

25 comments on the substance of the Task Force's corporate governance recommendations to that
26 topic.

27 We come before the Task Force to express our serious reservations with the Task
28 Force's recommendations relating to lawyer responsibilities and conduct. As we explain below,
29 while our profession likely will be able to accommodate the Task Force's proposed changes to
30 Model Rule 1.13's paradigm for lawyers reporting misconduct of corporate officers within the
31 corporate client itself, the proposed exceptions to confidentiality under Model Rule 1.6 are a
32 different matter. The proposed change to Model Rule 1.6 would not address the problem it seeks
33 to solve. If lawyers were indeed involved in facilitating corporate fraud, then those lawyers
34 violated existing ethical rules that already prohibit lawyer from facilitating crimes or frauds.
35 Neither more rules nor amendments to existing rules will solve a failure to comply with the
36 existing rules. While the proposed changes to Rule 1.6 would do nothing to solve the problems
37 the Task Force is studying, those changes would have the seriously adverse effect of undermining
38 the core function of a lawyer to counsel and advise his or her client – whether that client be a
39 private or governmental entity, or an individual.

40 The question before you, in our view, is to determine whether lawyers had a
41 significant role in the business scandals and, if so, to examine how it is that certain members of
42 our profession could have strayed so far as to violate the fundamental rule that lawyers do not
43 facilitate crimes or frauds. We do not believe that there is a widespread problem with lawyers
44 facilitating crimes or frauds, and the rules of legal ethics should not be changed based on a mere
45 assumption about such a problem or a few high-profile cases of lack of compliance with existing
46 rules.

47 If there is a significant number of lawyers who have strayed so far from our
48 profession's principles as to further crimes and frauds, then the American Bar Association must

49 do something to address that problem. That problem, if it exists, lies not in a flaw or omission in
50 the ethics rules, which already prohibit such conduct, but in a lack of integrity and conceivably in
51 a “culture” problem within part of our profession. A wholesale revision of the duty of
52 confidentiality, which the House of Delegates has now rejected three times, would not be the
53 answer to a culture problem or to lack of compliance (either widespread or isolated) with existing
54 ethics rules. Unethical lawyers will not heed a new ethical duty to reveal wrongdoing.

55 The solution to the legal profession’s role in the business scandals lies in
56 enforcement of existing rules, education of our profession’s members about their responsibilities,
57 and a clear-eyed examination of our profession’s conduct to be sure that we are complying with
58 the existing rules that already prohibit the sort of wrongdoing the Task Force is addressing.

59 To elaborate on our view, we will first describe why we think the Preliminary
60 Report’s proposed revisions to Model Rule 1.6 are not a solution to the problems the Task Force
61 seeks to solve. We will then outline the serious problems inherent with the Preliminary Report’s
62 recommended changes to confidentiality and how those changes will undermine the traditional
63 lawyer-client paradigm, particularly the lawyer’s role as a check on government power in a
64 democratic society. Finally, we address the various arguments that have long been made by the
65 proponents of a weakened duty of confidentiality and which have been rejected by this
66 Association’s House of Delegates three times in the last twenty years.

67

68 *New Rules Cannot Solve a Failure to Comply with Existing Rules*

69 The Task Force’s recommendation for drastic change to lawyer-client
70 confidentiality suggests an assumption that the dramatic corporate scandals you describe –
71 involving Enron, WorldCom and Adelphia – cry out for equally dramatic changes to legal ethics.
72 We are skeptical of this proposition and encourage you to examine it critically. We are aware of

73 no alleged misconduct by lawyers in those recent business scandals that would have rendered such
74 conduct legal or ethical under existing rules.

75 For example, in the Enron case, it was alleged that an Arthur Andersen lawyer,
76 Nancy Temple, sent an e-mail that, it was argued, implied documents should be destroyed. The
77 jury in the Arthur Anderson criminal trial found that the document shredding which Ms. Temple
78 allegedly ordered constituted obstruction of justice. It is already unethical and illegal for lawyers
79 to provide advice to facilitate a crime such as obstruction of justice. Thus, if a lawyer improperly
80 encouraged the destruction of evidence by shredding documents, that lawyer acted unethically
81 under *existing* rules. Another allegation has been that lawyers helped Enron set up numerous
82 related business entities which were used to facilitate fraud. Here again, if the lawyers knew what
83 they were doing was in furtherance of a crime or fraud, then *existing* rules already provide that
84 their conduct was unethical.

85 With the foregoing examples in mind, it strikes us that the remedy the Task Force
86 has proposed in the Preliminary Report – to radically change the rule concerning confidentiality to
87 require disclosure of a client’s crime or fraud – bears no relationship to the problems underlying
88 the recent corporate crises. As we see it, the problems which are blamed on lawyers arose
89 because lawyers allegedly either knowingly assisted their clients with illegal and/or fraudulent
90 activity, or indulged in wilful blindness to pretend that they were unaware of their clients’
91 fraudulent conduct. Lawyers who would order the illegal shredding of documents, or who would
92 knowingly facilitate, or who would recklessly turn a blind eye to business transactions that are
93 fraudulent, are unlikely to comply with a rule requiring disclosure of the wrongdoing in the which
94 the lawyers themselves have been active participants. Yet that is what appears to be the
95 Preliminary Report’s solution. This approach will not solve the problem, because the problem *did*

96 *not arise from a flaw or omission in the rules.* Rather, it arose from a *lack of compliance* with
97 the rules.

98 We as a profession cannot solve a compliance problem with new rules. The
99 compliance problem reflects one of two things. First, like every other profession, we have a few
100 bad apples in our midst. That problem can be solved by prosecuting those lawyers. Alternatively,
101 we might ask whether we have entire orchards full of bad apples. That is to say, what if we have
102 developed a culture or subculture in our profession that is inconsistent with the letter of our rules,
103 particularly the bedrock principle that lawyers do not, under any circumstance, facilitate a crime
104 or fraud? In that case, we would agree that dramatic action is required, but more rules will not
105 solve the problem.

106 We pause here to note that the Task Force's preliminary report assumes, we think,
107 that the profession has a pervasive problem with facilitating crimes or frauds. That is a big
108 assumption, and we question it. The Task Force should also question that assumption, look
109 critically at it and search for evidence to support or refute that assumption. A few high-profile
110 scandals do not amount to evidence of a pervasive lack of integrity or refusal to comply with
111 ethics rule. The Task Force should expressly examine and discuss whether the profession has a
112 pervasive problem before making proposed rule changes based on such an assumption.

113 If we assume for the sake of discussion that we have a "culture" problem in our
114 profession, what should we do about it? We cannot simply repeat our profession's response to
115 the Watergate crisis in the mid-1970s, which led to modern rules of legal ethics as we now know
116 them, including the Model Rules. This time, for all the reasons we have set forth above, more
117 rules are not the answer. Enforcement might be an answer. Well-publicized enforcement leads to
118 deterrence. Witness the conviction of Arthur Andersen on obstruction of justice charges, which
119 conviction was based in large part on the aforementioned conduct of Andersen attorney, Nancy

120 Temple. Surely that well-known incident has had a deterrent effect on other lawyers who might
121 be tempted to step over the line. There is, however, not much for the ABA to do in the area of
122 increased enforcement. That is a function left to the law enforcement authorities in our society –
123 not just criminal prosecutors, but also the bar disciplinary counsel.

124 Another solution to a culture problem is self-examination and education. The
125 ABA is well placed to pursue those solutions to a possible culture problem in our profession. If
126 there is a widespread problem of lack of personal and institutional integrity, such that a significant
127 number of lawyers are willing to ignore their ethical and legal obligations to further crimes and
128 frauds, then we had better confront it directly. And we had better not assume that adopting more
129 rules will solve that problem. New rules are not a panacea. Rather, the way to solve a culture
130 problem is by an increased emphasis on each lawyer's personal responsibility to comply with
131 ethical strictures. One way of doing that is education. Another is to conduct a real and
132 systematic inquiry into whether our profession has a "culture" problem, the extent of the problem,
133 how the problem came about and what the profession needs to do to reform its culture. We
134 emphasize that one important task in this endeavor is identifying whether we do have a significant
135 culture problem as opposed to a few notably bad apples. The correct solution can be framed only
136 when the full nature and extent of the problem is clearly understood.

137

138 ***The Confidentiality Paradigm: Creating Trust in the Client***

139 But now let us return to your proposal to weaken attorney-client confidentiality.
140 If that proposal were benign, and if it encouraged a sense that the profession was looking hard at
141 this issue, then we would not be so alarmed. Consider, for example, section 307 of the Sarbanes-
142 Oxley Act, which essentially modifies Model Rule 1.13 to require a corporate lawyer to report
143 law violations up the corporate chain of command. Model Rule 1.13 is discretionary, that is, the

144 lawyer “may,” but need not, proceed up the chain of command. Under the Sarbanes-Oxley Act,
145 however, the SEC must make that reporting mandatory for lawyers practicing before the SEC.
146 As Professor Morgan has advised you, that proposal could have a number of unfavorable
147 unintended consequences, such as overwhelming corporate leadership with minutia and by
148 running up unnecessary legal fees. Although we are concerned with the federal government’s
149 entry into the field of lawyer regulation, an area traditionally reserved almost entirely to the states,
150 in the greater scheme of things, this proposed change to Model Rule 1.13 is relatively benign.
151 Regardless of whether the reporting is discretionary or mandatory, any such reports are made
152 within the corporate client itself. It does not permit a lawyer to blow the whistle by going outside
153 of the corporate structure.²

154 The Preliminary Report’s proposal to alter Model Rule 1.6 to mandate reporting of
155 client fraud, however, is anything but benign. On the contrary, it is dangerous because it imperils
156 the core function of a lawyer to act as an advisor and counselor to the client. The rule 1.6
157 proposal would require a lawyer to become an undercover informant against the lawyer’s own
158 client. The proposal would make clients hesitant to speak with their lawyers for fear of having
159 their confidential communications turned against them. The proposal would fundamentally
160 change the historic role of lawyers as confidantes and advisors into the role of law enforcement
161 agents – agents of government power. This transformation would turn the lawyer’s role on its
162 head and cause significant problems in the long run. We cannot express the problem inherent in
163 the proposal better or more succinctly than did former ABA President Leonard Janofsky during
164 the 1983 debate on the original Model Rules when he noted that “the function of the lawyer is to

²We note and endorse the Bar Association of San Francisco’s comment that the Task Force should not recommend a “reasonably should know standard” under Model Rule 1.13. There is a vast difference between condemning wilful blindness and imposing an affirmative duty of investigation on every lawyer in every matter.

165 stand between the client and the forces that are trying to do the client in.” Under the Preliminary
166 Report’s proposed changes to rule 1.6, however, it would be the lawyer himself or herself who
167 “do[es] the client in.”

168 We firmly believe it would be a mistake to go down the road that President
169 Janofsky warned us against in 1983. The House of Delegates has now three times rejected
170 proposals to weaken confidentiality which were more modest than those described in the
171 Preliminary Report: in 1983, when the Model Rules were first adopted; in 1991, when this same
172 issue was presented to the House of Delegates as a free-standing proposal; and again at the
173 August 2001 Annual Meeting, when the House voted down by a two-thirds margin the Ethics
174 2000 proposal to permit lawyers to disclose client confidential information to prevent or rectify a
175 fraud. Nothing has occurred in the interim – neither the corporate scandals the Task Force has so
176 ably summarized in the Preliminary Report, nor the financial injuries these corporate
177 transgressions have caused the employees and shareholders of the corporations – to warrant a
178 change in the ABA’s long-held and reasoned policy towards the duty of confidentiality when
179 client fraud is involved.

180 The House has rightly recognized that changes in confidentiality, such as that
181 proposed by Ethics 2000 and now by the Preliminary Report, imperil the fundamental role of
182 lawyers in acting as advisors and counselors, and in providing a buffer between private parties and
183 government power. A common misperception holds it is only those lawyers who appear in court
184 to advocate on behalf of their clients who are at the forefront in protecting a person’s rights.
185 Corporate and transactional lawyers, however, are no less involved than litigators in protecting
186 private parties from improper government action. Clients retain transactional lawyers precisely to
187 avoid running afoul of government regulation. After all, a misstep can land the client in prison or
188 result in the loss of virtually everything that client owns. Transactional lawyers in this sense serve

189 two, compatible roles: they further compliance with law by giving good advice to their clients,
190 and they provide peace of mind to their clients. Moreover, just as litigators do, transactional
191 lawyers also on occasion negotiate with the government, here again helping to level the playing
192 field between private parties and government. Thus, lawyers are not mere advocates or
193 mouthpieces for their clients; they act as advisors and counselors.

194 Consider for a moment what it means to advise and counsel. We provide our
195 clients with information about the applicable law – both the current law and foreseeable trends in
196 the law, the ways in which the law has been applied by the responsible governmental entity, and
197 the predilections of decision makers within government. To break down our function as
198 counselors, we can observe that we bring to the task certain assets: specialized training in law
199 which enables us to identify applicable law and trends; experience with how things work, so we
200 can predict how the responsible decision-makers may react to a particular set of facts; and
201 objectivity, to enable us to assess competently the client’s position. But all of those assets we
202 bring to a client’s problem are of little use without one additional and critical resource: the
203 assurance of confidentiality. We cannot give good advice and counsel if clients do not confide in
204 us the particular facts of their problem. And our clients will not confide in us unless they are
205 assured that they may speak freely, without fear that the information they relate will be revealed
206 to the government or to others. We may take confidentiality for granted, but we ask you to pause
207 for a moment to consider its significance. Paramount to a free society is the ability of people in
208 our society to consult freely with a person trained in the law and knowledgeable about how
209 government operates.

210 A strong and vital legal profession is a critical feature distinguishing a democratic
211 society from a totalitarian one. One of the hallmarks of the profession has been a commitment to
212 principles, even when those principles require us to represent and afford legal services to an

213 unpopular person or cause. On many occasions over the years, our profession has fought for the
214 free speech rights and civil liberties of persons who were not popular. At an elemental level, one
215 of the democratic values that lawyers further is the rule of law and the limited powers of
216 government over private parties. We lawyers have the knowledge, the skill and the duty to stand
217 between our clients and the sometimes awesome power of government.

218 This ability to consult in private with a lawyer is also, in our estimation, necessary
219 to secure widespread compliance with law, especially today's highly complex and specialized
220 regulatory laws. In many fields, it is virtually impossible for a party to comply with relevant laws
221 and regulations without legal assistance. It serves society's interests to encourage private parties
222 to consult with lawyers in private, so that the client feels free to be completely honest and to place
223 all of the facts before the lawyer for consideration. Only then can the lawyer adequately advise
224 the client on an appropriate course of action, whether to do, or not to do, certain things.

225 Here, at the confluence of advice and action, is where we get to the crux of the
226 seemingly eternal debate over lawyer-client confidentiality. What should the lawyer do when the
227 client refuses to follow the lawyer's advice? Or, even worse, how should the lawyer respond
228 when the lawyer comes to realize that he or she has been tricked into assisting a client with an
229 illegal or fraudulent transaction? Some will tell you that such clients deserve neither protection
230 nor deference. After all, they have intentionally and unapologetically manipulated the system.
231 Under this view, proponents of weakened confidentiality argue that these clients should be turned
232 in and allowed to fend for themselves. The arguments in support of this view are not persuasive,
233 as we explain in the next section.

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235

236 *The Arguments in Support of Weakening Confidentiality are not Persuasive*

237 We are familiar with the arguments that have been advanced in favor of changing
238 Model Rule 1.6 to permit disclosure adverse to the client. So, too, is the House of Delegates,
239 having rejected these arguments a total of three times now. First, proponents have argued that
240 most states have a rule similar to the Ethics 2000 proposal, so why shouldn't the ABA just codify
241 that "consensus" in the Model Rules? There is in fact very little consistency among the states
242 concerning the ethical duty of confidentiality. Yes, many states have some variant of a rule
243 permitting, but not requiring, disclosure of a client's "crime," and this general criminal exception
244 would include a criminal fraud. And a tiny minority of states *require* the lawyer to make a
245 disclosure in certain instances to protect third parties. But the reality is that these existing
246 exceptions are rarely if ever employed. How can that be if, as the proponents of weakened
247 confidentiality contend, there is such a need to change ABA Model Rule 1.6? Surely if there were
248 a great need for lawyers to report their clients' criminal conduct, we would be aware of more
249 instances of such conduct.

250 We think the answer lies in the fact that most practicing lawyers do not think it
251 appropriate to betray their clients and to transform themselves into an omnipotent authority acting
252 as judge, jury and moral overseer of their clients' conduct. Most practicing lawyers recognize
253 that the lawyer must respect the client's right to make decisions on important issues, and the
254 lawyer's role is generally limited to advising the client about the law and, on occasion, the moral
255 implications of the client's proposed conduct. But lawyers understand that they would arrogate
256 to themselves too much power by making public announcements concerning what the lawyer
257 believes to be their clients' prior or anticipated misconduct. We believe that this explains the
258 decision of the House of Delegates on three occasions to reject weakening the duty of
259 confidentiality in significantly more limited contexts than the current proposal.

260 Second, recognizing the lack of evidence that lawyers actually make disclosures
261 even when permitted to do so by the law in their jurisdiction, proponents of a weakened duty of
262 confidentiality contend that existing weakened rules do serve a function, albeit one that is
263 invisible. They argue that the potential for disclosure provides the lawyer with “leverage” over
264 the client. In other words, the lawyer’s ability to threaten disclosure permits the lawyer to bend
265 the client to the lawyer’s will, and persuade the client to follow the lawyer’s advice. We find this
266 line of reasoning to be deeply disturbing, because it inverts the attorney-client relationship,
267 standing on its head the allocation of authority between lawyer and client. Lawyers are not
268 supposed to exercise “leverage” and “power” over their clients. Instead, by providing advice
269 based on an intimate knowledge of the client’s situation, lawyers empower the clients to make
270 well-informed decisions. This “leverage” view of the lawyer’s role usurps the client’s authority to
271 make decisions that affect the client’s substantive rights, and transforms the lawyer into a power
272 unto himself or herself, with no supervision and no right of effective recourse granted to the
273 client. “Leverage” is a polite term for bullying in this context, and it is an inappropriate tool for a
274 lawyer to employ against a client.

275 We think that the more common scenario encountered among practicing lawyers is
276 that a client confides a plan to do something which is legally or morally questionable to the
277 lawyer, and the attorney then counsels the client about why the client should refrain from that
278 conduct. Often the lawyer can structure an alternative for the client which is lawful. Sometimes
279 the lawyer appeals to the client’s self-interest – *i.e.*, the client’s desire for self-preservation – by
280 elaborating on the adverse consequences the client can expect to suffer if the client persists with
281 an illegal plan. Innumerable lawyers have had this experience with clients and usually find that the
282 client adjusts his, her or its behavior without the necessity of threats to report the client or
283 otherwise exercising “leverage” over the client. The Task Force’s proposals which strengthen

284 lines of communication between corporate counsel and key corporate decision-makers will
285 facilitate this process.

286 A third argument which proponents of weak confidentiality offer is that in those
287 jurisdictions where disclosures of crimes and/or frauds are permitted or required, clients still seek
288 out attorneys for advice. In fact, one study often cited by these proponents revealed that ordinary
289 people expect lawyers to divulge illegal plans. Here again, we think that the reality of practice
290 trumps the black-letter law in many states. Lawyers do not make disclosures adverse to their
291 clients. Thus we have no basis for finding that clients will not be dissuaded from confiding in
292 lawyers if and when a significant number of lawyers begin to report their clients' illegal or
293 fraudulent conduct.

294 A fourth argument suggests that certain clients, especially larger corporate clients,
295 cannot engage in business without the assistance of lawyer. Hence, the argument goes, we do not
296 need to worry much about dissuading corporate clients from seeking out the advice of lawyers.
297 Such clients have no choice but to do so. We agree that there is some truth to this observation,
298 but it is easily overstated. Must clients with nefarious intentions reveal every detail of their plans
299 to a lawyer? Probably not. In the Enron scandal, for instance, there have been allegations that
300 certain law firms assisted in the creation of business entities that were used for improper purposes.
301 However, there is nothing inherently sinister in the creation of related business entities. Large
302 corporations do this frequently. Might it be true that many sophisticated corporate clients, bent
303 on doing wrong, can nonetheless secure the legal assistance they desire without alerting the
304 lawyer to the improper ends of the engagement? We believe this is highly possible in many
305 instances. We think, then, that the profession does itself and society a disservice by weakening
306 confidentiality, because incipient wrong-doers will have a greater incentive to keep lawyers in the
307 dark. As a result, we as a profession will miss our opportunity to try, in private, to educate the

308 client and direct the client on a lawful path. We will be unable to function as advisers – and our
309 legal system and our society will suffer accordingly.

310 Furthermore, we echo Professor Morgan’s caution about forcing attorneys
311 routinely to investigate their clients’ intentions under a “should have known” approach. While
312 wilful blindness is not a component of an ethical lawyers’ persona, there are limits to the abilities
313 of lawyers to investigate their clients. Such a duty would force attorneys to run up even larger
314 bills – already a large source of friction with clients – to do work that is essentially adverse to the
315 client and for which the client will not want to pay. This is neither fair to the practicing lawyer
316 nor desirable from a practical standpoint. We must recognize that we as lawyers have an
317 important role to play, but we are not and cannot be guarantors of our clients’ conduct. That is
318 asking too much of us and too little of clients, which brings us to our final point and conclusion.

319 *Conclusion*

320 We should not, in an effort to convince the public that we take the current business
321 scandals seriously, enact rules of legal ethics that are ultimately unworkable. To retain our
322 credibility, and for lawyers to perform their proper function in society, our rules must be realistic
323 and must not ask the lawyer to be a grand moral inquisitor of each client’s act or to be a protector
324 of all parties involved in a deal, when the lawyer in fact represents only one party to the deal.
325 There are other ways of taking this problem seriously and correcting any culture problem which
326 might exist in the profession. We urge the Task Force to take an approach that is realistic, not
327 one that seems like a strong statement now, but which, in the long run, will not work.

328 We also urge the Task Force to remember that the debate on confidentiality has
329 raged for many years, and that the current business scandals should not be used to re-open that
330 debate. As we have explained, there is no relationship between the Task Force’s proposed
331 changes to confidentiality and the role that lawyers are alleged to have played in the business

332 scandals. The energy of the Task Force and of the American Bar Association is better directed at
333 correcting any cultural flaw that might have arisen in our profession, and which not only
334 encourages noncompliance with the rules of legal ethics, but which also approves of lawyer
335 involvement in illegal or fraudulent business activities.

336 To that end, we commend the Task Force for its work and care in making
337 suggested changes to corporate governance rules, which appear to be tailored to remedy the
338 corporate governance failings that appear to have contributed to the recent scandals. We have
339 offered no substantive comments on those proposals dealing with corporate governance since, as
340 the State Bar's Committee on Professional Responsibility and Conduct, we limit our consideration
341 to the topic of legal ethics. We appreciate the opportunity to provide the Task Force with our
342 comments concerning this topic that is so important to the legal profession.

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