Written Submission[1] of the
American Corporate Counsel Association (ACCA)[2]
to the ABA Task Force on Corporate Responsibility
(The "Cheek Commission")

November 11, 2002

I. Introduction

Thank you for the opportunity to comment on the hard work of your Task Force. Your proposal serves as a much-needed platform from which we can all participate in a dialogue that is important to lawyers, their clients, and the public. This dialogue is critical in order to ensure that the legal profession acts to address the crisis in confidence resulting from recent corporate financial debacles.

ACCA wants to get to the root of the post-Enron indictment that every shareholder, commentator, and average American is demanding that we consider: "Where were the lawyers and what were they doing? If they weren't in the thick of corporate wrongdoing as co-conspirators, where were they? Is it not the proper role of an in-house lawyer to prevent such scandalous actions inside their own client companies?" These are legitimate questions and they deserve an answer. Better yet, they deserve responsive action.

II. Statement of Interest

Founded in 1982, the American Corporate Counsel Association (ACCA) is the in-house bar association, with 14,000 members in 40 countries who work in over 6,500 private sector organizations.

Long before other lawyers were familiar with the concepts of institutionalized preventive law processes, ACCA members forged new paths in corporate responsibility through the development of the first in-house compliance systems to ensure ethical corporate behavior. While no one has all the answers to the dilemmas that we seek to address in this forum, our members do have a great deal of cumulative experience working to help corporate executives create a corporate culture that is ethical, that

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[1] This position paper is available online at http://www.acca.com/legres/enron/, along with other corporate responsibility material of interest, and including the text of the oral testimony offered to this Task Force's November 11 hearings at Stanford University by John H. McGuckin, Jr., 2003 Vice Chairman of the Board of the American Corporate Counsel Association (Mr. McGuckin is the Executive Vice President, General Counsel, and Secretary of Union Bank of California.) **November 8, 2002 Postscript: Please note that this paper was written prior to the November 6, 2002, SEC Open Meeting at which the SEC announced proposed regulations interpreting Section 307 of the Sarbanes-Oxley Act. Mr. McGuckin's testimony provides additional thoughts regarding the relationship of the SEC's and the ABA Task Force's proposals. -- SJH**

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respects the law, that values its employees, and that serves its shareholders, board, customers and community.

ACCA members have a keen interest in the issues addressed in your report: perhaps even more than the average outside counsel representing corporate clients. As in-house counsel, our members frequently act as both lawyers and integrated members of the corporate executive leadership team. When the executive leadership team fails, as they have in some recent corporate financial debacles, in-house counsel will not be immune from criticism and their role (or their lack of action) will correctly be evaluated as part of the post-mortem. While the public and our profession are now engaged in an examination of the role that lawyers in general may have had (or should have had) in preventing or remedying these debacles, the roles and responsibilities of in-house lawyers in particular will be under close scrutiny.

III. Executive Summary of Our Statement

ACCA has developed its positions and proposals based on our assessment of: 1.) the problems in-house lawyers' *clients* face in ensuring the creation of an ethical corporate culture post-Enron and how in-house lawyers can aide in that process, and 2.) the problems that in-house counsel will face in truthfully answering the question posed by an enraged public: "Where were the lawyers?"

While proposed changes to the regulation of lawyers through the amendment of the Model Rules of Professional Conduct may be appropriate to help lawyers understand how to better address some of the recurring issues raised by Enron-like debacles, this Task Force has not proposed changes that will serve that function, but has proposed changes that could immeasurably damage the corporate lawyer-client relationship.

Further, there are no changes we can make to the model rules that will address the public's outrage over these debacles; they perceive lawyer conduct rule amendments as an irrelevant distraction. Their lack of confidence in our abilities to prevent and resolve such problems and to regulate ourselves in the future is a far larger issue that we must face. The Task Force's proposals do little to restore their trust.

The final portion of our statement addresses those actions that we propose to undertake. As a part of our effort to re-earn the public's trust, our proposals include a variety of new initiatives to equip lawyers and their clients with practical skills and tools that will allow them to work together to ensure the proper execution of the company's function as a responsible corporate citizen.

IV. Assessing the Problem Before Fashioning A Solution

Before we seek to define or amend the proper role of lawyers in Enron-like debacles, we need to take stock of goals of our inquiry; we need to assess the problems lawyers in these situations currently face; and only then can we fashion and propose appropriate remedies.

As noted above, ACCA believes that our goal is to address two separate subjects: 1.) those concerns raised by those outside of the profession, namely, our clients, our clients'

stakeholders, and the larger public; and 2.), those concerns that are primarily of interest only to the legal profession. It is likely therefore that we will need to tailor unique responses targeted to each group's issues and concerns.

By spending so much energy focusing on the debate over changes to the model rules in an effort to turn lawyers into better reporters of client failures, the Task Force has not paid sufficient attention to helping lawyers find better ways to counsel their corporate clients about how to create and maintain a legal and ethical corporate culture.[3] The model rule proposals espoused by the Task Force require in-house lawyers to shift their role away from one that focuses on effective counseling and relationship-building, and toward one that focuses on counter-productive policing.

ACCA plans to address these problems by focusing on the root of the corporate debacles – a lack of ethical leadership and a failed or lacking culture of responsible compliance within these organizations. In order to fashion solutions to these problems, we wanted to find out what corporate clients and corporate counsel think about lawyer roles, effective counseling techniques, and the kinds of management priorities that lawyers can influence. You will find some of the relevant results of our recent surveys in Attachment 1.

V. What are the Values ACCA's Proposals Seek to Protect and Elevate?

Combining the results of these surveys with our long-held beliefs, the board of directors of ACCA recently adopted a general policy statement on corporate responsibility, set forth in Attachment 2. We affirm the following principles:

• All lawyers must at a minimum obey the rules of professional conduct and seek to act to even higher standards that inspire trust, respect and confidence in their skills and integrity.

• The attorney-client privilege is the foundation of the relationship between lawyers and clients, and especially between in-house counsel and their corporate clients. Without the confidence that the privilege attaches to communications with their lawyers, corporate managers may not seek a lawyer's input or allow lawyers to enter into conversations that they must have access to. If the trust and confidence of the lawyer-client relationship are threatened, lawyers may not have the opportunity to counsel executives to act lawfully and ethically to the benefit of the company and society, nor will they have the opportunity to exercise the leverage of reporting to the board any impending or actual wrongdoing not properly corrected. The latter is perhaps the most valuable tool that in-house lawyers possess to fight corporate

[3] We are mindful that the Task Force has proposed a number of corporate governance reforms, and that these proposals are no longer under consideration since they have been eclipsed by the passage of the Sarbanes-Oxley legislation and the New York Stock Exchange guidelines. While governance reforms are necessary and appropriate, they have little to do with the kind of preventive counseling and ethical leadership necessary to prevent future problems from arising, and more to do with ensuring accountability, proper reporting, and communication between management and the board, its committees, regulators and shareholders.

wrongdoing; while exercised judiciously and as sparingly as possible, the knowledge that it is an available option for the lawyer is most powerful.

• Lawyers must seek out new ways to prevent abuses of the privilege, without sacrificing the confidence that clients have that their lawyers are counselors with whom any conversation can be appropriately raised.

• The corporate client is the company, and not any one of its executives. Even if we fully understand that, it should be emphasized to management on a regular basis.

• It is entirely appropriate (and consistent with the model rules) for corporate counsel to climb the ladder seeking redress of corporate wrongdoing, all the way up to the board. In the vast majority of cases, the mere prospect that the lawyer may go to the board is enough to get even the most recalcitrant managers to reform their thinking. This is not an issue that we are debating. Our concerns lie with proposals to amend the model rules to create additional reporting requirements outside of the company -- beyond the board. To espouse such models is counterproductive, and results in a negative impact on the relationship between in-house lawyers and their clients, and the roles that in-house lawyers should play as members of the corporate team.

• It may be necessary for an in-house counsel to resign if other remedial measures fail and management and the board fail to address material legal issues brought to their attention. Some in-house counsel may be compelled by law or their principles to report unaddressed, egregious wrongdoing to authorities outside of the company. While we respect such lawyers for following their convictions, an in-house lawyer – unless mandated by rule or law – should not unilaterally breach the client's privilege without understanding that such an action may bring about a corresponding censure or dismissal.

• The client has responsibility for making financial and business decisions. We encourage clients to work with lawyers to make the best possible decisions. When there is no illegality involved, lawyers must respect the business judgment of their clients if the lawyer is confident that the client has heard and considered any concerns that the lawyer wishes to raise.

VI. ACCA's Response to the Task Force's Proposals

As noted earlier, and while we believe that corporate governance reforms are appropriate, the Task Force's proposals regarding governance have largely been mooted by the passage of Sarbanes-Oxley and the development of the NYSE guidelines; our comments regarding their proper interpretation and implementation will be directed to the SEC or other groups, but not this Task Force.

ACCA's comments in this paper will focus on the second portion of your report, discussing "the ethical and governance framework within which the corporate lawyer can advance corporate responsibility."

A. Proposals to Amend Model Rule 1.13

The Task Force's proposal to modify Model Rule of Professional Conduct 1.13 to make it tighter misses the point. The current rule is a poor rule, providing little guidance or meaningful help to the corporate attorney or her client seeking to understand the corporate lawyer's role as an ethical conscience for the corporation. The Task Force's proposed changes do not do enough to dispel the confusion, and add insult to injury by creating a negligence standard to attach to lawyers caught in the grip of its ambiguities.

Rule 1.13 regulates the lawyer whose client is an organizational entity; it is colloquially known as the "up the ladder" rule. It emphasizes that the corporate lawyer's client is the organization, and not any one of its executives. It suggests a number of possible actions that a lawyer might take when he knows that a corporate executive is taking actions which violate a duty to the corporation, or that violate a law in a manner that could be imputed to the corporation, and that would likely result in substantial injury to the client. It mandates that the lawyer must take some unarticulated action when he knows that a proposed action is both illegal and exposes the company to significant risk. The Rule's lack of practical guidance is legendary, and it is the subject of endless streams of academic debate.

While we recognize that some of the Task Force's proposals regarding 1.13 would be an improvement, the overall effect of your changes do not do enough to make the rule clearer or more helpful. While we appreciate that in-house lawyers need flexibility to exercise their discretion in determining the appropriate action required by each unique case, the Task Force's resulting rule provides too little guidance to make the mandate to report up the ladder stronger and too much guidance to allow lawyers to feel comfortable that they can truly exercise their own judgment without concern of being second-guessed later. It's the worst of both worlds.

Please note that we are particularly concerned over the Task Force's proposed change in the rule from the standard of "knows" to the more stringent standard of "reasonably should know." [This concern extends to the corresponding changes in terminology proposed for Rules 1.2(d) and 4.1.] This change of standard would have an enormously deleterious impact on both the function of the in-house lawyer's role and the relationship of that lawyer with the in-house client.

To enact such a change would shift the lawyer's attention away from healthy participation and inquiry into the client's day-to-day actions by mandating a new role for corporate counsel as a full-time in-house investigator. The lawyer who acts on knowledge ("knows") of a wrongdoing is one who acts as a counselor, a member of the executive team, and as a leader on issues of ethics and compliance; when he learns of activities or hears plans for initiatives that he "knows" are inappropriate, he acts to correct them or prevent them. He has the ability to investigate to his satisfaction anything that makes him suspicious without concern for unintended repercussions and without making management defensive. He spends most of his time working proactively with managers to get the company's business done.

The lawyer who will be held to a negligence standard of "reasonably should know" will spend more time investigating his possible exposure to liability in potential future lawsuits than he spends ensuring the legal health of the organization: he'll either get very stupid about that which he should know, or he'll investigate every situation in

which he is offering his services as if he were an outside prosecutor. In any event, he will not spend nearly as much time crafting better (legal) means of accomplishing the client's ends. No client will welcome the participation on the management team of an in-house attorney held to the "reasonably should know" standard – he won't be seen as someone who tries to assist the company in fulfilling its mission, but as someone whose primary function is to "just say no" to every new initiative that involves any kind of risk.

B. Proposals to Amend Model Rule 1.6

Model Rule 1.6 creates the foundation of the lawyer-client relationship by mandating that the relationship is confidential and by prohibiting lawyers from divulging information and communications to third parties (except in a very few circumstances, all of which are currently relatively easy to identify). The most commonly known exception to this rule allows a lawyer to reveal information to the extent the lawyer believes necessary to prevent reasonably certain death or substantial bodily harm; the remaining exceptions exist to protect the lawyer engaged in a suit against the client, the lawyer forced by law or court order to "disgorge" information, and the lawyer who needs to seek legal advice about his compliance with the rules.

ACCA does not support this Task Force's resurrection of Ethics 2000's proposed (and rejected) permissive financial impact disclosure standards. To permit or mandate lawyers to report *outside of the client organization* the suspicion that a corporate client is engaged in an activity that may cause substantial financial harm to the client or others violates the most fundamental tenets of our professionalism, is an unfair burden on the reporting counsel, and sets an impractical standard.

First, it is very hard to predict with any certainty exactly what actions – legal or illegal – might lead to a substantial financial harm as defined by the rule. A lawyer who is debating whether to disclose information under this rule will need 20/20 hindsight. We foresee the addition of such rules as an invitation to sue corporate lawyers for malpractice or negligence in every shareholder suit filed as a result of a corporate financial downturn or failure.

Second, the kind of sophisticated financial frauds that are the legitimate target of the Task Force's scrutiny and supposedly the object of their proposed regulatory fix in Rule 1.6 are by nature not easily detected. They are *frauds*, and are most difficult to detect by even those with extensive expertise with financial intricacies. Most corporate counsel can read a balance sheet and understand basic corporate finances; nonetheless, they do not consider themselves experts in detecting sophisticated or novel financial frauds without assistance from managers or other financial consultants who do possess that skill and who are encouraged to report their concerns to the lawyer.

Managers (or other financial consultants of the client) will be reticent to ask a lawyer's help in investigating a transaction of concern if they believe the lawyer will betray the confidence of their inquiry; they will not approach in-house or outside lawyers unless and until they are sure that the transaction is truly illegal or fraudulent, there is no hope for an internal remedy, and they are ready to go public with their concerns. Knowing the lawyer may report a confidence to an outsider chills the more day-to-day, and

sometimes casual inquiries that can be resolved internally through early detection and quick response – these "casual" reports are the foundation for almost all preventive counseling.

In cases in which a fraud is detected, on the lawyer's own or with assistance, the correct response should continue to be a climb up the corporate ladder within the company and all the way up to the board if necessary, just as the lawyer would do upon uncovering any other kind of inappropriate corporate action. Your proposals would create a client perception of the in-house lawyer as an internal adversary on issues involving financial matters, frustrating the very counseling we seek to encourage most in the post-Enron era.

Third, your proposal to amend Rule 1.6 runs head on into a debate over whether additional financial disclosure responsibilities (if enacted) should be permissive (permitted, but not required, and thus in the discretion of the lawyer to choose to act upon) or mandatory (requiring reporting to outside parties, regardless of whether and how the situation is or is not resolved internally). We note that the states are current split in resolving this debate.

ACCA does not favor mandatory reporting requirements because they result in the loss of the ability of the counselor to encourage management and the board to "do the right thing" under the threat of exposure. That said, part of our concern over these proposed amendments is that we believe that permissive disclosure has its warts, as well. In writing a rule that leaves to the lawyer's discretion the ability to decide whether or not to report to an outside party, the Task Force creates the worst of both possible worlds: if the lawyer chooses to report the problem, but it is arguable that she did not have to, her current client (and future clients) will never trust her again; yet if the lawyer chooses not to report and hindsight shows that she should have, she will be crucified (civilly and professionally) for not having prevented such an egregious problem from arising when she could have.

Because we believe that both permissive and mandatory financial harm reporting requirements do not serve lawyers or clients well, and because they do nothing to prevent the kinds of frauds that we're supposedly trying to address here, ACCA holds firm in its rejection of any changes to the model rules that would support or require lawyers to violate the confidence of their clients by reporting outside of the organization (beyond those exceptions already articulated in Model Rule 1.6). The rules regarding confidentiality should not be diminished without a stronger reason rendered that justifies why doing so is in our clients' or the public's better interest.

C. Summary of Concerns with Proposals Re the Model Rules

We need rules that enhance, not diminish, the in-house lawyer's role as a trusted advisor, an ethics counselor, and a vital leader on the executive management team. We need a better, clearer and simpler rule for service to organizational clients that provides more guidance, creates greater predictability, and sets appropriate standards for client service and lawyer responsibility. We need a new confidentiality rule that is capable of creating guidance for lawyers, reasonable reporting expectations for the public, and the insurance of a reliable standard of trust for clients. We propose to work to create new

model rules that do just that. We do not believe that the current rules can or should be cobbled to meet modern concerns while preserve traditional professional values.

D. The Task Force's Proposals for Establishing Lines of Communication by General Counsel and Outside Counsel

We endorse the Task Force's proposals to establish periodic meetings between the general counsel and the board (or its committees), and to create reporting lines between outside and inside counsel on matters regarding violations of law. Indeed, they are the policy in many in-house departments already. We commend you for promoting them as good benchmarks.

VII. ACCA's Proposals to Address the Crisis in Corporate Responsibility

Having stated what we think is not feasible, let us share with you our current list of action items. These items reflect the concerns that the public demands we act to correct, as well as the resources we believe are necessary to equip lawyers to help their clients avoid being labeled as the next household synonym for "corporate irresponsibility."

A. Rediscovering the Corporate Attorney-Client Privilege and Reporting Responsibilities

ACCA proposes that in order to encourage a trusting relationship between lawyers and clients that the foundation of their relationship must remain rooted in the attorney-client privilege. But we need to take a hard look at how and to what extent the privilege is being used and may be abused. We invite you to join us in examining how to deter possible abuse of the privilege as a cloak for inappropriate behaviors, while preserving its appropriate protection of confidential communications between corporate clients and corporate lawyers. We invite you to join us in also examining how the rules regarding the representation of organizational clients can be re-written to provide more positive and realistic guidance to in-house lawyers and outside corporate practitioners.

ACCA will host an invitation-only corporate ethics leadership retreat in the Spring of 2003 that will bring together general counsel, regulators, academics, and corporate practice experts from outside firms to discuss alternative ways to draft new rules that contemplate the realities of modern corporate practice. Hopefully, the resulting draft rules can be offered to states considering revisions to their current codes of professionalism, as a part of their consideration of new MJP and Ethics 2000 model rule reform proposals.

B. A New Focus on Compliance as the Highest Form of Legal Art

ACCA further proposes that in order to meaningfully counsel our clients toward ethical and legal behavior, we need to focus much more attention on effective compliance strategies that rise to a new level of responsibility. This includes: the integration of corporate governance policies, new ideas for processes and procedures that can be used to measure successes and intercept failures in compliance with far greater predictability (and that encourage greater employee involvement), and best practices that can assist

CEOs and other members of the executive leadership team in conveying the strongest possible mandate for the creation and maintenance of an ethical corporate culture.

ACCA is instituting a number of initiatives in 2003 that will produce a wide variety of resources: for teaching non-legal management about their legal responsibilities, for encouraging outside counsel to be more proactive with inside counsel in ensuring compliance, and for teaching in-house counsel about the establishment and integration of truly effective compliance systems within the corporate culture.

C. The Cultivation of Higher Standards of Ethical Leadership

While most in-house and outside lawyers understand the crucial connection between leadership and effective counseling, many are not offered appropriate training opportunities where they can learn ethical leadership. ACCA believes that there is a gap in the availability of resources to help develop these crucial skills. There is an additional void of resources that address the needs of attorneys at different levels of seniority or who are operating at different junctures within the company.

In 2003, ACCA will role out a series of segmented resources, targeted to the unique needs of attorneys working in a variety of practice settings within the corporation. Accompanying resources will be offered to law schools to allow them to integrate ethical leadership skill courses into their curriculums. Additionally, we will seek to coordinate our efforts with other national organizations that serve the needs of other leaders who direct the work of the company: the senior management team, other outside professionals who counsel the company, and the board.

V. Conclusion

The aftermath of recent corporate financial debacles presents lawyers, their clients, and the public with significant challenges. We can view these challenges defensively and host discussions about making changes to our rules of self-governance, or we can decide that this challenge may be a golden opportunity for our profession to do more: to re-examine our practices, to consider new solutions to recurring problems, and to step up to a higher level of professionalism in serving our corporate client's legal needs and therefore, indirectly, the public's interests.

We appreciate the work that this Task Force has done, and your consideration of our comments. We look forward to working with you as we begin to enact our initiatives, and stand ready should you call on us to play a leading role in further developing yours. We welcome all comments.

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ATTACHMENT 1:
ABA Task Force on Corporate Responsibility
Written Submission of the American Corporate Counsel Association

What do CORPORATE CLIENTS and IN-HOUSE COUNSEL Think About the Lawyer's Proper Role in Ensuring Corporate Responsibility? How do the Results of that Inquiry Inform and Shape ACCA's Proposals?

(November, 2002)

Part One: What do our CLIENTS Think?

ACCA conducted a major first-of-its-kind survey of CEO's, CFO's, and COO's in the Spring of 2001. ["In-House Counsel for the 21st Century," a Survey Conducted by the American Corporate Counsel Association, sponsored by Spherion Corporation, 2001: available in executive summary online at http://www.acca.com/Surveys/CEO/]

We asked top execs what they think about their inside and outside counsel so that we might know more what they value in us, dislike about us, and expect from us, especially when the results differ for in-house and outside lawyers. The results of those surveys are not too surprising when you think about it, but what they tell us is nonetheless very informative. Some of the raw data from that survey that may be particularly important to this discussion is provided here in summary for your consideration since it drives ACCA's corporate responsibility proposals:

• 91% of execs surveyed placed the general counsel in the top 10 executives in the company; 55% ranked the GC as being in the top 5; 19% rank them in the top 3. Clearly, clients see the GC as having a position from which to lead.

• The hands down top characteristic from a long list of possibles that chief execs want their general counsel to exhibit is trustworthiness. 92% said it was critically important and 98% ranked the GC's performance in this area as excellent or very good.

• Maintaining confidentiality, another of the choices in characteristics, came in ranked as the second most important characteristic behind trustworthiness, with 89% stating that is was critically important and 98% noting that they rated their GC's performance in that area as excellent/very good.

• Out of the 16 choices of characteristics that they would seek out in a general counsel, a focus on preventive measures ranked in the middle at number 9 and was viewed as critically important by only 62% of respondents. More on that later when we begin our discussions of what we believe we should be focused on doing.

• "Being involved in the company," the trait that most GCs will tell you is the hallmark of an effective general counsel, ranked 14th out of 16 in importance to the chief executives, with only 29% of respondents designating it as a critically important characteristic: only "contributing to the company's image" and "contributing to the community" ranked lower.

When moving from important characteristics to important roles, the results become even more interesting to this dialogue.

• According to our CEO respondents, the most important roles played by an in-house or outside counsel to the company (in-house and outside counsel roles ended up ranked in the same order) are as:

1. an educator regarding legal issues
2. an ethics advisor
3. a sounding board or confidante to the CEO
4. a compliance officer
5. a sounding board or confidante to senior executives (as a group)
6. a business or contract negotiator
7. a member of the strategic planning team
8. a human resources advisor
9. a sounding board or confidante to the board
10. a risk manager
11. a mediator/conflict resolution expert

• When asked if these roles were critically important (as opposed to other degrees of importance) 60% ranked the number two role of "ethics advisor" as critically important and 92% rated their GC's performance of that function as excellent/very good; outside counsel rankings as ethics advisors were significantly lower: only 7% of CEOs thought that outside counsel performance of this role was critically important and outside counsel performance of that role was rated excellent/very good by only 31% of CEO respondents.

What we take from this is the following: That CEOs are looking for a trusted and confidential relationship with their general counsel and clearly see trust and confidentiality as two separate issues. They believe that the proper role of the GC is as an advisor first to the CEO, second, to senior executives, and ranking near the bottom of the list, as an advisor to the board. They look to outside counsel more for technical legal advice, but don't believe that their in-house counsel are as important a part of the strategic and executive team as general counsel want themselves to be, even though the majority of them list the General Counsel as one of the top 5 officers in the company. That probably means that they are generally not letting inside or outside counsel in to participate in some of the most sensitive corporate processes. Thus, ACCA believes that we clearly have some work to do in re-shaping the beliefs of top executives about the proper role of lawyers and how they should be used if we are to assume a vital role in addressing future corporate scandals.

Part Two: What Do CORPORATE COUNSEL Think?

While the client survey discussed above was conducted in 2001, or pre-Enron, the in-house counsel survey results offered below were gathered post-Enron and released in October of 2002. ["In-House Counsel Poll on Corporate Scandals," American Corporate Counsel Association (conducted by Widmeyer Communications), Fall 2002; contact Deneen Stambone (stambone@acca.com) until these results can be mounted to the acca.com website.]

• When asked what the role of in-house counsel should be in preventing financial and accounting fraud, or other illegal and unethical behavior, 57% of general counsel said that the in-house counsel should play as important a role as the CEO, COO or CFO; 23% said that they should play a role, but not as important a role as the CEO, COO, or CFO; 12% said that in-house counsel should take *the* leading role; and only 8% said that an in-house counsel's role should be restricted to advising senior management on legal issues alone.

• When asked if their company's corporate culture valued ethics and corporate responsibility, 72% said that both are taken very seriously; another 24% said that they are important, but should be taken more seriously; and only 4% thought that ethics and corporate culture are not taken seriously enough. Eighty-nine percent of general counsel surveyed thought that the in-house counsel has a great deal (50%) or some (39%) responsibility to the public. When asked to whom they should report instances of possible misconduct, 78% said they would report the conduct to the appropriate managers; 20% said that they would report the concern to the audit or other "independent" board committee; and only 10% said that they would report to the board (19% indicated other paths they would follow – perhaps they are some of the few who have read Model Rule 1.13!).

• When asked what remedies or rules should guide their leadership on ethical and corporate responsibility issues, the responses were split. 32% said that existing laws, regulations and voluntary Model Rules of Professional Conduct would suffice; 26% said that corporations should voluntarily set higher professional standards; 27% said that government should impose new regulatory requirements (remember, this is after the passage of Sarbanes-Oxley), and 15% said that Congress should legislate new legal standards.

While ACCA does not believe that eviscerating the privilege or deputizing corporate counsel as in-house policemen and whistleblowers would have solved any of the problems that these corporate scandals have raised, our survey showed that a significant number of in-house lawyers don't believe that their client relationships would be ruined if the privilege was not available to protect them. 48% of those asked stated that if a stronger rule requiring them to climb the ladder were enacted, it would have no effect on their relationship with their management; 26% said that it would negatively affect the relationship; and 22% said they didn't know what the impact would be. If the reporting requirement required in-house counsel to report wrongdoings outside of the company, 30% said it would have no impact; 47% said it

would negatively affect the relationship and the candor of communication; and 19% said they didn't know.

What do we take from what these general counsel are telling us? Combining the results articulated here with other results from the survey, ACCA presumes the following: The vast majority of general counsel want to step up to the plate with an aggressive role in ensuring corporate responsibility. While they are not asking for the attorney-client privilege to be diminished in order to accommodate their doing so, they are not concerned that reporting up within the chain of command (including reporting to the board or its committees when management is not responsive) would have a significant negative impact on their practices or their ability to counsel effectively. They are looking for new and clearer methods and procedures by which they can address these issues within their companies. As a result, ACCA will be working to provide resources and ideas for helping general counsel fulfill their role as a conscience within the corporation. We will pay especially strong attention to the creation of resources that will offer clients and lawyers the opportunity to address and define their relationship to the greater advantage of the organization and its legal health.

ATTACHMENT 2:
ABA Task Force on Corporate Responsibility
Written Submission of the American Corporate Counsel Association

American Corporate Counsel Association (ACCA) Policy Statement: In-House Counsel's Role in Ensuring Corporate Responsibility

November, 2002

In light of recent highly-publicized cases of corporate wrongdoing, this policy reaffirms our unequivocal allegiance to the highest standards of legal, professional, and ethical behavior of in-house lawyers serving organizational clients. By adopting this policy statement, we underscore our belief that:

1. Every lawyer serving the organizational client, whether practicing in-house or in an outside firm, must conform to the rules regulating the profession. These rules, however, are only the baseline. We must do more to instill trust and confidence in our abilities and judgment, and better serve our clients, legal system and society.

2. When a situation calls into question a need to assess what our professional duties are, it is crucial to remember (and help corporate executives and other employees understand) that the in-house attorney's client is the entity, and not any one employee or group of executives. An in-house attorney addressing corporate wrongdoing should seek to resolve the issue internally, including redressing the issue up the chain of command of management. If those steps do not result in appropriate action to resolve an issue of material impact on the entity, the attorney must take the matter to the board or an appropriate sub-group of the board. Unless required to do so by law, counsel must not violate the attorney-client and related privileges by reporting the matter to outside/third parties.

3. Corporate clients tell us that they look to their in-house counsel not only as a compliance resource, but as an ethical resource as well. In-house lawyers are uniquely situated to encourage good corporate behavior. ACCA is committed to support in-house counsel in fulfilling that role by promoting practical resources that help corporate counsel act as ethical compasses for their clients, as well as developing and sharing best practices in legal and governance leadership that will be a model for both the profession and our clients.

Sometimes it is not clear whether certain corporate actions are improper or unethical (especially when they are not illegal) without the benefit of 20/20 hindsight. We support the adoption and enforcement of professional rules that provide clear guidance on how to help lawyers help clients stay on the right side of the law, but it would be inappropriate to adopt rules that supersede the legal and reasonable business judgments of clients.

4. Fundamental to the corporate client/lawyer relationship are the attorney-client and related privileges, which promote the open and honest flow of communication between clients who seek guidance in their endeavors and lawyers who can provide ethical and legal direction to that effort. Without the attorney-client and related privileges, legal

counsel will no longer be fully trusted as advisers on sensitive matters, and may well be marginalized or shut out of key decisions. As a result, corporate clients will be deprived of a crucial resource in meeting the legal compliance and corporate responsibility expectations of shareholders and the public.