DÉJÀ VU ALL OVER AGAIN:
THE MARGINALIZATION OF LAWYERS?

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Testimony to the ABA Task Force on Corporate Responsibility
The Cheek Commission

On behalf of the 14,000 in-house counsel around the world who are members of the American Corporate Counsel Association, thank you for the opportunity to address the Task Force today. I am John McGuckin, Vice Chairman of ACCA's Board of Directors. I have also served as the General Counsel of Union Bank of California since 1984.

Since it was founded 20 years ago, ACCA has addressed the important, evolving ethics issues which face in-house lawyers, in particular, and our profession, in general. Most recently, we participated in the ABA's multi-jurisdictional practice and Ethics 2000 commissions. We appreciate the opportunity to continue the dialogue which has been so beneficial in the past.

I suspect that, like many of your speakers today, I have revised my comments in light of last Wednesday's SEC announcement of the proposed rules prescribing minimum standards of professional conduct for lawyers practicing before the Commission. Consequently, I will rely on

ACCA's written testimony to provide you with the details of our specific concerns with the Task Force's proposed changes to Model Rules 1.13 and 1.6. Suffice it to say that we believe that, by adopting a negligence standard in Rule 1.13 and supporting permissive or mandatory reporting outside the client organization under a weakened standard of confidentiality in Rule 1.6, you will encourage the marginalization of lawyers from our client's business decision-making process and undermine the lawyer's ability to fulfill his role as the client's counselor.

In large measure, these are also our concerns with the SEC's proposals under Sarbanes-Oxley. Last week's proposed rules change everything in this debate and yet they change nothing. They change everything because we now face the certain prospect that a federal regulatory agency will provide a federal definition of professional conduct regardless of what we do. The focus of the debate is no longer here or in the House of Delegates. It is in Washington.

Having said that, really nothing has changed. Although they seek to reduce fraud and misconduct in corporate America, the SEC proposals, like the proposed Model Rule changes, will, in our view, marginalize and weaken the role of the lawyer and make them less effective and influential counselors within the company. It is entirely possible that the impact of these changes will be to decrease the ability to lawyers to uncover misconduct and non-compliance by encouraging clients to exclude in-house and outside attorneys from the corporate decision-making process. The underlying assumption of the proposed reforms seems to be that lawyers, especially in-house lawyers and our outside securities attorneys,

can be the on-the-spot policemen, investigators and preventors of corporate misconduct. We can be, but only if we are, in fact, on-the-spot and not on the margins of corporate life.

We believe that both the Task Force and the SEC's proposals misunderstand the dynamics and realities of corporate practice, especially, in-house corporate practice today. Despite the well publicized sins of a few, America's corporate executives and their lawyers have a close working relationship which serves the client's and the public's best interest by avoiding corporate misconduct and encouraging legal compliance. This is a fact which has been ignored in this debate. Most corporate executives work with their lawyers to comply with the law and to remedy promptly non-compliance when it is discovered.

In the spring of 2001, long before Enron became a household word, ACCA surveyed 1500 chief executive, chief financial and chief operating officers to learn their attitudes about their lawyers, both inside and outside counsel. In the fall of this year, we surveyed more than 1000 in-house counsel to learn their reaction and analysis of the current crisis in corporate responsibility and government.

Our CEO survey supports the conclusion that corporate clients already view their lawyers, especially their in-house lawyers, as important and essential parts of the management team. 55% of the executives surveyed placed the general counsel in the top 5 executives in the company and 91% put the chief legal officer in the top 10. This puts the lawyers in a privileged position to understand and influence the company, its business

objectives, its legal and regulatory programs, its personalities, politics, corporate governance and culture and strategic vision. Lawyers are at the table when important decisions are made.

Once there, the lawyer's first role is, of course, as an educator and advisor on legal issues. But, the executives told us that the in-house attorney's second most important role was as an ethics advisor. Fully 60% of the respondents ranked the role of ethics advisor as critically important to the company and 90% said that their general counsel's performance of that function was excellent or very good. As a profession, we should be proud of these statistics, even if some are concerned that the role of ethics advisor takes us beyond the traditional role of a lawyer.

We also asked the executive respondents what characteristics they needed or valued most in their general counsel. Trustworthiness was the hands' down winner. 92% of the respondents said this quality was critically important to them. 89% said that maintaining confidentiality was number two. While the questions weren't posed in terms of the attorney-client privilege and I doubt that most executives compartmentalize their conversations with their lawyers into those covered by the privilege and those which are not, these responses support the conclusion that when corporate executives consult their lawyers, they view the attorneys as trustworthy counselors who will maintain their confidences. That attitude is, of course, the basis and the result of the attorney-client privilege. In responding to the current crisis, if we damage the sense of trust and confidence which underlie effective client communications, we will

undermine the lawyer's ability to counsel against and help prevent corporate misconduct.

We must also safeguard the principle that it is the client's responsibility and privilege to make financial and business decisions as long as they are informed decisions. In most cases, there is no illegality involved. In these situations, the corporate lawyer must respect the business judgement of her clients as long as the lawyer is confident that the client has heard and considered any concerns, both legal and ethical, that the lawyer has raised. While there may be a thin line between ignoring a lawyer's advice and weighing it during the decision-making process and not, ultimately, taking it, lawyers should not be required to second-guess reasonable business decisions carefully and intelligently arrived at or report these decisions outside the company. Going up the corporate ladder insider the company is a reality of life in most companies today. Going outside the company is a very different and a very dangerous proposition.

Most of us are old enough to remember the S&L crisis. Then as now, Congress responded with legislation which imposed on the banking industry many of the same panaceas we find in Sarbanes-Oxley: independent audit committees, management certification of control systems; restricted transactions among affiliates, more disclosure of major events within the company, whistle-blower protection.

Then as now, some voices in Government, the courts, the media and the public questioned the ethical standards which seem to permit the lawyers to stand by as their clients perpetrated the schemes which cost the

American taxpayer billions of dollars. Some of these voices ventured to assert that a lawyer's duty to the public could impose duties of disclosure when, to use a phrase then current, "the client is a crook." "Where," asked the trial judge who sentenced Charles Keating, "were the lawyers?"

Then as now, the ABA empanelled a task force to address the ethical issues arising from the active and passive complicity of the S&L's outside counsel. The task force report admired the issues posed by the S&L crisis and determined that nothing needed to be done to the professional ethical framework within which corporate attorneys work. Nothing happened. The questioning voices were stilled, the public lost interest and the legal profession continued as before.

Then, the names were Lincoln Savings and Loan Association and Charles Keating. Now, the names are Enron and Andy Fastow. To quote that great American jurist, Yogi Berra, "It's déjà vu all over again."

But, it's not. Some would say the legal profession dodged this ethical bullet a decade ago. Others, less cynical, would say we failed to recognize and meet the challenge of conscience in the profession then. With Congress and the SEC now in the picture, we cannot dodge the bullet or shrink from the challenge again. It is easy to articulate what is wrong with the proposed changes to the Model Rules and why the SEC's regulations will not work. It is more important to recognize that something must be done to align the legal profession and our ethical standards of conduct with the legitimate expectation and demands of the public that we, as officers of the

court, will not condone or assist in illegal conduct or even arguably illegal conduct.

ACCA will comment on the SEC's proposals. We will also take a hard look at how and to what extent the attorney-client privilege is being used and may be abused. We hope the bar will join us in examining how to deter possible abuse of the privilege as a cloak for inappropriate behavior, while preserving the protection which encourages and permits confidential communications between corporate clients and corporate lawyers. We must examine 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. Regretfully, neither the Task Force's proposed changes to the Model Rules nor the SEC's complex process do either.

We also believe that, in order to counsel our clients toward ethical and legal behavior, we need to embrace our role as ethics advisor and focus much more attention on effective compliance strategies. This includes the integration of new corporate governance policies into the way our clients do business and we advise them and a continued emphasis on practical and preventive law to encourage and accomplish compliance and, then, remedy compliance failures. These attitudes are already an important part of many in-house legal departments. They need to be institutionalized in our profession so that our outside counsel understand that both we and our executives expect more of them when they see questionable corporate conduct and decision-making. As attorneys, we have to understand that

we have an important stake in a corporate culture which emphasizes legal and ethical conduct.

The aftermath of the recent corporate financial debacles presents lawyers, their clients, and the public with significant challenges. We can view these challenges defensively as we did in the S&L era or we can decide that this 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 and ethical needs and therefore the public's interests.

We must go beyond traditional rules of professional conduct to recognize that, as the ethical conscience of the organization, the lawyer's position and role must be expanded, protected and facilitated. We must provide lawyers the clear ethical guidelines, the professional tools to become and remained involved in the decision-making processes of our clients. The conscience, judgment and skill with which individual lawyers advise their clients in our increasingly regulated society cannot be restricted or dictated by ethical rules or regulatory processes which undermine the confidence with which clients involve their lawyers. The proposed rules will, we believe, encourage clients to exclude and marginalize their lawyers from discussions, debates and decisions in which we now participate and, thereby, undercut the very goal we seek to accomplish.

Thank you.