

**AMERICAN BAR ASSOCIATION  
TASK FORCE ON CORPORATE RESPONSIBILITY**

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Mr. Chair, Members of the Task Force.

My name is Eli Wald. I am an assistant professor of law at the University of Denver College of Law. Thank you for permitting me to comment on your Preliminary Report, dated July 16, 2002.

You have received numerous comments on your proposals in general, and several comments on your recommendations regarding the ABA Model Rules of Professional Conduct (“Model Rules”) in particular. As I appear before you today to give testimony on the last of the scheduled public hearings, I wish to comment briefly, not about what is in your Preliminary Report, but rather about what I believe is missing. Because the Preliminary Report fails to address some of the more serious and disturbing questions concerning the actions of, and roles played by, lawyers in connection with recent corporate failures, I respectfully suggest that this Task Force withdraw its Preliminary Report and undertake a thorough and comprehensive analysis of the duties and roles of corporate and securities lawyers. The Preliminary Report should be withdrawn, not

because of a potential risk of neglecting to address some of the relevant questions, but rather because it fails to address fundamental relevant concerns.

In its examination and recommendations regarding the conduct of lawyers (part III, at 24-43) the Preliminary Report takes a narrow approach, analyzing selected Model Rules. It does not concern itself with the relevant underlying facts – the actual conduct of, and roles played by, lawyers in recent corporate collapses. Nor does the Report explore broader policy questions – what roles lawyers should play and what advice they should give their organizational clients. Adopting such a narrow scope prevents this Task Force from exposing and analyzing some of the most challenging and disturbing questions raised by the recent corporate scandals.

In his September 20, 2002, testimony, President Alfred P. Carlton, Jr. urged this Task Force to take the “30,000 foot view,” to consider broad public policy conclusions and to explicitly embrace the role of “public policy generalists.” (Testimony of Alfred P. Carlton, Jr., at 2-3, 4). Today I would like to pick up where President Carlton left off. First, I wish to explain why such a broad policy approach is required given the Task Force’s mandate. Second, I will argue that, while the Task Force should adopt the “30,000 foot view,” it must at the same time ground its report and recommendations in a “3 foot view” of the relevant facts regarding the actions taken, and the roles played by lawyers in the recent corporate breakdowns. Finally, I will raise several questions which the “3 foot” fact-based / “30,000 foot” policy-based approach exposes, questions the Preliminary Report fails to identify and address.

## **I. The path taken in the Preliminary Report**

The Task Force is charged with examining “systematic issues relating to corporate responsibility” in the wake of a series of recent lapses at large corporations involving alleged false or misleading financial statements and misconduct by executive officers. The Task Force correctly defines “corporate responsibility” to encompass legal and ethical conduct by the executive officers and directors of the corporation, as well as legal and ethical behavior by “outside directors, auditors and lawyers, who have important roles in our system of independent checks on the corporation’s management.” (Preliminary Report, at 1-7). Inclusion of the latter category of outsiders is warranted because “our system of corporate governance has long relied upon the active oversight and advice of independent participants in the corporate governance process.” (Preliminary Report, at 9). Indeed, the core conclusion of the Task Force, with which I fully concur, is that the “exercise by such independent participants of active and informed stewardship of the best interests of the corporations has in too many instances fallen short.” (Preliminary Report, at 10).

In part III of its Report, the Task Force offers recommendations involving the ethical and governance framework within which the corporate lawyer can advance corporate responsibility, and specifically proposes that the ABA’s Standing Committee on Ethics and Professional Responsibility consider a number of modifications to the Model Rules. While the Task Force identifies some of the corporate scandals that form the background for its charge (Enron, WorldCom, Adelphia Communications, Tyco International and Global Crossing, Preliminary Report, footnote 2), it clearly indicates it “has not attempted to determine the legal, ethical, or moral responsibility of any

individual person or organization associated with any particular failure of corporate governance.” (Preliminary Report, footnote 8). Instead, the Task Force’s recommendations are based on its review of applicable provisions of the Model Rules. (Preliminary Report, at 25).

The Task Force’s reluctance and inability to comment on recent corporate failures are well understood. Nevertheless, its analysis and recommendations must be grounded in an understanding of the actual roles lawyers played in the recent corporate debacles. It is simply not enough to state that “the amendments proposed by the Task Force are designed to help lawyers comply with their duties to an organizational client in circumstances in which corporate officers engage in or countenance criminal, fraudulent or deceptive conduct.” (Preliminary Report, at 25). The Task Force’s reform proposals must be grounded in a clear articulation of what are and what should be the duties of lawyers to organizational clients, informed by an evaluation of what went wrong, that is, how and why lawyers failed to discharge their duties to their corporate clients. Simply put, it makes little sense for the Task Force to suggest amendments to the Model Rules without a clear understanding of what it is trying to amend and why.

The Task Force’s desire to promptly respond to President Hirshon’s charge is understandable, particularly given the magnitude of the corporate failures and the public outcry that followed. Moreover, exhaustive investigations and adjudications of the various accusations against corporate attorneys are likely to take years to conclude before any authoritative conclusions are reached. That said, rushing to amend the Model Rules without an understanding of the problems and shortcomings of the current regulatory

system is contrary to common sense. Indeed, the ABA's own experience in dealing with past failures at the corporate bar advises against it.

In 1992 the Office of Thrift Supervision ("OTS") brought charges against the law firm of Kaye, Scholer, Fierman, Hays, and Handler in connection with its representation of Charles Keating. In March 1992, the president of the ABA appointed the Working Group on Lawyers' Representation and Regulated Clients, which published its report in January 1993.<sup>1</sup> Perhaps for some of the same reasons that lead this Task Force not to evaluate actual charges against lawyers, the Working Group's report offered no analysis of the facts OTS alleged about Kaye Scholer. Commentators later characterized the response by bar organizations and leaders as pervasively disingenuous and irresponsible.

If only because of the magnitude of the stakes in the Savings and Loans crisis and Lincoln in particular, investigation and assessment of the OTS charges should have been a high priority. Even more important, the case was an occasion for clarifying substantive ambiguity about lawyers' duties of candor in banking and other contexts. Finally, the case strikingly raised issues about individual lawyer responsibility in situations of broad institutional breakdown. The bar failed to meet these challenges, and indeed spent considerable energy and ingenuity in evading them.<sup>2</sup>

As in the S&L crisis, the magnitude of the stakes in the Enron and other corporate failures makes investigation of the actual allegations against lawyers a high priority. More importantly, the recent corporate scandals are an opportunity for clarifying ambiguity about lawyers' duties to organizational clients and the general public.

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<sup>1</sup> American Bar Association Working Group on Lawyers' Representation of Regulated Clients (ABA Working Group), 1993. *Laborers in Different Vineyards? The Banking Regulators and the Legal Profession*. Chicago: American Bar Association.

## II. The fact-based “3 foot view”

In the past year, several law firms have been named as defendants in connection with recent corporate scandals. For example, in In re Enron Corp. Sec. Litig. (Newby v. Enron Corp.), (S.D. Tex. 2002) (“Newby”), two law firms, Vinson & Elkins, LLP, and Kirkland & Ellis, are named as defendants. The complaint alleges, *inter alia*, that Vinson & Elkins, and Kirkland & Ellis participated in structuring illicit devices used to falsify Enron’s financial results; that the firms issued false opinions on these transactions; and that they participated in covering their client’s fraudulent scheme and wrongful course of business. (Newby, Consolidated Complaint for Violations of the Securities Laws ¶¶ 98, 800-856 for allegations regarding Vinson & Elkins, ¶¶ 99, 857-896 for allegations regarding Kirkland & Ellis). Moreover, in his September 21, 2002, First Interim Report, Neal Batson, the court-appointed examiner in the bankruptcy case In re Enron Corp., (S.D.N.Y. 2002) strongly suggests that the Houston-based law firm of Andrews & Kurth furnished two legal opinions that facilitated an illicit Enron transaction. Batson’s investigation now encompasses discovery efforts directed at 45 law firms.<sup>3</sup>

It is important to bear in mind that these assertions are mere accusations which the law firms vigorously deny. However, on their face, and, more importantly, independent of their factual validity, these allegations expose several questions about the roles lawyers play in the context of corporate responsibility. First, the allegations suggest an industry-wide corporate law failure. That is, they do not identify a select few “bad apples” and

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<sup>2</sup> William H. Simon, *The Kaye Scholer Affair: The Lawyer’s Duty of Candor and the Bar’s Temptations of Evasion and Apology*, 23 LAW & SOCIAL INQUIRY 243, 282 (1998).

accuse them of misconduct. Instead, the allegations implicate dozens of leading and well-respected corporate and securities law firms, and suggest that the law firms have systematically violated legal and ethical rules. Second, the allegations suggest an across-the-board failure of enforcement; that is, they indicate total disregard by corporate law practitioners for existing legal and ethical rules. Finally, the allegations suggest a deep disagreement within the corporate bar regarding the meaning and scope of legitimate legal advice (for example, in providing opinion letters). That is, the allegations reflect substantive ambiguities about corporate lawyers' duties to their organizational clients and possibly to the general public.

In considering proposed amendments to existing legal and ethical rules, it is often prudent to ground such an undertaking in an analysis of the actual shortcomings of the current rules. Not surprisingly, a preliminary examination of the relevant facts – the alleged conduct of lawyers in connection with recent corporate failures – exposes serious institutional and structural questions about the function and operation of corporate and securities law practices.

### **III. The “30,000 foot view” and the questions that follow**

This section outlines a few of the questions the fact-based “3 foot view” may help expose.

#### **(1) Who should regulate corporate and securities lawyers?**

The industry-wide corporate law failure and the wide-spread disregard for existing legal and ethical rules suggest the existing regulatory structure is ineffective and

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<sup>3</sup> In another case referenced by the Preliminary Report, SEC v. Kozlowski, (S.D.N.Y. 2002), the SEC alleges that Mark Belnick, chief corporate counsel at Tyco International defrauded Tyco shareholders of

therefore raise the policy question, “who should regulate corporate and securities lawyers?” First, who should enforce the rules? In essence, under the existing regulatory model, state courts and state bar associations assume responsibility for rule enforcement vis-à-vis corporate lawyers within their jurisdictions, and the SEC is responsible for enforcement vis-à-vis securities lawyers appearing before it. The apparent failure of the current regulatory system indicates this Task Force must undertake a thorough examination of enforcement of legal and ethical rules governing the conduct of corporate and securities lawyers.

The Task Force should also explore the related question of who should promulgate such rules of conduct. The “3 foot view” suggests the shortcomings of the current state-by-state decentralized enforcement model. It perhaps also suggests the role the ABA can play in stepping up and providing leadership by proposing unified rules that would govern the conduct of corporate and securities lawyers. The magnitude of the stakes and the apparent widespread failures of individual lawyer and firm-level responsibility warrant a comprehensive examination of corporate bar regulation, far greater in scope than the limited Model Rules analysis undertaken in the Preliminary Report.

(2) What should be the duties of corporate and securities lawyers to their organizational clients and the general public?

The apparent deep disagreement about what constitutes legitimate provision of corporate advice raises the question, “what should be the content of the governing rules of conduct?” That is, what should the duties be and what roles should corporate and securities lawyers play? I propose this Task Force undertake a comprehensive evaluation

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millions of dollars through self-dealing transactions. (Complaint ¶¶ 3, 55-59).

of the duties and roles of the corporate bar. For example, is the dominant traditional model of zealous advocacy appropriate in the context of the corporate giving of advice? Or would a different model, perhaps one that incorporates commitments to the public good, third-parties and society as a whole, be more appropriate? Should adherence to notions of loyalty to clients continue to guide the conduct of corporate lawyers or should notions of public-spirited gate-keeping be adopted instead?

Moreover, is the notion of a unified bar and of one legal profession governed by one set of rules still appropriate given the realities of the two hemispheres of law practice,<sup>4</sup> or should separate models be adopted, one to govern the conduct of lawyers practicing in the individual hemisphere, another to govern the behavior of attorneys practicing in the corporate sphere? At this stage I do not wish to offer answers to these broad questions, yet I believe that, until such a comprehensive study is undertaken, any changes to the Model Rules will be premature.

#### **IV. Conclusion**

I believe that, because it limits itself to a narrow examination of a few existing Model Rules, the Preliminary Report fails to address some of the more important and disturbing questions regarding lawyers' conduct in recent corporate failures. I therefore propose that the Task Force withdraw its Preliminary Report and instead undertake a thorough and comprehensive investigation of corporate and securities law practices.

The recent corporate collapses are an occasion for clarifying substantive ambiguity about lawyers' duties to their organizational clients and the general public.

The scandals raise issues of individual lawyer and firm-level responsibility in situations of broad institutional breakdown. The bar, the ABA, and this Task Force should not fail to meet this challenge.

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<sup>4</sup> JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982); John P. Heinz et al, *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 LAW & SOC'Y REV. 751 (1998).