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The in-house bar associationSM

To: The American Bar Association Task Force on Corporate Responsibility
Chairman, James H. Cheek, III
Reporter, Lawrence A. Hammermesh

From: American Corporate Counsel Association (ACCA)

Re: Support of the Task Force's Final Report and Recommendations to the
ABA House of Delegates, Report Nos. 119A, 119B, and 119C.

Date: July 29, 2003

The American Corporate Counsel Association has reviewed carefully your Report and Recommendations to the American Bar Association's House of Delegates. For the reasons set forth in this memorandum, ACCA strongly supports the Recommendations of the Task Force, and urges members of the ABA House of Delegates to vote for each of them. We believe that the adoption of the Recommendation is critically important, not only for in-house corporate counsel, but also for the professional integrity and independence of all lawyers seeking to act with the highest ethical standards in the best interests of their clients.

ACCA is a bar association for corporate counsel, with over 14,000 individual members who represent over 6,000 organizational clients across the United States. ACCA is founded on and committed to supporting the highest standards of professionalism for our members and the outside counsel they retain. Since in-house counsel are singularly and intimately committed to the professional representation of the single organizational client that employs them, they are perhaps even more focused than the lawyer for many clients on the need for constant attention to the professional responsibilities they owe to the clients they serve. Accordingly, we have followed the progress of this Task Force and assessed the value of its ensuing recommendations with close scrutiny. We were prepared to protest the Task Force's findings; we are pleased, however, to instead heartily support their report.

The Task Force Recommendation to amend Model Rule 1.6(b) is necessary and appropriate to prevent a client from using a lawyer's services to commit a crime or fraud that results in substantial financial injury to innocent third parties. This amendment would apply in extremely limited situations, and does not impact the daily relationship between lawyers and clients, even when clients have significant remedial needs. Underlying this policy is our fundamental belief that clients, whether corporations or individuals, should not be able to abuse a lawyer's services under the cloak of the duty of confidentiality; the proposed amendment of Model Rule 1.6(b) permits a lawyer caught in this unlikely and unhappy circumstance to *exercise professional discretion* in deciding whether or not to disclose a client's confidence in the pursuit of a remedy to a wrongdoing that unwittingly involved the lawyer's services. The correctness of this policy is even clearer in the glaring hindsight of the Enron-type financial frauds. The fact that the Task

Force Recommendation is consistent with the current rules of ethics in 42 states only adds support to our contention that it represents what is already in fact an accepted standard of professionalism at the bar. Indeed, the experience of ACCA members practicing in these 42 States indicates that the adoption of this rule nationwide will do no damage to the preservation of an appropriate and trusting relationship between a lawyer and her client, and will not result in any increased liability concerns for lawyers, either. Indeed, we believe that in *not* adopting the rule, the remaining jurisdictions are doing a disservice to their clients, their bar, and the professional standards upon which we stake our professionalism. The ABA should not be out of step with the practical experience and policy dictates of the State bars its Model Rules serve.

Regarding the Recommendation to amend Model Rule 1.13, we believe the proposal will help to overcome the current rule's lack of clarity and usefulness. The proposed revisions to the "up-the-ladder" reporting elements of the rule provide needed guidance, yet still preserve the lawyer's necessary discretion to assess and react to each client's situation with a uniquely tailored action plan, permitting – but not mandating – any one particular course. We are confident that the amendment will assist our members and all lawyers representing an organizational client in protecting the organization against illegal conduct that would substantially injure it.

We also note that passage of this Task Force's Recommendations regarding Model Rules 1.6 and 1.13 are important for additional reasons that may not be apparent from the face of the recommendations themselves. Many ACCA members have watched very closely, and with great concern, the entrance of the Securities and Exchange Commission (SEC) into the regulation of lawyer conduct, pursuant to the mandates of Sarbanes-Oxley Section 307 (now codified as SEC rules in 17 CFR, Part 205). We are particularly concerned about still-threatened SEC rules that would expand further the SEC's authority over attorney conduct in such a way as to completely remove lawyer discretion, replacing it with a requirement of a noisy withdrawal and an inappropriate "policing" role. Like it or not, the organized bars, responsible for the self-regulation of our profession, must consider the concerns of Congress, the SEC, and the investing public, which concerns led to this federally imposed rule governing public company attorney conduct. We believe that the Task Force Recommendations effectively address these concerns, and, according to statements made by SEC officials, may go a long way toward alleviating the need for further lawyer conduct rulemaking by the SEC.

Perhaps most importantly to our members, ACCA commends this Task Force for its vision in including a final proposal on recommended governance policies and procedures. These proposals have not received the attention they deserve. While not everyone may agree about the appropriate application of each of the Task Force's governance recommendations in every corporate client environment, it is our belief that history may look back at the this Task Force's contributions and cite as foremost amongst them their focus on the importance of the lawyer's role – and in particular, the in-house lawyer's role – vis a vis the Board, the corporation's culture of ethics and compliance, and the organizational client's governance processes.

The Recommendations made by this Task Force to the House of Delegates are timely, meaningful, reasonable, and – most importantly – balanced in their effort to move the bar and the role of lawyers forward in promoting corporate responsibility in the post-Enron world, while still holding high the principles which singularly define us as lawyers.