, expanding the traditional narrow exception that permits disclosure of misconduct that threatens death or severe injury, so that it requires disclosure of misconduct that affects only pecuniary interests, would undermine the ability of attorneys to represent their clients by inhibiting the free flow of information between them and by transforming counsel from advocates to police officers who serve the financial interests of other parties. The recommendation, if adopted, would do nothing to prevent corporate criminal conduct. On the contrary, it would exacerbate the problem by deterring clients from discussing criminal or possibly criminal conduct with attorneys who would counsel against such actions. An attorney cannot represent a client in the ways our legal system requires if the attorney is merely another potential adversary who serves interests that are in opposition to the client's interests. Thus, the proposed rule would diminish the contribution that attorneys can make toward solving the problem that the Task Force is attempting to address, while dismantling the foundational principles that have allowed our legal system to meet similar challenges in the past.

The American College of Trial Lawyers therefore opposes the Task Force proposed amendment to Model Rule 1.6. The College would submit its Report of the Legal Ethics Committee of the American College of Trial Lawyers on Duties of Confidentiality as part of this record.